IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

CIVIL CAUSE NUMBER 162 OF 2023

BETWEEN:

AC (A Minor) acting through Litigation Guardian Mr CJ CLAIMANT

AND

MR JENALA SOLOMON 1st DEFENDANT

BLANTYRE DISTRICT COUNCIL (ONE STOP CENTRE AT CHILEKA HEALTH CENTRE) 2nd DEFENDANT

ATTORNEY GENERAL (MINISTER OF HEALTH) 3rd DEFENDANT

HUMAN RIGHTS COMMISSION 4th DEFENDANT

CENTRE FOR REPRODUCTIVE HEALTH AMICUS CURIAE

CORAM: JUSTICE M.A. TEMBO

Mlauzi, Mathanga and Chimbwete, Counsel for the Claimant
Chiume and Kunje, Counsel for the 1st, 2nd and 3rd Defendants
Namonde and Madukani, Counsel for the 4th Defendant
Soko and Nnleremba, Counsel for the Amicus Curiae
Makhambera, Official Court Interpreter

JUDGMENT

1. This is the decision of this Court following a trial of this matter on the minor claimant's claim for some declarations and damages for the loss she suffered because of being denied safe pregnancy termination services by the 1st and 2nd defendant following her defilement by a man who has since been convicted of the defilement. The claimant alleged breach of the Gender Equality Act by the defendants. She also seeks costs of this action. The defendants contest the claim.
2. The claimant stated her case in her amended statement of case as follows:

    1. The claimant is a minor aged 14 years. She is the second born in a family of 4 children and lives with her mother and father. The claimant was at the material time in standard 5 at a Primary School about 7km away from her village.
    2. The claimant brings this action through her father and litigation guardian Mr CJ. Mr CJ together with his wife, the claimant's mother, are subsistence farmers.
    3. The 1st defendant was at all material times a Clinician at One Stop Centre at Chileka Health Centre. One Stop Centre Clinics also known as 'Chikwanekwanes' or 'everything under one roof' provide medical, legal and psychosocial services for survivors of child maltreatment and adult intimate partner violence.
    4. The 2nd defendant is the 1st defendant's employer and is a party to this matter through vicarious liability.
    5. The 3rd defendant is a party in this matter on behalf of the Government Minister responsible for health, who is responsible for promulgating and implementing the health policy in Malawi, including the Standards and Guidelines for Post Abortion Care 2020 ("the PAC Guidelines").
    6. The 4th defendant is a constitutional body whose duties, functions or responsibilities include the following:

        6.1. To promote more particularly the human rights of vulnerable groups, such as children, illiterate persons, persons with disabilities and the elderly;

6.2. To study the status and effect of legislation, judicial decisions and administrative provisions for the protection and promotion of human rights and to prepare reports on such matters and submit the reports, with such recommendations or observations as it considers appropriate, to the authorities concerned or to any other appropriate authorities;

6.3. Where necessary, to recommend the adoption of new legislation or administrative provisions, or the repeal, replacement or amendment of legislation or administrative provisions in force and relating to human rights.

7. In or around the month of November 2022 a Non-Governmental Organization ("NGO") went to conduct voluntary testing and counseling at a Primary School where the claimant was learning. During the voluntary testing exercise it was discovered that the claimant was 1 month pregnant. The medical officers of the NGO referred the claimant to Chileka Health Centre One Stop Clinic where it was confirmed that the claimant was pregnant.
8. This shocked the claimant's parents and the rest of her family members as the claimant was only 13 years old at that time.
9. The claimant revealed that she was forced to have sexual intercourse with a certain man known as Lazaro Charles who was living in the same village with her. Lazaro Charles was arrested, charged, tried and sentenced by Chisenjere Magistrate Court in Lunzu to 14 years imprisonment for the offence of having sexual intercourse with a child in criminal case number 486 of 2022. He is currently serving his jail time.
10. In or around November 2022 Blantyre District Social Welfare Office ("Social Welfare") intervened and took the claimant and placed her in a foster home within Blantyre district. The claimant could no longer go to school. While at the foster home the claimant was ill-treated and stigmatized due to the pregnancy. She was also kept in a room separate from the rest of the children at the foster home. The foster home did not want to keep the claimant any longer due to the pregnancy.
11. The claimant experienced health problems due to the pregnancy. She showed signs that she was unwell and mentally troubled. She kept away

from interacting with her friends and family. She stopped eating and was visibly unhappy. Due to these health problems, in or around January 2023 the claimant and her family resolved to go back to the One Stop Centre at Chileka Health Centre for checkup, counseling and assistance.

12. At Chileka Health Centre the 1st defendant reviewed the claimant. The claimant's parents requested for safe termination of the claimant's pregnancy as the claimant was too young to keep the pregnancy and that the pregnancy had put her health and life at risk.
13. The 1st defendant diagnosed that, "mentally the claimant looks worried that she is leaving the safe home". The 1st defendant concluded that "she was a stable patient medically. That there was no medical danger to her life which was noted hence no abortion will be done." He further planned "counseling her to accept the pregnancy and pyscho-social counseling and referred her to social welfare for further assistance."
14. The 1st defendant further indicated that he was afraid to terminate the pregnancy as it is deemed illegal. He refused to provide the service of safe termination of pregnancy to the claimant and he indicated that he was afraid of the consequences because abortion is illegal in Malawi. The claimant and her family went back home feeling helpless and frustrated.

    Meanwhile the claimant continued to exhibit health problems.
15. Due to the persistence of the health problems and the stigmatization which the claimant continued to face, the claimant and her family decided to get a second opinion on the claimant's condition. The claimant went to see a specialist gynecologist at Queen Elizabeth Central Hospital in Blantyre ("Queen's Hospital"). Upon assessing her, the specialist, in exercise of his expert assessment and in accordance with the PAC Guidelines, recommended termination of the pregnancy as the pregnancy put the claimant's health and life at risk. The pregnancy was safely and successfully terminated at Queen's Hospital.
16. Thereafter the claimant returned to her home in the village. The claimant is now back to school thanks to the specialist gynecologist at Queen's Hospital. However, the claimant is still traumatised and

stigmatized due to the events which took place before her pregnancy was safely terminated.

17. The claimant now pleads that the conduct of the 1st defendant in refusing or failing to provide her access to safe termination of her pregnancy was a breach of the 1st defendant's statutory duties.

Particulars of breach of statutory duties by the 1st defendant

17.1. The 1st defendant breached Section 19 (1) of the Gender Equality Act [Cap. 25:06] ("GEA") which guarantees the claimant the right to adequate sexual and reproductive health which includes the right to access sexual and reproductive health services which includes safe and legal termination of pregnancy.

17.2. The 1st defendant breached Section 19 (2) of the GEA which guarantees every person the right to choose whether or not to have a child subject to sections 149 and 151 of the Penal Code [Cap.7:01] as read with section 243 of the Penal Code.

17.3. The 1st defendant did not provide the claimant with information about risks of pregnancy for her age and on the availability of post abortion care including termination of pregnancy as explained in the PAC Guidelines, thereby the 1st defendant breached his duty under Section 20 (1) (d) of the GEA which mandates that the health officer "imparts all information necessary for a person to make a decision regarding whether or not to undergo any procedure or to accept any service affecting his or her sexual and reproductive health."

18. The 2nd defendant is vicariously liable for the 1st defendant's breach of duties in its capacity as the 1st defendant's employer.

19. The claimant further pleads that the 3rd defendant is in breach of its obligation or mandate as the Government Minister responsible for health.

Particulars of breach by the 3rd defendant

19.1. Failure to amend and promulgate the PAC Guidelines to state clear directions that health providers in Malawi should provide on-demand access to legal termination of pregnancy to children, in particular, victims of sexual violence.

19.2. Failure to ensure that all health providers designated to provide post-abortion care services in accordance with the current PAC Guidelines are appropriately instructed and trained to:-

19.2.1. Provide termination of pregnancy services to child victims of sexual and gender-based violence in accordance with the GEA and other relevant law.

19.2.2. Impart all information necessary to child victims of sexual and gender-based violence in order to make a decision regarding whether or not to undergo termination of pregnancy in accordance with the GEA and other relevant law.

20. The Claimant further pleads that the facts of this matter show that the 4th defendant is in breach of its statutory duties.

Particulars of breach of statutory duties by the 4th defendant

20.1.Breach of Section 8 of the GEA by failing to enforce the provisions of Sections 19 (1), 19(2) and 20 (1) (d) of the GEA

20.2.Breach of Section 9(2) (c) of the GEA and Sections 13 (1) (d) and (e) of the Human Rights Commission Act by failing to recommend the adoption of new legislation or guidelines or amend legislation or guidelines in force relating to rights of minor girls who are victims of sexual violence.

21. As a result of the defendants' actions above, the claimant suffered loss and damage.

Particulars of Loss and damage

21.1. Physiological and psychological distress, pain and suffering for being made to carry a risky pregnancy.
21.2. Loss of amenities of life as the claimant was unable to engage in normal activities for a child including playing with her friends, going to school, and enjoying parental care.
21.3. Experiencing stigma, shame, fear, anxiety and isolation.

22. The claimant further pursues this case in the interest of the public, particularly minor girls in Malawi as they continue to die or suffer from health problems due to failure by health facilities in Malawi to provide access to safe termination of pregnancy to children who are victims of sexual and gender based violence.
23. Therefore, the claimant seeks the following reliefs:

23.1. A declaration that the conduct of the 1st defendant in refusing or failing to provide the claimant access to safe termination of her pregnancy breached Sections 19 (1), 19 (2) and 20 (1) (d) of the Gender Equality Act ("GEA").
23.2. An order that the 2nd defendant is vicariously liable for the actions of the 1st defendant complained of in this matter.
23.3. An order that the 3rd defendant must, within 180 days from the date of this order, amend and promulgate the Standards and Guidelines for Post Abortion Care 2020 ("PAC Guidelines') to state clear directions that health providers in Malawi should provide on-demand access to legal termination of pregnancy to children, in particular, victims of sexual and gender-based violence, on the authority of the GEA.
23.4. An order that the 3rd defendant must ensure that all health providers designated to provide post-abortion care services in accordance with the PAC Guidelines are:

23.4.1. appropriately instructed and trained to provide termination of pregnancy services to child victims of sexual and gender-based violence in accordance with the GEA and other relevant laws.

23.4.2. appropriately instructed and trained to impart all information necessary for child victims of sexual and gender-based violence, to make a decision regarding whether or not to undergo termination of pregnancy in accordance with the GEA and other relevant law.

23.5. An order that the 4th defendant must investigate how the 2nd and 3rd defendants' institutions, including the One Stop Centres, are complying with the GEA and other relevant laws in dealing with cases of pregnant child victims of sexual and gender-based violence, and make recommendations as it considers appropriate to ensure that the 3rd defendant's reproductive health policies, clinical guidelines, training protocols and hospital practices effectively protect and respect children's sexual and reproductive health and rights in accordance with the GEA and other relevant laws.

23.6. Compensation/damages payable by the 2nd and 3rd defendants in the aggregate sum of K50,000,000.00 (Fifty Million Kwacha) for breach of the claimant's reproductive health rights under the GEA, for pain and suffering and loss of amenities of life on authority of a similar case of *Federation of Women Lawyers (Fida - Kenya) & 3 others v The Attorney General & 2 others*, Petition No 266 Of 2015 at the High Court of Kenya.

23.7. The claimant further prays that costs be in the discretion of the Court.

3. The 1st, 2nd and 3rd defendants stated their defence to the claimant's claim as follows:

    1. The 1st, 2nd and 3rd defendants refer to paragraphs 2 and 3 of the claimant's statement of case and makes no comment as it has no knowledge of the same.
    2. The 1st, 2nd and 3rd detendants refer to paragraph 4 of the claimant's statement of case and admit that the 1st defendant is a clinician. The defendants however deny that Chileka Health Centre provides legal services.

3. The 1st, 2nd and 3rd defendants refers to paragraphs 5, 6 and 7 of the claimant's statement of case and makes no comment.
4. The 1st, 2nd and 3rd defendants refer to paragraph 8 of the claimant's statement of case and deny the contents therein; the defendants aver that the voluntary testing referred to therein, was specifically for Human Immunodeficiency Virus (H.I.V), of which the claimant tested positive. The defendants further avers that it was when the claimant was referred to Chileka Health Centre that she tested positive for pregnancy.
5. The 1st, 2nd and 3rd defendants repeat paragraph 4 of the Defence and further state, that upon being tested for H.I.V, the 1st defendant treated her H.I.V and along with Blantyre District social welfare employees gave the claimant counselling on how to deal with the H.I.V.
6. The 1st, 2nd and 3rd defendants refer to paragraphs 9 and 10 of the statement of case and make no comment.
7. The 1st, 2nd and 3rd defendants refer to paragraph 11 of the statement of case and deny the contents therein; that the 1st defendant after treating the claimant for H.I.V was told by the claimant that she was in fear of moving back into her community due to the stigma of being pregnant and being H.I.V positive.
8. The 1st, 2nd and 3rd defendants repeat paragraph 7 of the Defence and further states that the 1st defendant after hearing the concerns of the claimant, took it upon himself to help find the claimant a safe shelter (foster home) and guardians to assist her in the process of pregnancy and stigma of being H.I.V positive.
9. The 1st , 2nd and 3rd defendants refer to Paragraphs 12, 13 and 14 of the claimant's statement of case and deny the contents therein and put the claimant to proof; state that when the claimant and her parents visited Chileka Health Centre in January, they requested for termination of the pregnancy. However, medical examination did not make any observation revealing any other co-morbidity that would put her in danger to warrant termination of the pregnancy.
10. The defendants repeat paragraph 9 above and state that the claimant was referred to social welfare for counselling and further examination. The social welfare personnel found that the claimant's H.I.V status was made known to pupils at her school and the community where she lives.

As a result the claimant faced discrimination hence she was moved to a foster home at Chirimba for her mental well-being.

11. The 1st, 2nd and 3rd defendants refers to paragraph 15 of the claimant's statement of case and deny the contents therein and put the claimant to strict proof; the defendants further contends that the claimant, at the time the examination was done, did not qualify to have her pregnancy terminated considering that the claimant was healthy and was showing signs that the she could deliver the child without any complications.
12. The Defendants repeat paragraph 11 of the Defence and further states that the claimant only had sociological problems which do not necessarily warrant health centres to carry out abortions.
13. The 1st, 2nd and 3rd defendants refers to paragraphs 16 and 17 of the claimant's statement of case and deny the contents therein and puts the Claimant to strict proof.
14. The 1st, 2nd and 3rd defendants deny breaching their statutory duty as alleged under paragraph 18. The defendants contend that the right to adequate sexual reproductive health provided under the Gender Equality Act does not mandate the defendants to terminate pregnancy upon request.
15. The defendants repeat paragraph 10 above and aver that termination of pregnancy is illegal except in circumstances where the life of the mother or girl is at risk. The law is restrictive as it is not open to each and every lady that is expectant. The qualifier is that there should be a risk to the life of the mother by preserving the unborn child.
16. In view of the foregoing, the defendants deny causing loss and damage as particularised under paragraph 20 of the claimant's statement of case.
17. Notwithstanding the above, the claimant herein has instituted these proceedings without serving the office of the Attorney General with the required 90 days' notice. At trial, the defendant will raise a preliminary objection to have this matter dismissed for the claimant's failure to comply with this requirement.
18. The 1st, 2nd and 3rd defendants deny that the claimant is entitled to any of the reliefs as outlined under paragraph 22 of the claimant's statement of Case, and all its sub-parts, and put the claimant to strict proof thereof.

19. Save as hereinbefore admitted, the defendants deny each and every allegation of fact as if the same were traversed seriatim.

4. The 4th defendant stated its defence to the claimant's claim as follows:

    1. The 4th defendant refers to contents of paragraph 1 and 2 of the claimant's statement of the case and makes no comment thereof.
    2. The 4th defendant refers to contents of paragraph 3, 4, and 5 of the claimant's statement of case and makes no comment thereof.
    3. The 4th defendant admits contents of paragraph 6 of the claimant's statement of case as particularized therein.
    4. The 4th defendant refers to paragraph 7 to 17 of the claimant's statement of case, notes the contents therein and makes no comment thereof.
    5. The 4th defendant refers to paragraph 18 of the claimant's statement of case notes the contents and realizes that all particulars therein shall ably be responded to by the 1st defendant.
    6. The 4th defendant refers to contents of paragraph 19 and all particulars there under of the claimant's ctatement of case and makes no comment thereof as they shall be ably responded to by the 3rd defendant herein.
    7. The 4th defendant refers to paragraph 20 and its particulars thereunder of the claimant's statement of case, and denies that the 4th defendant is in breach of section 8 of the GEA in enforcing its contents of which the context of the claim is subject to enforcement under another law of which the State is responsible for and is a subject under a pending Bill, hence, subjects the claimant to strict proof.
    8. The 4th defendant refers to paragraph 21 of the claimant's statement of case and makes no comment to all the reliefs thereunder, with recognition to paragraph 23.5 the 4th defendant denies that the claimants' reliefs fall under the provided sections of the GEA.
    9. Save as hereinbefore specifically admitted, the 4th defendant denies each and every allegation of fact in the statement of case as if the same were herein set forth and traversed seriatim.
    10. The 4th defendant prays for cost of this action.

5. Amicus Curiae, which was admitted as a friend of the Court, filed a brief on the matter at hand, which this Court takes into consideration in its determination.
6. As all the parties are aware, this being a civil matter, the burden of proof lies on the claimant to prove her case on a balance of probabilities. See *Msachi v Attorney General* [1991] 14 MLR 287, *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302, *Limbe Leaf Tobacco v Chikwawa and others* [1996] MLR 480, *Commercial Bank of Malawi v Mhango* [2002-2003] MLR 43 (SCA) and *Miller v Minister of Pensions* [1947] All ER 372.
7. The issue for determination is whether the claimant is entitled to the declarations sought as well as the damages claimed. In order to determine this, this Court has to answer a number of issues, namely, whether or not the claimant was denied termination of pregnancy services by the 1st defendant. Whether or not the 2nd defendant is vicariously liable for the 1st defendant's refusal to terminate the claimant's pregnancy. Whether or not the 1st defendant's refusal to terminate the claimant's pregnancy herein breached section 19 (1) (a), 19 (2) and 20 (1) (d) of the Gender Equality Act. Whether or not the 3rd defendant breached its obligations or mandate as the Government Minister responsible for health for failing to promulgate clear guidelines that a child who gets pregnant as a result of sexual violence can access safe termination of pregnancy under the law. Whether or not the 4th defendant breached its obligations under sections 8 and 9 (2) of the Gender Equality Act and section 13 (1) (d) and (e) of the Human Rights Commission Act. Whether or not the clamant suffered loss as a result of the defendant's conduct. Whether or not the claimant is entitled to the damages and costs sought in her statement of case.
8. The claimant called two witnesses and for her third witness only a witness statement was admitted in evidence. The 1st, 2nd and 3rd defendant called one witness, the 1st defendant. The 4th defendant also called one witness, its Chairperson, Chikondi Chijozi.
9. The first witness for the claimant is her mother. She stated as follows in her witness statement:

    1. I am CC... I am the biological mother of AC, the claimant in this matter.
    2. The claimant ("my daughter") was born on 28th February 2009.

3. In or around the month of November 2022, a Non-Governmental Organization ("NGO") known as [..] went to conduct voluntary testing and counselling at a Primary School where my daughter was learning and was in Standard 5.
4. After the voluntary testing and counselling exercise, the NGO referred my daughter to Chimembe health centre where it was discovered that she was one month pregnant. The child protection officer at Chimembe referred the matter to the Blantyre social welfare officer who took my daughter to Chileka Health Centre One Stop Clinic where it was confirmed that she was pregnant.
5. My family and I were utterly shocked to learn that our daughter was pregnant as she was only 13 years old.
6. When we asked her who was responsible for her pregnancy, she told us that she had been forced to have sexual intercourse with a certain man known as 'LC' who was living in the same village with us.
7. As my daughter's pregnancy progressed, I noticed that she was unwell most of the time and that she looked sad and depressed. She constantly complained to me that she was experiencing pain and discomfort due to the pregnancy.
8. Further, I noted that she kept away from interacting with her friends. When I asked her, she complained that her friends would laugh and ridicule her because of the pregnancy.
9. Before she became pregnant, she was always outdoors and used to enjoy playing netball with her friends, but stopped all that after the pregnancy.
10. She even stopped eating and looked visibly unhappy.
11. In or around January 2023, due to her state, age, and challenges she was facing due to the pregnancy, we resolved to go back to the One Stop Centre at the Chileka Health Centre to seek termination of the pregnancy. Mr Jenala Solomon, the 1st defendant, was the clinician who examined her.
12. However, the 1st defendant refused to provide the service of safe termination of pregnancy and he stated that he was afraid of the consequences of terminating the pregnancy because it is illegal in Malawi.
13. We were not satisfied with the 1st defendant's response. Hence we sought further advice from well-wishers who then referred us to Nyale Institute.

14. We then went to Nyale Institute where we were enlightened that an unwanted pregnancy of a 13 year old posed a risk to her life and qualifies her for safe termination of the pregnancy.
15. Following the advice from Nyale Institute, we went back to the clinic where we obtained a medical report from the 1st defendant. The 1st defendant advised us that my daughter is a stable patient and there was no medical danger to her life which required a termination of pregnancy. Hence our request for safe termination of pregnancy was denied. He further recommended counselling so that she should accept the pregnancy. He further referred her to the social welfare office for further assistance. I attach and exhibit hereto a copy of the medical report by the 1st defendant marked as exhibit CC1.
16. We went back home feeling helpless and frustrated as we felt that my daughter was being forced to keep a pregnancy that posed a health risk to her and her life but also jeopardised her future. Meanwhile, my daughter continued to show symptoms of poor health due to the pregnancy.
17. In or around November 2022, the Blantyre District Social Welfare Office ("Social Welfare"), through Mr. Maulidi Chiphwanya, intervened. They took my daughter and placed her in a foster home within Blantyre District on the ground that the claimant would be safe there and would also return to school whilst there.
18. However, we discovered during our visits that my daughter was not attending school. We further discovered that my daughter was being ill-treated and stigmatized by some of her fellow children at the foster home and also some workers at the foster home, due to the pregnancy. She was also kept in a separate room from the rest of the children so that other children should not know about the pregnancy. Consequently, the foster home informed us that they did not want to keep my daughter any longer due to the pregnancy.
19. Our family also suggested to the social welfare officers that my daughter's pregnancy should be safely terminated. However, the social welfare officers did not agree to facilitate this process.
20. Due to the persistence of the health problems and the stigmatization which my daughter continued to face, we decided to get a second opinion on my daughter's condition. We went around enquiring for help. We were

informed that Banja la Mtsogolo provides the safe termination of pregnancy service but requires payment for the service. However, because we are poor we could not afford to pay for the service.

21. Some well-wishers eventually advised us to meet a gynecologist at Queen Elizabeth Central Hospital in Blantyre ("Queen's Hospital"). Upon assessing my daughter, the gynecologist recommended termination of the pregnancy as the pregnancy put my daughter's health and life at risk.
22. In or about February 2023, the pregnancy was safely and successfully terminated by the gynecologist.
23. Thereafter, we returned home. My daughter is now back to school thanks to the assistance that we received from the gynecologist at Queen's Hospital.
24. However, my daughter is still not socialising as she used to before the pregnancy. The treatment and rejections that she experienced during the pregnancy at the clinic and also at Chombo Safe House have severely affected her self-esteem.
25. My daughter informs me that she still experiences shame, fear, and anxiety and isolates herself from her peers.
26. We further suffered inconvenience and shame for having to go around various places and offices with a pregnant 13 year old girl seeking assistance, including the Chileka Health Centre, the safe house, Nyale Institute, Queens Hospital and all the other well-wishers from whom we sought assistance. The fact that we stay very far away, about 70 kilometres from Blantyre, made it worse.
27. Additionally, for a period of time since she became pregnant, my daughter was unable to engage in the normal activities of a child including playing with her friends, going to school, and enjoying parental care.
28. The perpetrator who defiled my daughter, LC, was later arrested and sentenced to 14 years imprisonment by the Chisenjere Magistrate Court in Criminal Case Number 486 of 2022. He is currently serving his sentence.
29. In the circumstances, it is my prayer that the Court should grant us the reliefs as prayed in the statement of case.

10. She also filed a supplementary witness statement, in order to attach her daughter's Health Passport and Assessment Report by Dr Zumazuma marked

as exhibit "CC2" and "CC3" respectively, which are not in her witness statement.

11. During cross-examination, she stated that she is a farmer and has no medical expertise. She indicated that her witness statement, which is in English, was translated in Chichewa. She stated that her daughter was tested at his school. She added that the personnel at the NGO did the HIV test. She added that at the Chileka Health Center, her daughter was examined for pregnancy by the 1st defendant. She indicated that she asked that her daughter's pregnancy be terminated. She stated that she took her daughter home after she had been tested for pregnancy and Sexually Transmitted Infections (STIs).
12. She stated that before her daughter became pregnant, she used to stay with her. She indicated that she discovered that her daughter was pregnant on 20th January 2023. She denied that her daughter was in a foster home for two months.
13. She indicated that, after the pregnancy, her daughter no longer played much, even within the first three months. She stated that she did not know why the 1st defendant refused to terminate her daughter's pregnancy. She indicated that it would be hard for her to say that she had been better judgment regarding the pregnancy termination herein.
14. She stated that at the Nyale Institute it was an officer who told her about the risk of the pregnancy herein and that it was neither a lawyer nor a medical doctor. She added that the Institute personnel did not show her any guidelines as a basis for their advice on the risk herein. She indicated that after visiting the Nyale Institute, she did not visit the Chileka Health Center again.
15. She indicated that the defendant said that her daughter was not at risk. She added that then her daughter was one month pregnant. She denied that her daughter was three months pregnant at the time over of her visit to Chileka Health Centre on 20th January 2023.
16. She indicated that on medical matters, she defers to the medical doctors. She indicated that she does not know when a pregnancy can be safely terminated. She asserted that the 1st defendant said that her minor daughter herein should accept her pregnancy. She denied that the 1st defendant said that her daughter should go for counseling.
17. She asserted that she concluded that her daughter was at risk because her daughter was not eating well and was weak. She however indicated that the

1st defendant could be relied upon regarding the risk to her daughter's health herein. She indicated that her daughter was throwing up or had malaria.

18. She stated that her daughter was not in a safe home in January 2023. But that she had been in a safe home. She indicated that her earlier statement should be disregarded. She stated that she would visit her daughter in the safe room. But that her daughter was not playing with her friends in the safe home. She added that her daughter had been taken to the safe home after suffering a sexual assault while at her home.
19. She indicated that she did not know why the Social Welfare Office did not facilitate the termination of her daughter's pregnancy herein. She indicated that she did not know how many months pregnant her daughter was then. She does not recall when she visited the social welfare office. She indicated that at that time her daughter might have been three months pregnant. She also stated that she does not know the guidelines on termination of pregnancies in Malawi. She stated that she noted the health challenges of her daughter, but did not visit a hospital regarding the same. She stated that the psychiatrist's report was not interpreted to her. She added that she does not know that the psychiatrist report said that her daughter had no depression. She clarified that she was not living with her daughter then and this is why she does not know anything about this aspect. She, however, said she could still explain her daughter's condition because her daughter explained the same to her whenever she visited her daughter. She, however, agreed that the Social Welfare personnel had better knowledge of her daughter's condition. And that they were in a better position to decide the fate of a daughter.
20. She then asserted that she could not explain the contents of her daughter's health passport. And that she could not say whether the medical opinion on her daughter was that her daughter was alright.
21. She then stated that a pregnant person may be vomiting or may have no appetite. She added that however, her daughter had other ailments, that is, the HIV beyond her pregnancy. And that this is what caused the her daughter's health risks.
22. She then indicated that she does not know about the Malawi Human Rights Commission. She also said that at the Nyale Institute she was not told about the Human Rights Commission. She indicated that it was not fair to say that the Human Rights Commission had failed her because the Human Rights

Commission was not aware of daughter's problem. She also said that she is aware that medical records are private. There was no re-examination, she stated that

23. The second witness for the claimant was Doctor Chisale Mhango. He stated as follows in his witness statement:

1. My name is Dr Chisale Mhango. I am an Obstetrician and Gynecologist by profession.
2. I am a Fellow of the Royal College of Obstetricians and Gynaecologists of the United Kingdom. I trained as a Gynaecologist at the Royal Free Hospital in London. After briefly working for the University Teaching Hospital in Lusaka, Zambia, I joined the World Health Organization (WHO) and the United Nations Population Fund (UNFPA) working in Zimbabwe, Uganda, Mauritius, and at UNFPA Headquarters in New York. My work mostly involved promoting the development of women's health programs on the African continent. I attach hereto some of my certificates as proof of my qualifications marked as exhibit CM1.
3. Upon retirement from WHO, I worked in the Department of Health of the African Union, in Addis Ababa, Ethiopia, where I developed continental policy framework and the First edition of the Maputo Plan of Action for Universal Access to Comprehensive Sexual and Reproductive Health Services in Africa.
4. I also worked as the Director of Reproductive Health at the Ministry of Health in Lilongwe, and as a Senior Lecturer at the College of Medicine (now KUHES) in Blantyre, Malawi.
5. I have personally conducted or participated in and published research studies on unsafe abortion in Malawi including the following 11 articles and 4 books:

ARTICLES

a. Godfrey Dalitso Kangaude, Chisale Mhango: **The duty to make abortion law transparent: A Malawi case study** *Int J Gynecol Obstet* 2018; which I attach as exhibit CM 2;
b. Polis CB, Mhango C, Philbin J, ChimwazaW, Chipeta E, Msusa A (2017) **Incidence of induced abortion in Malawi**, 2015. PLoS

ONE12(4): e0173639. https://doi.org/10.1371/journal.pone.0173639 which I attach as exhibit CM 3;

c. Brooke A. Levandowski, Chisale Mhango, Edgar Kuchingale, Juliana Lunguzi, Hans Katengeza, Hailemichael Gebreselassie and Susheela Singh: **The Incidence of Abortion in Malawi**. Int. Pers. Sexual and Reprod. Health Vol. 39 No. 2 June 2013 which I attach as exhibit CM 4;

d. Tim Colbourn, Sonia Lewycka, Bejoy Nambiar, Igbar Anwar, Ann Phoya, Chisale Mhango **Maternal mortality in Malawi**, 1977-2012 BMJ Open 2013; 3:004150 doi: 10.1136/*bmjopen*-2013-004150 which I attach as exhibit CM 5;

e. Brooke A. Levandowskia, Linda Kalilani-Phiri, Fannie Kachale, Paschal Awah, Godfrey Kangaude, Chisale Mhango **Investigating social consequences of unwanted pregnancy and unsafe abortion in Malawi: The role of stigma** Inter. J. of Gynaecology and Obstetrics 18, Supplement 2 (2012) which I attach as exhibit CM 6;

f. Jackson E, Johnson BR, Gebreselassie H, Kangaude GD, Mhango C. **A strategic assessment of unsafe abortion in Malawi**. Reproductive Health Matters 2011; 19(37): 133-43 which I attach as exhibit CM 7;

BOOKS

g. Authored the **Maputo Plan of Action** for the implementation of the Continental Policy Framework for Reproductive Health and Rights, 1s Edition which I attach as exhibit CM 8.

1. From my research and experience I know that unsafe termination of pregnancy is an indication of lack of access to safe termination of pregnancy; nobody would choose to have unsafe termination than safe termination of pregnancy.
2. The paper, Jackson et al, captures the people's view that revealed that women in rural Malawi observed and believed that safe termination on demand was legal in Malawi, but only for the rich, so they, being poor, did not bother to seek safe termination of pregnancy and went straight for unsafe termination of the pregnancy which they could afford.

3. In Malawi, Health providers do not know what is the scope of legal termination of pregnancy. Therefore, most women seek unsafe termination of pregnancies because health providers inform them that they do not qualify for safe abortion under the current law.
4. I personally do not know the claimant; she has never been my patient and I have never examined her. But I am familiar with the facts relevant to this matter as they relate to my professional interest and expertise.
5. The claimant's lawyers approached me to offer my expertise in this matter because of my extensive research and experience on the issue regarding maternal health and abortion.
6. In my expert opinion, I sincerely believe that the claimant, in view of her age, should have been granted her request to terminate her pregnancy or at least be referred tosomeone who could provide that service, or indeed be provided with correct and sufficient information regarding her request to terminate her pregnancy and where she could be assisted as requested.

12. My reason for my opinion as expressed above is based on the following information that I know and believe to be true. Firstly, the fact that pregnancy at her tender age is associated with high morbidity and mortality.
13. It is also known that women who are denied safe abortion in Malawi often will proceed to seek unsafe abortion, which is the third commonest cause of maternal deaths in Malawi.
14. The National Statistical Office (NSO) has estimated that 18% of the maternal deaths in Malawi were due to unsafe abortion. Women who access safe abortion do not die. This means that abortion deaths alone are responsible for 79/100,000 live births.
15. Further, through the studies I have conducted coupled with my work experience, I know that pregnancy is the most common cause of school dropout among teenage girls, and the most common cause of death at that age.
16. I have personally conducted the safe termination of pregnancies of girls in similar situations as the present case. For example, I once met a senior government official who expressed gratitude because I had agreed to safely terminate her pregnancy when she was 13 years old.

17. While I was the Director at the Ministry of Health's Reproductive Health Directorate, I was involved in developing the 2020 Standards and Guidelines for Post Abortion Care ("the PAC Guidelines"), which I now exhibit as exhibit CM 9.
18. Chapter 1 of the PAC Guidelines describes Malawi's abortion legal framework which includes the Constitution of Malawi, the Gender Equality Act, the Penal Code and other laws. Paragraph 1.2 entitled "Guidance to medical practitioners on safe abortion care in Malawi" provides guidance on circumstances where safe termination of pregnancy may be conducted to preserve the life of the woman. At the end of the guidance, this is how the chapter concludes:
    "The provider should reduce and avoid harm to the pregnant woman, maximize the benefits to her life, against the risks posed by continuing the pregnancy. If the provider is convinced that continuing pregnancy would endanger the life of the woman, he or she should provide Post Abortion Care (if the woman chooses after medical advice)."
19. In my expert opinion, therefore, the case of a pregnant girl of tender age, who becomes pregnant due to sexual violence is eligible for a safe and legal termination of pregnancy as described under the PAC Guidelines even if these specific circumstances have not been expressly articulated in this document.
20. The solution is therefore threefold as follows:

    a. Clarify the exceptions for permitting safe termination of pregnancy so that all women who are eligible should be able to access it and thereby not seek unsafe abortion;
    b. Safe termination of pregnancy under law should be made accessible even to women in rural and remote areas;
    c. Train health workers to understand the PAC guidelines so that they can provide safe and legal termination of pregnancies with confidence.

24. During cross-examination, he stated that he is in the category of health workers he alluded to in paragraph 8 of his witness statement who do not know the legal scope for safe abortion under the law. He indicated that he was

testifying generally on issues of termination of pregnancy. And that he was not testifying specifically regarding the claimant in this matter. He added that he is an expert on issues of termination of pregnancy. He reiterated that he never examined the claimant herein. He indicated that when doing a termination of pregnancy there has to be a one on one examination.

25. He indicated that he does not know if the claimant reported her issues to the Human Rights Commission. He also said he does not know whether the Human Rights Commission breached his statutory duties. He indicated that he never reported his findings herein to the Human Rights Commission.
26. During re-examination, he stated that the issue in his evidence is to do with the consequences of not getting safe termination of pregnancy when one needed it.
27. The last witness for the claimant who did not appear at trial but whose witness statement was admitted in evidence is Dr Zumazuma. He stated as follows in his witness statement:

    1. My name is Dr Alex Zumazuma. I am a Consultant Psychiatrist by profession.
    2. My academic qualifications are: Bachelor of Medicine, Bachelor of Surgery (MBBS) and Master of Medicine in Psychiatry (MMed Psych). I attach hereto some of my certificates as proof of my qualifications marked as exhibit AZI.
    3. My work experience includes: child and adolescent mental health, old age, General Psychiatry, Liaison Psychiatry, Forensic Psychiatric assessment and Psychotherapy.
    4. I currently work as a Clinical Lecturer in the department of Psychiatry and Mental Heath at KUHES and I am also a visiting psychiatrist at St John of God Hospitaller (SJOG).
    5. I examined the claimant in this matter on 20th September 2024 and thereafter I prepared a report. Attached is the copy of the report marked as exhibit AZ2.
    6. I believe that the facts stated in this witness statement are true to the best of my knowledge, information and belief.

28. The Psychiatric Assessment report that he attached to his witness reads as follows:

ASSESSMENT REPORT
Referrer: Mlauzi Legal Solutions
Date of referral: 20th September, 2024
Reason for referral
1. Ascertain current mental health status
2. Assess for evidence of trauma-related disorders
3. Ascertain the existence of a medical condition warranting abortion
4. Assess for capacity to make informed decisions (including consent)

Sources of information

1. Psychiatric assessment
2. Collateral history including

- School information
- Police report
- Health Passport

A. Background Information

…. a 14-year-old girl reported to have been raped by Mr LC from her community in ….. The incident occurred in the year 2022 and it was discovered when an NGO called ….. visited her school. The NGO supports children in the area and routinely conducts medical check-ups including HIV. During the routine check-up, it was found that AC was HIV-reactive. When asked, the child reported getting it from LC. The child was then taken to Chileka Health Centre for a confirmatory test including a pregnancy test. Following the confirmatory tests, the case was reported to police and Mr LC was found guilty and sentenced to prison.
Following these events, the parents reported to have been concerned about AC's future i.e. school attainment and other risks because of her pregnancy. The NGO group also alerted the social office from DC which

took the child to CH orphanage for "protection." According to the child and parents, the child was taken to CH orphanage because of:

a. Reduced appetite
b. School refusal. The child further explained that "whenever I go to school, I would have a lot of thoughts. / was always afraid that if I met relatives of Lazaro, they would harm me"
c. The child opting to stay home most of the time and most of the days
d. having low mood for most of the days and most of the times
e. having reduced energy levels
f. A decline in school performance
g. re-experiencing the events. The child was however unable to explain fully (noted to be very tearful)

The child reported that these symptoms started before the revelation that she was HIV-reactive and was pregnant. During her stay at CH, the child reported that

a. She was isolated. "only one person was chatting with me". The child attributed the isolation to her pregnancy
b. Women at the orphanage were telling her that they don't keep mothers
c. Was constantly fighting with other children because she was bullied. This is also the reason she was released from Chombo.

B. Other important history

On 20th January 2023, the client reported to Chileka Health Centre with the aim and intention of aborting the pregnancy. The attending medical practitioner concluded that the child was stable and no medical conditions that could potentially put her life in danger were present. The MP recommended that the child should go for counselling so that she can accept the pregnancy and be referred to social welfare for further assistance. The child and the parents reported that they knew about the risk of abortions, and the methods used and had weighed pros and cons before opting for the abortion.

In February 2023, the family and the child were taken to Queen Elizabeth Central Hospital. The attending clinician assessed the child and deemed it reasonable to conduct an assisted abortion. The parents reported to have been educated on the procedures, risks and they were able to make a logical decision.

C. Summary of school information

AC is described as an average student by her teachers. From the information gathered from the school regarding his relationship with peers, general mood state and academic achievements, before and after the termination, it was found that:

7. Increased social interaction. Before the abortion, it is reported that she had few friends, and was aggressive. Post-abortion, no reports of aggressive are present
8. The child is still moody and easily frightened but she is no longer tense as reported before the abortion.
9. There were no remarkable changes in AC's performance in multiple domains. However, the teachers reported a decline in her academic performance after her readmission to school.
10. School teacher recommended for psychological support
11. There is a subtle decline in her academic performance after the incident

D. Current mental state

The child reported no symptoms of depression, anxiety, or any trauma related. She reported that she has been doing great in school and is happy. Her mental state examination during the assessment was normal apart from being tearful and sad when asked to describe the events she was re-experiencing.

E. Summary of findings

1. Current mental health status

From the assessment and the collateral history, currently, it is probable that AC still has unresolved "other specified trauma and stress-related disorders (Persistent response to trauma with PTSD-like symptoms)".

2. Assess for evidence of trauma-related disorders

During the period after sexual harassment, the history suggests "depression" and "other specified trauma and stress-related disorders (Persistent response to trauma with PTSD-like symptoms)".

3. Ascertain the existence of a medical condition warranting abortion

- presented with symptoms suggestive of Depression and other specified trauma and related disorders (Persistent response to trauma with PTSD-like symptoms). According to Chapter 1.2, page 15 of the Standards and Guidelines for Comprehensive Abortion Care in Malawi, other conditions include psychiatric conditions.

4. Assess for capacity to make informed decisions (including consent)

During the assessment, both the parents and AC demonstrated the capacity to make an informed decision.

F. Conclusion and Recommendations

As a result of the sexual assault, AC suffered from depression and other trauma- and stress-related disorders. Her psychiatric condition warranted a termination of pregnancy when she was seen at Chileka Health Center. AC and her parents were capable of making an informed decision about the procedure. Despite not reporting symptoms of depression during the assessment, AC's collateral history and mental state examination indicate unresolved trauma and stress-related disorders. It would be beneficial for her to seek psychotherapy from a trauma-focused therapist.

Dr Alex Zumazuma (MBBS, MMED Psych)
Consultant psychiatrist
KUHES/QECH

29. The witness for the 1st, 2nd and 3rd defendant is Mr Jenala Solomon. He stated as follows in his witness statement:

1. I am of full age and, by reason thereof, capable of swearing this statement.

2. That I am the 1st defendant in this matter and the matters of fact I depone herein are from my personal knowledge and I hold them to be true and accurate unless stated otherwise.
3. I am clinical officer and the in-charge Co-ordinator for gender-based violence for the 3rd defendant situated at Chileka Health Centre.
4. A Non-Governmental Organization was conducting voluntary HIV/AIDS testing in the Chimembe Community. During this process, the claimant herein voluntarily decided to have herself tested for HIV/AIDS and that the results of the claimant were positive for HIV/AIDS.
5. That upon viewing the positive results of the claimant, the organization took the minor's parents to Chimembe Health Centre for further testing to determine if the minor contracted the virus from them or through other means but the test results revealed that the minor's parents were both negative.
6. The results of the parents' tests suggested that the child contracted HIV/AIDS from someone other than the parents.
7. Upon inquiry and counselling with the minor, it was discovered that she had been raped by one of the members in here own community and as such it was recommended that the tests be conducted for sexually transmitted infections (STls).
8. That upon gaining consent from the minor's parents, tests for STI's were carried out on the minor which resulted in the minor being positive for several STIs.
9. After I had administered treatment for the STI and I consulted the parents of the minor and stated that she would require further counselling in order to deal with the positive results of both the HIV/AIDS and the STI tests.
10. The minor complained to me several occasions that she is receiving constant stigma and abuse from people in her community due to the fact that she was pregnant and was HIV positive at a young age. As such I further suggested to the parents of the minor that she should go to the social welfare support before she was taken to a safer home in Chilimba, where social welfare support is provided.

11. The minor was taken to the to the safe shelter (foster home) for assistance with the process of pregnancy and to deal with the stigma she was facing from her community.
12. But to my supervise, in or around January 2023, the minor with her guardian and representatives from Nyale Institute came to the 3rd defendant seeking an abortion. That the officers on duty examined the minor but the observation did not reveal any co-morbidity that would put the minor in any danger to warrant the termination of the pregnancy. Attached and exhibited hereto is a copy of my clinical notes marked as "JS1".
13. As such it was clear that the minor did not qualify to have her pregnancy terminated under the laws of Malawi, as she was healthy and would have been able to deliver the child without any complications.
14. It was further clear to me and the social welfare employees that the minor only had sociological problems which do not necessarily warrant the defendants to terminate a pregnancy at the time she was assessed.
15. The minor was not willing to keep the pregnancy and admitted that she wanted to abort it because she was scared of her parents and upon further examination, the minor stated that she was willing to keep the pregnancy but was worried about the implications.
16. I planned to take her for consultation and welfare services because, according to our Guidelines, at 12 weeks, the pregnancy was advanced, and termination would be more complicated and could lead to complications. Therefore, I refused to facilitate the termination of the pregnancy. Attached and exhibited hereto is copy of the Obstetrics & Gynaecology Protocol and Guideline marked as "JS 2".
17. Due to the fact that the minor was 12 weeks pregnant and the fact that she was healthy and there being no medical risk to the child, the minor was advised to keep the pregnancy and start high antennal.
18. 1 had planned to take the minor to the anti-retroviral clinic in order for her to be examined and to ensure that she will deliver a healthy and HIV/AIDS negative child. Unfortunately, the minor and her guardian failed to show up without any good reason.
19. In view of the Guidelines set out in the Obstetrics & Gynaecology Protocol and in line with the laws of Malawi an abortion can only be

performed when there is a physical danger to the life of the mother, not for emotional or psychological reasons.

20. That during the minor's pregnancy and at her age, the minor would have been able to safely have a child through a c-section.
21. According to Obstetrics & Gynactology Protocol and Guideline and the laws of the Malawi, it is not automatic that a pregnancy resulting from rape will be terminated.
22. According to Obstetrics & Gynaecology Protocol and Guideline and the laws of the Malawi, it is not automatic that a pregnancy resulting from rape will be terminated, even for a minor. Termination is only done when there is a risk to the life of the mother, and only after intensive monitoring, or when the mother has mental health issues resulting in suicidal thoughts.
23. That in view of the foregoing it is clear that, the defendants worked within the guidelines provided for them by the laws of Malawi and as well as the international standards set by the Obstetrics & Gynaecology Protocol and Guideline.

30. During cross-examination, he stated that he holds a Diploma in Clinical Medicine from the Malawi College of Health Services obtained in 2016. He indicated that he is employed by the Blantyre District Council. And that he wakes under the mandate of the Ministry of Health.
31. He indicated that he knows the Ministry of Health Standards for Post Abortion Care, 2020. He confirmed that he is aware of the Guidelines. And that the guidelines focus on post abortion care and not that abortions can be performed by health care providers. He was referred to the Ministry of Health Standards and Guidelines for Post Abortion Care 2020. He noted that the Guidelines have a Table which indicates the services that can be provided by various cadres, that is, both abortion and post abortion services. He noted that his cadre appears in the Table and shows which services he can perform. This includes Medical abortion in the first trimester. He indicated that he has some obstetrics and gynecology clinical training. But that there are specialists in that field who are more qualified than him. He added that they are also

specialists in psychiatry or mental health. He indicated that he is not a specialist in either of these fields.

32. He indicated that the claimant and her parents visited his clinic and he attended to her in January 2023. And that then the claimant never complained about stigma in her community. He stated that in November 2022, the claimant complained about stigma in the community. He added that the claimant did not say that the stigma was because of a pregnancy. He, however, said that the claimant complain about stigma several times when he met her.
33. He stated that in January 2023 the claimant suit termination of a pregnancy. And that he did not do the termination he requested. He indicated that at that time the pregnancy was at 12 weeks. And that this was within the first trimester. He explained that he where there's a risk to health of a mother. The explained that where there is risk to the health of a mother, a health worker is permitted to perform termination of a pregnancy within the first trimester.
34. He elaborated that his examination of the claimant did not only focus only on physical health. He indicated that his he screened the claimant for psychiatric or mental health issues. He explained that he can screen for mental health issues and then refer the patient to a psychiatrist who is better placed to deal with psychiatric issues.
35. When he was referred to the medical report that he made in this case, he stated that under the plan section, he did not refer the claimant to the Social Welfare for psychological counseling but 'for further assistance'. He indicated that the mental examination is a process. And that it cannot be just by looking at the patient. He indicated that in the medical report his finding on the claimant was that mentally she looked so worried. He noted that in the medical report, he did not document any negative aspects regarding the claimant's mental state. He elaborated that he did not record the mental examination of the claimant on his medical report. He agreed that in cases of severe mental issues of a mother, health care workers are permitted to terminate a pregnancy. He elaborated that the red flags for severe mental health issues will lead to a diagnosis of severe mental health issues. And that red flags are visible and you need no critical analysis. He noted that according to the Ministry of Health Standards and Guidelines on Post Abortion Care 2020, in paragraph 1.2 other conditions, such as psychiatric disorders, warrant termination of a pregnancy. He noted that this is a mental health condition. He noted further

that the Standards state that other conditions that place a woman's life in danger may be considered and a termination of a pregnancy may be done as a result.

36. When he was referred to the Obstetrics and Gynecology Protocols and Guidelines of the Association of Obstetrics and Gynecologist of Malawi 2017, he indicated that he cannot tell if these are from the Ministry of Health as there is no mention of the Ministry of Health on the cover page. He indicated that he could not tell which would prevail if there was a conflict between the Association protocols and the Ministry of Health Guidelines as they speak about two different things.
37. He then stated that he was told by someone from Nyale Institute that after he had refused to terminate the claimant's pregnancy, her pregnancy was eventually terminated. He, however, said that he was not told that a specialist gynecologist had approved the termination.
38. During re-examination, he was referred again to the Table to the Standards and Guidelines for Post Abortion Care 2020 and he stated that it shows abortion and post abortion services he could do. He explained that the claimant had no indications that are stipulated in the Obstetrics and Gynecology Association Protocols, which he uses, so he could not terminate the claimant's pregnancy as a result.
39. He explained that his diploma curriculum covers Obstetrics and Gynecology as a major and that he also did Psychiatry as a minor. He indicated that he is competent to screen a patient, identify red flags, and refer to a psychiatrist for full examination. He added that the red flags can be seen during history, for example signs of dysfunction like not eating, bathing or showing depression. He explained that the claimant showed none of these. Further, that the claimant showed no risk to pregnancy, physical or severe mental risk. He reiterated that after assessing the claimant and referring to the Association Protocols, the protocols did not permit him to do the termination of the claimant's pregnancy.
40. Commenting on the medical report that he authored, he indicated that there are others that are more qualified to do psychosocial counseling than him. And that he wanted to refer the claimant to those people to do the full psychosocial counseling. He elaborated that on the social aspect, he referred the claimant to Social Welfare so that the claimant could go to a safer place.

41. When he was referred to the Ministry of Health Guidelines 2020, he reiterated that a pregnancy can be terminated where the condition stated there cause danger to the life of a mother. But he noted that these conditions were not present regarding the claimant in this case.
42. He explained that he is competent to assess a person's mental state. But that he did not document all the mental health findings concerning the claimant. He added that he had to document all negative and positive findings on the medical report he authored herein. He explained that there are signs of severe mental health issues that one cannot miss. He indicated that when he screened the claimant, he started from her complaint and noted that she was worried and was under emotional distress.
43. The witness for the 4th defendant is Chikondi Chijozi. She stated as follows in her witness statement:

    1. I am of full age and the Chairperson of the 4th defendant and therefore I am competent to provide this testimony.
    2. All matters of fact deponed to herein have come to my knowledge in my capacity as Chairperson of the 4th defendant and I verily believe the same to be true to the best of my knowledge and belief.
    3. The claimant alleges that the 4th defendant violated/breached provisions in the Gender Equality Act (GEA), which is not true.
    4. The 4th defendant enforces the GEA by conducting workshops, awareness sessions, fact-finding missions, investigations, releasing statements, and producing IEC materials among other things.
    5. When there are any issues with members of the public, the 4th defendant acts on its own volition upon coming across information of violations or upon receiving complaints from the parties affected.
    6. At no point did the claimant through a guardian bring a complaint to the 4th defendant regarding the issues before this Court. The 4th defendant only got to know about the claimant's issue through the proceedings before this Court.
    7. If the claimant had brought this issue before the 4th defendant, the 4th defendant would have taken action within its mandate under the Human Rights Commission Act and the GEA.

8. The claimant has not shown how the 4th defendant breached its obligations and or whether she brought a complaint before the 4th defendant to investigate.
9. In light of the foregoing, the 4th defendant prays that the Court should not find the 4th defendant in breach of any provisions under the GEA and should dismiss the claimant's claim against the 4th defendant.

44. During cross-examination, she stated that she is aware of the facts of this case, namely, that the claimant is a minor and was pregnant. Further, that the claimant was denied abortion services. She explained that she knows that the claimant has brought this case under the Gender Equality Act. She confirmed that the Gender Equality Act provides for sexual and reproductive health rights, including abortion. Further, that the 4th defendant is responsible for enforcing the Gender Equality Act. And that the 4th defendant can do investigations of its own accord. She added that the Human Rights Commission Act allows the 4th defendant to investigate human rights violations on its own accord. And that therefore the 4th defendant can investigate human rights violations on its own accord.
45. She explained that the 4th defendant has taken action to deal with the issue of access to abortion for victims of sexual violence in Malawi. She, however, said that she had not brought evidence in this Court in that regard. She indicated that the sexual and productive health rights of girls are vital to the girls' human rights. And that the 4th defendant will consider dealing with this in the future.
46. She then stated that the 4th defendant never received a complaint regarding the 1st, 2nd and 3rd defendant in this case. She, however, stated that she came to know about the case of the minor AC hearing, but not as chair of the 4th defendant. She indicated that she knew this case as legal counsel. She did not recall the date when she came to know about this, but that it was at the time when the claimant wanted the abortion service and that she referred her to the hospital where she got the service. She added that by then the claimant had no complaint.

47. During re-examination, she stated that in terms of context, she meant that the 4th defendant as mandated herein can do investigations of its own motion if an issue has been raised in the public domain regarding human rights violation by a specific person/institution in a specific locality. She added that the 4th defendant can do an investigation if there is an issue that has come to the 4th defendant as a matter of concern, which will move the 4th defendant to investigate.
48. This Court now determines the questions in issue upon considering the submissions of the parties and amicus curiae on the relevant law and evidence as outlined herein above.
49. This Court considers the first issue, whether or not the claimant was denied termination of pregnancy services by the 1st defendant. This is a question of fact to be resolved with reference to the evidence herein. From the evidence, it is clear that it is not disputed at all that the 1st defendant attended to the claimant herein regarding her request for an abortion or termination of her pregnancy herein and that the 1st defendant formed a professional opinion that he should not terminate the claimant's pregnancy. The question is therefore quickly answered in the affirmative, whether or not the claimant was denied termination of pregnancy services by the 1st defendant.
50. The next issue for determination is whether or not the 2nd defendant is vicariously liable for the 1st defendant's refusal to safely terminate the claimant's pregnancy herein. As correctly submitted by the claimant, and not successfully disputed by the 2nd defendant, the 2nd defendant is at law vicariously liable for actions of the 1st defendant when those actions are taken in the course of the 1st defendant's employment with the 2nd defendant. See *Kumbukani and Others v Franchise Holdings Ltd t/a Halls Tours and Car Hire* [1993] 16 (1) MLR 223 (HC). The 1st defendant denied to safely terminate the claimant's pregnancy herein whilst in the course of his employment with the 2nd defendant. The 2nd defendant is therefore vicariously liable for 1st defendant's refusal to safely terminate the claimant's pregnancy herein.
51. The next question is one that has generated elaborate arguments between the claimant on the one hand and the 1st, 2nd and 3rd defendant on the other hand, namely, whether or not the 1st defendant's refusal to terminate the claimant's pregnancy herein breached section 19 (1) (a), 19 (2) and 20 (1) (d) of the

Gender Equality Act. Amicus curiae also made elaborate submissions on this aspect. An important question that has also garnered much attention of this Court given the seriousness of the issue of sexual violence against minor girls that result in unwanted pregnancy that oftentimes comes with attendant health and medical risks to the minor girl. This Court is profoundly grateful for the respective parties' submissions on this issue.

52. On her part, the claimant submitted as follows. She argues that this question can best be answered by addressing the following sub-issues. The first being, what is the scope and limitations of the rights provided under sections 19 and 20 (1) of the Gender Equality Act? Section 19 of the Gender Equality Act provides as follows:

> (1) Every person has a right to adequate sexual and reproductive health which includes the right to:
> (a) access sexual and reproductive health services;
> (b) access family planning services;
> (c) be protected from sexually transmitted infection;
> (d) self-protection from sexually transmitted infection;
> (e) choose the number of children and when to bear those children;
> (f) control fertility; and
> (g) choose an appropriate method of contraception.
> (2) Subject to any other written law, every person has the right to choose whether or not to have a child.

53. Section 20 (1) of the Gender Equality Act provides that:

> In addition to the duties imposed or powers conferred on health officers by the Public Health Act or any other relevant law, every health officer shall—
>
> (a) respect the sexual and reproductive health rights of every person without discrimination;
>
> (b) respect the dignity and integrity of every person accessing sexual and reproductive health services;
>
> (c) provide family planning services to any person demanding the services irrespective of marital status or whether that person is accompanied by a spouse;

(d) impart all information necessary for a person to make a decision regarding whether or not to undergo any procedure or to accept any service affecting his or her sexual and reproductive health;

(e) record the manner in which the information imparted to the person seeking reproductive health services was given and whether it was understood; and

(f) obtain the written consent of a person being offered sexual and reproductive health services or family planning services before performing any procedure or offering any service.

54. The claimant posited that section 19(1) (a) of the Gender Equality Act guarantees every person the right to access sexual and reproductive health services. And that the World Health Organisation defines Reproductive Health as follows:

> Reproductive health is 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 … have the capability to reproduce and the freedom to decide if, when and how often to do so…[1]

55. The claimant asserted that safe termination of pregnancy is an aspect of sexual reproductive health. And that according to Paragraphs 15–20 of UN Doc. E/C.12/GC/22 (4 March 2016), the Committee on the Elimination of Discrimination Against Women confirmed that access to safe termination of pregnancy is a human rights issue and an integral part of reproductive health.
56. She noted that in terms of section 19(2) of the Gender Equality Act reproductive rights are subject to other applicable laws in Malawi, and in this respect the Penal Code [Cap. 7:01]. She set out the the relevant sections of the Penal Code. She observed that section 149 of the Penal Code stipulates that:

> Any person who, with intent to procure a miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, shall be guilty of a felony and shall be liable to imprisonment for fourteen years.

[1] https://www.who.int/southeastasia/health-topics/reproductive-health#:~:text=Reproductive%20health%20is%20a%20state,to%20its%20functions%20and%20processes.

57. She also noted that section 150 of the Penal Code states that:

> Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, shall be guilty of a felony, and shall be liable to imprisonment for seven years.

58. And further that, section 243 of the Penal Code provides that:

> 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.

59. The claimant asserted that a reading of the foregoing provisions shows that although termination of pregnancy is legally prohibited under the Penal Code, termination of pregnancy under certain circumstances is lawful, including as provided for under section 243 of the Penal Code where termination of pregnancy is in good faith with reasonable care and skill to save the life of the pregnant woman would be lawful.
60. The claimant noted that this Court interpreted section 243 of the Penal Code in the case of *The State (On the Application by HM (Guardian) on behalf of CM (Minor) vs The Hospital Director of Queen Elizabeth Central Hospital & The Minister of Health***,** Judicial Review Cause Number 03 of 2021 (High Court of Malawi, Zomba District Registry) (unreported) ("the CM case"). She indicated that the brief facts of the CM case are that the applicant ("CM"), a 15-year-old girl, got into a sexual relationship with an adult man. She then realized that she was pregnant. The man accepted responsibility at first but after a few days the man dumped her at her home village and never returned. According to CM, she suffered the consequences of trauma of having been abandoned after being sexually abused and becoming pregnant as a result. Her mental and physical health deteriorated, and she even contemplated committing suicide. Consequently, CM went to the One Stop Centre (OSC) at

Queen Elizabeth Central Hospital (QECH) to access safe termination of pregnancy, but she was denied the service.

61. The claimant noted that the High Court stated as follows on page 8 of its judgment in relation to section 243 of the Penal Code:

> The section contains exemptions where a medical doctor may perform such a procedure, to terminate a pregnancy lawfully under medical procedure. However, to perform such a procedure, the emphasis must be had to the words of the statute, which provide the qualifiers in the performance of such duty. These are;
>
> (i) That it must be performed in good faith;
> (ii) The performance of the procedure must be reasonable;
> (iii) Must be done with regard to the state of the patient at that time; and
> (iv) Regard should be had to all the circumstances of the case.
>
> …As if that is not enough, the medical practitioner may evaluate the pregnancy for preservation of the life of the mother, if the state of the patient is unstable to warrant such a procedure to terminate.

62. The claimant asserted that another relevant case is that of *R v Bourne* [1938] 3 All E R at 618. She noted that this is a landmark case on the subject from a common law jurisdiction whose law criminalized termination of pregnancy and was then similar to the current penal laws in Malawi on termination of pregnancy. She claimed that section 243 of Malawi's Penal Code was adapted from the section 1 of the Infant Life (Preservation) Act of 1929 of the United Kingdom. She observed that section 1 of the Infant Life (Preservation) Act contained a proviso stating that a person would not be liable if he or she caused the death of a child capable of being born alive if they were intervening in good faith to 'preserve the life of the mother'. And that, in that case the defendant, Mr Bourne, was a medical doctor and an expert surgeon who had the necessary skill to perform termination of pregnancy. Mr Bourne terminated the pregnancy of a girl of about 15 years who got pregnant because of rape. He was then arrested and charged under section 58 of the Offences against the Person Act 1861 for procuring the abortion of the girl. Macnaghten J addressed the meaning of 'preservation of the life of the mother' as follows:

> Take a reasonable view of the words "for the preservation of the life of the mother." I do not think that it is contended that those words mean merely for the preservation of the life of the mother from instant death. … The law is not that the doctor has got to wait until the unfortunate woman is in peril of immediate death and then at the last moment snatch her from the jaws of death. He is not only entitled, but it is his duty, to perform the operation with a view to saving her life.

63. The claimant noted that the court further ruled that the mother's life includes her health. And that it stated that "life depends upon health, and it may be that health is so gravely impaired that death results."
64. The claimant argued that health is not merely physical health but also mental health. She asserted that in a case similar to the present case in Kenya, Petition 266 of 2015: *Federation of Women Lawyers (Fida – Kenya) and others v the Attorney General* ("*JMM case Kenya*"), the court stated as follows on page 59:

> WHO also defines health to include both physical and mental health: "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." In our view therefore, the 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.
>
> …In our view, there can be no dispute that sexual violence exacts a major and unacceptable toll on the mental health of women and girls.

65. The claimant then submitted on the aspect of children who are survivors of sexual violence like her. She argues that children who are survivors of sexual violence like her pass the test under section 243 of the Penal Code as read with Sections 19 (1) (a) and 19 (2) of the Gender Equality Act as they satisfy the exceptions which allow for safe termination of pregnancy under those sections.
66. She added that children are further protected by section 23(1) of the Constitution which provides that all children are entitled to equal treatment before the law, and that the best interests and welfare of children shall be a primary consideration in all decisions affecting them. She noted that the Constitution is the supreme law of Malawi and therefore any statute including the Penal Code and the Gender Equality Act should be interpreted in light of its provisions.

67. The claimant indicated that in a similar case in Zimbabwe, in the case of *Women in Law in Southern Africa and another vs Minister of Health and Child Care and others* 1 HH 552-24 HC 7364/23 the court stated as follows on page 5 of the judgment:

> In my view teenage pregnancies are not in the best interests of children, therefore the law as it stands in the Termination of Pregnancy Act [Chapter 15:10] which denies children who are pregnant the right to abortion is not in the children's best interest and therefore it is an infringement of s 81(2) of the Constitution of Zimbabwe…
>
> In view of this, any sex with a minor, is therefore unconstitutional and therefore any Pregnancy arising from such sex has to be treated as unlawful intercourse for the purpose of s 2(1) of the Act. Once it is accepted that the age of sexual consent consistent with s 81 of the Constitution is 18 it becomes clear that any sexual act with a minor and indeed any pregnancy arising thereto, is unlawful and illegal. Subjecting children to child pregnancies without a right to safe abortion is abuse and torture in violation of s 53 of the Constitution of Zimbabwe.

68. The claimant then observed that, P. Mhango, in 2024 published a research report entitled "*I am carrying a baby whose father I do not know; Experiences and context of girls pregnant from rape and sought sexual and reproductive health services"* in order to understand what happens to pregnant minors when they are denied access to abortion-related care services. The publication concluded that:

> Adolescent girls who experience pregnancy as a result of rape encounter significant emotional, social, and psychological difficulties. These challenges are exacerbated by limited access to secure safe abortion services leading to severe health and societal consequences. Furthermore, the prevalence of victim-blaming attitudes within families and communities, coupled with the inefficiencies of legal and judicial systems, further isolates and traumatises these girls. The findings underscore the pressing necessity for comprehensive support, including easily accessible safe abortion services, mental health resources, and community education, to reduce stigma and provide vital assistance.

69. Considering the high risk to life and health of the minors, the claimant argues that minors who are survivors of sexual violence should automatically be

entitled to access safe termination of pregnancy in light of section 243 of the Penal Code as read with sections 19 (1) (a) and 19 (2) of the GEA.

70. The claimant then submitted on applicable principles of statutory interpretation. She understands that the matter before this Court also entails interpreting statutory provisions of the Gender Equality Act and the Penal Code. She stated that the principles of statutory interpretation at common law have evolved over time into what is known as the purposive interpretation approach. And that the purposive approach refers to situations in which courts utilise extraneous materials from the pre-enactment phase of legislation. Further, that this approach was eventually adopted by the House of Lords decision in *Pepper v Hart* [1993] AC 593. She note that according to the case of *Pepper v Hart* when trying to interpret the meaning of statutory provisions, courts make use of both internal and external aids. And that external aids to statutory interpretation include the objects and reason of the Act, text books, dictionaries, international conventions, legislative history, judicial interpretation of words, debates, and proceedings of the legislature, and the state of affairs at the time of the passing of the Bill. She urged this Court to apply the purposive approach in interpreting the relevant provisions in this matter, especially section 243 of the Penal Code as read together with sections 19(1) (a), 19(2) and 20 (1) (d) of the Gender Equality Act. and that this Court should take into account the relevant international conventions on the subject matter, the most relevant one being the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, commonly referred to as the ("Maputo Protocol"). The relevance of the Maputo Protocol is demonstrated below.

71. The claimant indicated that the Maputo Protocol was ratified by Malawi on 20th May 2005 and entered into force in November 2005. Further, that as on June 2023, 44 out of 55 African Union member states have ratified it.[2] She observed that Article 14(2)(c) of the Maputo Protocol directs that "States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted." And that in doing so, State Parties have expressly agreed to take "all appropriate measures" to "protect

[2] African Union, 'Maputo Protocol On The Rights Of Women In Africa: Commemorating 20 Years' (5 July 2023) <https://au.int/en/newsevents/20230705/maputo-protocol-20-years#:~:text=As%20at%20June%202023%2C%2044,the%207th%20of%20June%202023> accessed 7 June 2024.

the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."

72. The claimant observed that, in November 2014, the African Commission on Human and Peoples' Rights (the "African Commission"), the treaty monitoring body overseeing implementation of the African Charter including the Maputo Protocol, issued General Comment No. 2 on Article 14(2)(c) of the Maputo Protocol as follows:

> noting that the Protocol provides for women's right 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.

73. The claimant then indicated that section 211(1) of the Constitution of the Republic of Malawi ("the Constitution") states that international agreements entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by an Act of Parliament. She noted that currently there is no Act of Parliament that has domesticated the Maputo Protocol as part of the law of Malawi. However, she observed that, commenting on section 211(1) of the Constitution, the High Court in *Re David Banda* [2008] MWSC 243 held that courts must interpret the Constitution, statutes, and all other laws in a manner that, as far as possible, avoids conflict with international law. At pages 10 and 11 of the judgment, the court stated as follows:

> In other words, Malawi has consciously and decidedly undertaken the obligations dictated by these Conventions. It is therefore our solemn duty to comply with the provisions of the Conventions. If for a moment the argument that the Conventions are not part of our law found favour, then at least on part of the Court the duty is to interpret and apply our statutory law, so far as the spirit of the statute could allow, so that it is in conformity and not in conflict with our established obligation under these Conventions. And therefore that unless the statute, by its words and spirit compels our Courts to ignore international laws that is binding on us, the practice of our Courts is to avoid a clash and the way is to construe the domestic statute in

> such a way as to avoid breaching the obligation. See *Mwakawanga v Rep* (1968 – 1970) 5 MLR 14 and *Gondwe v Attorney General* [1996] MLR 492.

74. The claimant then noted that the Malawi Supreme Court of Appeal (the "MSCA") reaffirmed this principle in *In the Matter of the Adoption of Children Act and In the Matter of CJ, (A Female Infant)* [2009 MLR at 247 ("In the Matter of CJ") observing that:

> In all cases therefore the courts will have to look at our Constitution and our statutes and see if the international agreement in question or the customary international law in question is consistent or in harmony with the law of the land and the Constitution.

75. The claimant therefore urge this Court to find as persuasive article 14 of the Maputo Protocol when interpreting section 234 of the Penal Code as read together with section 19(1) (a), 19(2) and 20 (1) (d) of the Gender Equality Act, and find that a purposive interpretation of the provisions leads to a conclusion that minors who get pregnant as a result of sexual violence or rape should be entitled to safe termination of pregnancy as the continued pregnancy endangers their mental and physical health or life.
76. The claimant then addressed the aspect whether she qualified for safe termination of pregnancy under Malawian law. She asserted that while section 243 of the Penal Code does not, technically, permit abortion as a legal right, it provides a limited exception to criminal liability where a person's actions that result in the loss of the foetus were done to preserve the life of the pregnant woman, in good faith, with reasonable care and skill, and having regard to all the circumstances of the case. Further, that the *CM case* interpreted section 243 of the Penal Code and clarified that the preservation of the pregnant woman's life should be understood to include preservation of her mental and physical health.
77. The claimant contended that the evidence in this case clearly establishes that she was 13 years old at the material time. She was depressed, withdrawn, not eating, and worried. Her mother testified to these changes, and the report of Dr Zumazuma confirmed she appeared worried and displayed signs of depression. She observed that the 1st defendant himself in re-examination admitted to noticing red flags such as not eating and emotional distress.

Further, that he also admitted that mental health conditions such as depression form a basis for termination of pregnancy under the Ministry of Health Standards and Guidelines for Post Abortion Care, 2020 during cross-examination. She argues that she was therefore entitled to access termination of her pregnancy pursuant to sections 19 (1) (a) and 19 (2) of the Gender Equality Act.

78. The claimant indicated that, furthermore, the Ministry of Health Standards and Guidelines for Post Abortion Care, 2020 at page 31, clearly permit medical termination of pregnancy in the first trimester and specifically allow clinical officers like the 1st defendant to perform such procedures. And that the 1st defendant was therefore allowed by the law to act and terminate her pregnancy but failed to do so.

79. She noted that the 1st defendant's justification for the refusal was that he believed there was no physical danger to her life, and he relied on the Obstetrics and Gynaecology Protocol and Guidelines from the Association of Obstetrics and Gynaecology. She noted that, however, these Guidelines make no mention of abortion care nor instances when termination of pregnancy can and cannot be conducted. But that on the other hand, the Ministry of Health Standards and Guidelines for Post Abortion Care, 2020, specifically provide for abortion care and explicitly outline instances when safe termination of pregnancies can be conducted and by whom. She submitted that Ministry of Health Standards and Guidelines for Post Abortion Care, 2020 are authoritative and binding clinical protocols on clinical officers. She asserted that, evidently, the 1st defendant had not considered the Ministry of Health Standards and Guidelines for Post Abortion Care, 2020. She noted that, during cross-examination, the 1st defendant acknowledged that the Ministry of Health Standards and Guidelines for Post Abortion Care, 2020 authorize clinical officers such as him to conduct termination of pregnancy within the first trimester. And that he also acknowledged that the said Guidelines provide for instances where safe termination of pregnancy can be conducted and that one such instance is where the patient has a mental health illness. She added that the 1st defendant admitted that he made a decision not to provide the safe abortion service on the basis of her physical health alone. Thus, that the 1st defendant indeed denied the claimant the termination of pregnancy services

which she was eligible to receive pursuant to sections 19 (1) (a) and 19 (2) of the Gender Equality Act and subject to section 243 of the Penal Code.

80. The claimant then addressed the aspect whether the 1st defendant breached the duty to impart information under Section 20(1)(d) of the Gender Equality Act. She asserted that the essence of section 20(1)(d) of the Gender Equality Act is that it mandates every health officer to impart all information necessary for a person to make a decision regarding whether or not to undergo any procedure or to accept any service affecting their sexual and reproductive health. And that, arguably, this duty includes explaining the risks of continuing a pregnancy and informing the patient of available lawful options.

81. The claimant argued that the evidence herein unequivocally shows that the 1st defendant did not impart the information necessary for the her and her parents to make an informed decision. That he did not explain to them their legal options as explained in the Ministry of Health Standards and Guidelines for Post Abortion Care, 2020 especially considering the fact that she made a request to terminate her pregnancy. Instead, that the 1st defendant decided unilaterally not to conduct the safe termination of pregnancy and referred AC to counseling to "accept the pregnancy". She observed that the 1st defendant's own notes (Exhibits JS1 and CC1) confirm this. She indicated that, further, section 20 (1) (d) of the Gender Equality Act empowered the 1st defendant to refer her to a psychiatrist to further examine her mental health or to a Gynaecologist to further examine the risks associated with the pregnancy. And that the 1st defendant did not do any of that.

82. The claimant submitted that the law gives the patient (in this case, with parental consent) the autonomy to decide whether to access safe termination where permitted by law. And that this is also explained in the Ministry of Health Standards and Guidelines for Post Abortion Care, 2020 at page 10 in the following words: "Sections 19 and 20 of the Gender Equality Act provide specifically for women's sexual and reproductive health and rights. Section 2 of the Gender Equality Act limits abortion within the context of the Penal Code. Thus, Malawian women have a right to choose." She noted further that at page 11 the Ministry of Health Standards and Guidelines for Post Abortion Care, 2020 state, "The provider should reduce and avoid harm to the pregnant woman, maximize the benefits to her life, against the risks posed by continuing the pregnancy. If the provider is convinced that continuing

pregnancy would endanger the life of the woman, he or she should provide [Post] Abortion Care (if the woman chooses after medical advice)." The claimant submitted that the 1st defendant's conduct was therefore contrary to section 20(1)(d) of the Gender Equality Act, which obligates a health officer to inform and empower a patient to make a decision, and not to make the decision for them.

83. On their part, the 1st, 2nd and 3rd defendants made the following submissions on the question at hand. They noted the provisions in section 19 (1) and (2) of the Gender Equality Act. They asserted that this section needs to be carefully studied and should not be read in isolation. Rather that this section needs to be read alongside section 24 of the Constitution. Section 24 of the Constitution guarantees women's right to full and equal protection by the law and protection from discrimination on the basis of gender. It also provides that legislation shall be passed to eliminate customs and practices that discriminate against women, particularly among others practices such as sexual abuse, harassment and violence.

84. They also noted the provisions in section 20 of the Gender Equality Act. They then submitted that, in view of the foregoing and in light of the evidence given by all the witnesses, it is clear to see that AC was in good mental and physical health when she discovered the pregnancy and that she was willing to carry on with the pregnancy as she was properly advised by a medical practitioner that she was healthy enough to carry the baby.

85. They argued that, through further witness evidence, it is also clear to see that the 1st, 2nd and 3rd defendants did not in any way contravene section 20 (1) of the Gender Equality Act as it was shown before this Court that the 1st defendant did a physical and mental exam of AC and that he further recommended that AC be put in foster home for her own safety and for her to be able to carry out the pregnancy.

86. They contended that, again, the claimant has failed to meet the standard and burden of proof in this matter and that as such it would be unjust to award the claimant any of the reliefs claimed under this head.

87. They then alluded to provisions in sections 149, 150 and 243 of the Penal Code. They argued that section 150 of the Penal Code is clear when it comes to abortions in the Republic of Malawi. They also referred to section 151 of the Penal Code further provides as follows:

> Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, shall be guilty of a felony and shall be liable to imprisonment for three years.

88. The 1st ,2nd and 3rd defendants contended that the foregoing sections of the Penal Code are very straightforward, in that it is clear that abortions in the Republic of Malawi are illegal and are punishable by imprisonment of up to 14 years. They submitted that therefore, the 1st defendant in fear of being imprisoned and after clearing AC to be mentally and physically fit did not carry out the abortion that was requested by the claimant and her parent.
89. The 1st , 2nd and 3rd defendant then pointed out that the leading case on breach of statutory duty is the case of *X v Bedfordshire CC* [1995] 2 AC 633 in which the House of Lords addressed claims for breach of statutory duty against a local authority in the context of child welfare and education. They noted that the House of Lords held a person claiming breach of statutory duty must show the exact statutory provision that the defendant is said to have breached but the Court was quick to state that not every statutory provision gives rise to a private cause of action; whether a breach of statutory duty can lead to liability depends on whether Parliament intended to confer a private law right. And that this intention is determined by examining the language and purpose of the statute.
90. The 1st , 2nd and 3rd defendant then referred to the case of *Anns v Merton London Borough Council* [1978] AC 728 which they observed established a two-stage test for determining whether a breach of statutory duty can give rise to a private right of action. They noted that the first stage involves determining whether the statute imposes a duty of care, which requires examining if the statute is meant to protect a specific class of persons from a specific type of harm. And that the second stage considers whether there are any policy reasons to deny such a duty, balancing the interests of protecting individuals with avoiding an undue burden on public authorities. They indicated that in *Anns,* the Court found that the local council owed a duty of care under the Public Health Act 1936 to protect residents from unsafe housing conditions,

with no overriding policy reasons to deny this duty, allowing tenants to claim damages for defects in their flats.

91. They then submitted that it is easy to determine whether or not the 1st, 2nd and 3rd defendant breached any statutory duty herein. And that in view of the above-mentioned case authorities and in light of the witness testimony that was brought before this Court, this Court is able to observe that the three defendants did not at any point whilst dealing with AC breach any statutory duties laid out before them.

92. On its part, the Center for Reproductive Rights (the "Center" or the "Intervener") has prepared this *amicus curiae* brief to assist this Court and draw attention to the relevant international human rights landscape and comparable case law related to the sexual and reproductive health rights of victims of rape[3], and in particular the position of adolescent girls.

93. It noted that the underlying claim in this case pursued by A.C. (A Minor) acting through a litigation guardian, Mr. C.J. raises issues under the current laws of Malawi that are pertinent to the sexual and reproductive health rights of women and girls in Malawi. In particular, the claim raises the legal question of whether Part VI of the Gender Equality Act (construed in light of the general prohibition of abortion in the Malawi Penal Code[4], as amended (the "Penal Code")) has been interpreted and implemented in a way to provide safe termination of pregnancy to victims of rape, in particular where those victims are adolescent girls.

94. In light of the Center's extensive experience in this field, the Center endevoured to demonstrate in this brief that (a) the legislative position in Malawi is inconsistent with its obligations in respect to the provision of abortion services under international human rights law, and (b) the Court has an opportunity to clarify that the circumstances in which abortions are permitted to preserve the mother's life and mental and physical health, includes cases in which the woman is a victim of rape and/or is an adolescent girl.

95. The objective of this brief is accordingly to provide this Court with information regarding international and comparative law and standards from

[3] This brief refers to "rape" generically. However, the normative language used in the literature describes "sexual and gender-based violence" and should be construed accordingly.

[4] Malawi Penal Code, Chapter 7:01.

the international, regional and domestic legal systems, in recognition that this body of jurisprudence can inform the Court's interpretation of the provisions of the Gender Equality Act (and the exceptions in the Penal Code) in this case.

96. It is indicated that this brief is structured as follows: after this Introduction, Section II briefly describes the interest of the Intervener; Section III explains the context of the situation in Malawi; Section IV explores the relevant legal landscape under international and regional human rights law, focusing on sexual and reproductive health rights that are afforded to victims of rape and in particular the rights of adolescent girls, and Section V provides an overview of comparative jurisprudence. Section VI sets out a conclusion.

97. Regarding the interest of the Centre, it is indicated that the Center, founded in 1992, is an international non-profit legal advocacy organisation and is one of the world's leading legal human rights organisations in the field of women's reproductive health. It uses the power of the law to defend and promote reproductive rights as fundamental human rights worldwide. It is headquartered in New York City, with regional offices in Nairobi, Bogotá, Geneva, and Washington, D.C. The Center's International Legal Program, in collaboration with human rights advocates around the world, documents violations of reproductive rights, monitors and comments on laws concerning reproductive healthcare, and advocates before the United Nations (the "U.N.") and other regional human rights fora.

98. Leveraging on its legal expertise, original research and analysis in international human rights law, the Center has intervened as a third party in cases before domestic, regional and international courts to inform how key issues at stake are understood and decided. By way of example, the Center has submitted *amicus curiae* briefs before regional and national courts and bodies in Africa,[5] Asia,[6] Europe,[7] Latin America[8] and the United States of

[5] *Teachers Service Commission v WJ & 5 Others* [2020] eKLR (Court of Appeal of Kenya) – vicariously liable for failure to protect students from sexual violence.

[6] *Lakshmi Dhikta v Government of Nepal*, Decision No. 8464 (2009) (Supreme Court of Nepal) – failure to ensure adequate access to safe abortion services despite the decriminalization of abortion on broad grounds.

[7] *In Re NIHRC Application for Judicial Review* [2018] UKSC 27 (Supreme Court of the United Kingdom) –prohibition of abortion in situations of rape, incest and fatal fetal impairment, violates the European Convention on Human Rights. *A, B and C v. Ireland* (App. No. 25579/05) (European Court of Human Rights) - failure to adopt legislation and establish an effective and accessible procedure to access lawful abortions for women whose lives were at risk violated the right to respect for private life under the ECHR.

[8] *I.V. v. Bolivia.* Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-American Court of Human Rights (ser. C) No. 329 (November 30, 2016), (Inter-American Court of Human Rights) – Sterilisation without consent

America.[9] The Center's expertise is also frequently called upon by U.N. human rights treaty monitoring bodies[10], the Office of the High Commissioner of Human Rights, and the Human Rights Council.

99. The Center then submitted on the context of the situation in Malawi by indicating as follows. According to a UNICEF Malawi report (2020), an estimated 38% of women in rural communities and 33% of women in urban communities between the ages of 15 and 49 have experienced sexual violence.[11] It is also inevitable that victims of sexual violence tend to be adolescent girls, due to their vulnerability. The World Health Organisation has estimated (as of 2018) that:

> Adolescents aged 15–19 years (24%) are estimated to have already been subjected to physical and/or sexual violence from an intimate partner at least once in their lifetime, and 16% of adolescent girls and young women aged 15–24 have been subjected to this violence within the past 12 months.[12]

100. Where rape and sexual violence result in pregnancy, women often turn to unsafe illegal abortions. Whilst statistics are difficult to source, an estimated 141,000 abortions were performed in Malawi in 2015, roughly 38 abortions per 1,000 women of reproductive age.[13] These women and girls face serious risk of complications and death in seeking abortion care.[14] For example, "out of the estimated 141,000 abortions performed in Malawi in

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is a breach of rights to personal integrity, private life, personal liberty, access to information, and freedom to start a family.

[9] *Alliance for Hippocratic Medicine v. FDA*, 23 U.S. 235 (Supreme Court of the United States) - challenge to a district court decision blocking the FDA's long-standing approval of mifepristone, a drug used in medical abortion procedures.

[10] *A.S. v. Hungary* (Communication No. 4/2004), CEDAW/C/36/D/4/2004 (Committee for the Elimination of Discrimination against Women) - Hungary had failed to protect the Applicant's rights under the Convention on the Elimination of Discrimination against Women and that its failure to provide reproductive health information and to ensure that women's full and informed consent was obtained prior to sterilisation violated the Convention.

[11] UNICEF Malawi, 'Ending Violence against women and girls in Malawi: What do we know?' (2020), 13, fig 2. <https://www.unicef.org/malawi/sites/unicef.org.malawi/files/2020-07/Spotlight_Ending_Violence_Against_Women_andGirls_v2_15062020_WEB_0.pdf> accessed 8 April 2024.

[12] WHO, 'Violence Against Women Prevalence Estimates, 2018: global, regional and national prevalence estimates for intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women' (9 March 2021), XII<https://www.who.int/publications/i/item/9789240022256> accessed 3 April 2024.

[13] Guttmacher, 'Abortion and Postabortion Care in Malawi Fact Sheet' (April 2017) <https://www.guttmacher.org/fact-sheet/abortion-malawi> accessed 3 April 2024.

[14] *ibid*, "*The majority of induced abortion procedures in Malawi are performed under clandestine and unsafe conditions. Complications from abortions have been estimated to account for between 6 percent and 18 percent of maternal deaths in Malawi*".

2015, approximately 60 percent resulted in complications that required medical treatment in a health facility."[15] Some estimates suggest that unsafe abortions account for approximately 18% of the maternal deaths in Malawi.[16]

101. The data also suggests that abortions are sought largely by girls under the age of 19, meaning that abortion care in Malawi is largely a child-health concern. Of women seeking post-abortion care, one study found that approximately 20% are aged 10 to 19,[17] although data from some areas suggests that number is closer to 50%, with the vast majority of abortions being sought by women under the age of 20.[18]

102. That adolescent girls in particular have access to safe and comprehensive reproductive or sexual health services is crucial for their well-being and general health. This is particularly so in light of increased risks to the life and physical health that the pregnancy itself can present.[19] Complications relating to pregnancy and childbirth are among the leading cause of death for girls aged 15 to 19.[20] In addition to the risk of fatality, according to available medical studies, adolescents have an increased risk of adverse maternal outcomes, including maternal anaemia, preterm delivery, postpartum haemorrhage, and preeclampsia.[21] Aside from physical health risks, adolescent pregnancies may also trigger adverse outcomes to the girl's mental health and social circumstances, particularly if she is required by policy or stigma to cease formal education.

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[15] *ibid.*

[16] Ipas, 'Malawi', <https://www.ipas.org/where-we-work/africa/africa-southern-region/malawi/> accessed 3 April 2024.

[17] Brooke Levandowski et al, 'Reproductive health characteristics of young Malawian women seeking post-abortion care' (2012) 16(2) *Afr J Reprod Health*, 253-261. <https://pubmed.ncbi.nlm.nih.gov/22916557/#:~:text=This%20study%20collected%20data%20on,(age%2020%2D24)> accessed 3 April 2024.

[18] International Campaign for Women's Right to Safe Abortion, 'Malawi – Young girls bear the brunt of unsafe abortions' (22 March 2024) <https://www.safeabortionwomensright.org/news/malawi-young-girls-bear-the-brunt-of-unsafe-abortions/ > accessed 3 April 2024. ("*Data from Blantyre District Health Office shows that the majority of those seeking post-abortion care in the district are young girls. Of the 2,003 reported cases treated with post-abortion care for unsafe abortions in the last quarter of 2023, as many as 1,003 were under the age of 20, while the rest were only slightly over 20 years of age*.").

[19] Not addressing here the risks and health threats post-pregnancy, and the adverse fetal outcomes that can arise.

[20] WHO, 'Adolescent and young adult health' (28 April 2023) ('Early pregnancy and childbirth'). <https://www.who.int/news-room/fact-sheets/detail/adolescents-health-risks-and-solutions> accessed 3 April 2024.

[21] Tetsuya Kawakita et al, 'Adverse Maternal and Neonatal Outcomes in Adolescent Pregnancy' (2016) 29(2) *J Pediatr Adolesc Gynecol*, 130-136 <https://www.jpagonline.org/article/S1083-3188(15)00307-1/abstract> and manuscript at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4886236/> accessed 3 April 2024.

103. The Center the submitted on the legal framework of reproductive health in Malawi. It alluded to the Gender Equality Act, that it enshrines the right to adequate sexual and reproductive health for every person. And that this right includes the rights to access sexual and reproductive health services and to choose whether to have a child as provided in section 19 of the Gender Equality Act. It asserted that, as discussed in this brief, the consensus under international human rights jurisprudence is that the right to access sexual and reproductive health services encompasses, at least in specific circumstances, the right to safe and legal termination of pregnancy. It noted that, while the Gender Equality Act guarantees this right, the Penal Code broadly criminalizes the administration of an abortion[22], with the only stated exception provided at Section 243. And that, that section states that a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation on any person for her benefit, or on an unborn child for the preservation of the mother's life. It indicated that the meaning of 'preservation of the mother's life' has however remained ambiguous and as noted by the Law Commission in its 2016 report advocating abortion law reform[23]: "health professionals are not clear on what could fall under the exception provided by the law and that has meant that safe abortion services on the available exception has largely been inaccessible."[24]

104. The Center noted that in the case of *The State (On the Application of HM (Guardian) on Behalf of CM (Minor)) v Hospital Director of Queen Elizabeth Central Hospital and Another* [2021] MWHC 43, the Court observed that the exception in Section 243 of the Penal Code encompasses the mental health of the woman. Accordingly, that the Court's recent clarification that the exception under Section 243 applies to preservation of a women's

[22] Under Section 149 of the Penal Code, it is a criminal offence to unlawfully administer to a woman any noxious substance or use any force with the intent to procure a miscarriage. Section 150 of the Penal Code makes it a criminal offence to unlawfully supply to or procure for any person anything with the knowledge that it is intended to be unlawfully used to procure the miscarriage of a woman. Section 151 of the Penal Code criminalizes the supply of drugs or instruments to procure an abortion.

[23] The Center recognizes that upon the recommendation of the Malawi Law Commission to reform and significantly liberalise abortion laws (further to its 2016 report), the Termination of Pregnancy Bill had been presented to the Malawi National Assembly in 2017, but did not progress and has since been withdrawn. *See* VOA, 'Malawi Parliament Withdraws Abortion Rights Bill after Objections' (19 June 2021) <https://www.voanews.com/a/africa_malawi-parliament-withdraws-abortion-rights-bill-after-objections/6207221.html> accessed 8 April 2024.

[24] Report of the Law Commission on the Review of the Law of Abortion (15 March 2016, Commission Report No. 29), p. 15.

"mental health" is a significant step towards recognition that abortion is available in a wider range of circumstances, and provides this Court with basis to interpret the legal position in Malawi in light of the consensus position under international human rights law.[25]

105. The Center then submitted on the application of international law in Malawi. It observed that Malawi takes a dualist approach to the application of international treaties. Section 211(1) of the Constitution states that international treaties are part of Malawian law if so provided in an Act of Parliament. Commenting on this provision, the High Court in *Re David Banda* [2008] MLR 1 (HC) held that courts must interpret the Constitution, statutes, and all other laws in a manner that, as far as possible, avoids conflict with international law. And that the Malawi Supreme Court of Appeal (the "MSCA") reaffirmed this principle in *In the Matter of CJ (A Female Infant)* [2009] MLR 220 (SC) ("In the Matter of CJ").

106. Additionally, the Center noted that section 11(2)(c) of the Constitution requires courts, where applicable, to have regard to current norms of public international law and comparable foreign case law when interpretating and applying the Constitution. And that while international treaties may lack the force of law and are therefore not binding authority, they are persuasive authority on the normative framework. Consequently, that courts must consider them when interpretating and applying the Constitution, as well as domestic statutes. And that this is exactly what the MSCA did in *In the Matter of CJ* in which it considered and applied the Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child to decide the case before it. The Center therefore invited this Court to properly consider the import of international human rights law and jurisprudence in the interpretation of the provisions of the Gender Equality Act and the Penal Code.

107. The Centre then submitted on the relevant legal landscape under international and regional human rights law. It indicated that as will be set out in this section of the brief, international human rights treaty bodies have

[25] Indeed, Malawi has acknowledged that the 2021 High Court judgment recognized that safeguarding mental and physical health is part of preserving life. See, for example, 'Replies of Malawi to the list of issues in relation to its initial report to the Committee on Economic, Cultural and Social Rights', (5 April 2024) UN Doc E/C.12/MWI/RQ/1, para 98.

affirmed that ensuring access to safe legal abortion in accordance with human rights standards is part of the State's obligation to eliminate discrimination against women, and to ensure women's rights to health, amongst other fundamental rights. The jurisprudence also recognizes that victims of rape are vulnerable categories of persons requiring treatment with dignity and respect. The distress suffered by victims of rape is often exacerbated by risk of unwanted pregnancy or actual pregnancy resulting from rape. The denial of timely access to necessary medical treatment, including legal abortion, exposes victims to additional suffering. Not only does this have a clear and direct impact on the woman's mental health, it also amounts to an act of inhuman or degrading treatment. International and comparative jurisprudence also acknowledges the unique position of minors as a vulnerable group, and the need to realize and protect their human rights in the context of their reproductive health.

108. The Centre indicated that as further explained in this section, there is broad consensus in international and regional human rights law that States should decriminalize abortion, and at the very least, must include exceptions to any abortion bans for situations of rape. And that international law affirms the importance of providing adolescents access to sexual and reproductive health services. It stated that reference will be made primarily to the human rights instruments promulgated by the U.N. and regional institutions, the comments and decisions of their treaty monitoring bodies, and cases determined by regional human rights courts and decision-making bodies.[26][27]

109. The Center submitted on the Protocol to the African Charter On Human And Peoples' Rights On The Rights Of Women In Africa. It pointed out that the Protocol to the African Charter on Human and Peoples' Rights on the

[26] Treaty monitoring bodies are committees of independent experts that monitor implementation of the core international human rights treaties. 'General Comments' issued by those bodies are legally non-binding clarifications of treaty obligations that however influence the development of international human rights law. Certain treaty monitoring bodies are also empowered to hear and determine complaints raised by individuals as to violation of their human rights.

[27] Malawi is one of only states to have filed a declaration permitting the African Court on Human and Peoples' Rights to consider applications filed against it by individuals and NGOs and accordingly Malawi accepts the Court has jurisdiction to determine cases of infringement of the African Charter on Human and Peoples' Rights "*and any other relevant human rights instruments ratified by the States concerned*" (art 7 of the Protocol to the African Charter on Human and Peoples' Rights).

Rights of Women in Africa[28] (the "Maputo Protocol"), was ratified by Malawi on 20 May 2005 and entered into force in November 2005. Further, that the Maputo Protocol comprises a comprehensive articulation of women's civil and political rights, economic, social and cultural rights, group rights and health and reproductive rights. And that as at June 2023, 44 out of 55 African Union member states have ratified the Maputo Protocol.[29] It noted that the health and reproductive rights are set out at Article 14, which in particular directs that "States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted."[30] In doing so, State Parties have expressly agreed to take "all appropriate measures" to "protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."[31]

110. It observed further that the Maputo Protocol is the only human rights treaty to expressly recognize access to safe abortion as a human right in certain circumstances. And that, in part, this appears to be natural recognition that carrying a pregnancy following rape has significant health -- particularly mental health -- implications for women and girls. It noted that in November 2014, the African Commission on Human and Peoples' Rights (the "African Commission"), the treaty monitoring body overseeing implementation of the African Charter including the Maputo Protocol, issued General Comment No. 2 on Article 14, noting that:

> The Protocol provides for women's right to terminate pregnancies contracted following sexual assault, rape and incest. Forcing a woman to keep a pregnancy

[28] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 1 July 2003, entered into force 25 November 2005) ("Maputo Protocol").
[29] African Union, 'Maputo Protocol On The Rights Of Women In Africa: Commemorating 20 Years' (5 July 2023) <https://au.int/en/newsevents/20230705/maputo-protocol-20-years#:~:text=As%20at%20June%202023%2C%2044,the%207th%20of%20June%202023> accessed 7 June 2024.
[30] Maputo Protocol, art 14(1).
[31] Maputo Protocol, art 14(2)(c).

resulting from these cases constitutes additional trauma, which affects her physical and mental health.[32]

111. The Center asserted that it is therefore clear that the current legislative position in Malawi is inconsistent with the obligations expressly set out in the Maputo Protocol. It added that the African Commission in its most recent Concluding Observations (on the 2nd and 3rd Combined Period Report for Malawi for the period from 2015-2019) has pointedly expressed concern regarding continued delays to Malawi's implementation of the proposed amendment to abortion law developed by the Law Commission.[33]

112. The Centre then submitted on the International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights. It indicated that provisions in other international human rights instruments also recognize that any restrictions on access to abortion must not result in a woman or girl's physical or mental pain and suffering. It observed that the International Covenant on Civil and Political Rights[34] ("ICCPR") and the International Covenant on Economic Social and Cultural Rights[35] ("ICESCR") are complementary global human rights instruments that were both ratified by Malawi on 22 December 1993, and are widely ratified by countries around the world.[36] It noted that Article 6 of the ICCPR recognizes and protects the right to life. And that according to the Human Rights Committee (the treaty monitoring body overseeing implementation of the ICCPR), this right should not be interpreted narrowly, and "concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity."[37] The Center noted that Article 7 of the ICCPR

[32] African Commission, 'General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights', (adopted November 2014), para 37. Para 51-52 also stress the importance of access to information and education on, *inter alia*, safe abortion for women, especially adolescent girls and young people.

[33] African Commission, 'Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Malawi, 2015-2019' (adopted March 2022), paras 79 and 91.

[34] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ("**ICCPR**").

[35] International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 ("**ICESCR**").

[36] The ICCPR and ICECSR were initially passed by the UN General Assembly in 1996 as a codification of the U.N.'s 1948 Universal Declaration of Human Rights (adopted 10 December 1948) 217 A (III).

[37] Human Rights Committee, 'General Comment No. 36 on article 6: right to life', (2019) UN Doc CCPR/C/GC/36, para 3.

guarantees that no one shall be subject to cruel, inhuman or degrading treatment or punishment, which protection applies to "in particular, children".[38] And that Article 2 provides that the treaty articles shall apply "without distinction of any kind".

113. It asserted that, in the context of reproductive rights, the Human Rights Committee has stated in its General Comment No. 36 (2019) on Article 6 that:

> restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy.[39]

114. Further, that, moreover:

> States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable.[40]

115. The Center added that the Human Rights Committee's Working Group on the issue of discrimination against women in law and in practice has in fact expressly recommended, in recognition of its discriminatory effect on women of a lower socio-economic demographic, that States:

> Repeal restrictive laws and policies in relation to termination of pregnancy, especially in cases of risk to the life or health, including the mental health, of the pregnant woman, rape, incest and fatal impairment of the fetus, recognizing that such laws and policies in any case primarily affect women living in poverty in a highly discriminatory way.[41]

116. The Center also observed that, similar to other treaty monitoring bodies, the Human Rights Committee has been critical about Malawi's general criminalization of abortion, expressing "deep concern" in its 2014 Concluding Observations over the "high percentage of unsafe abortion-related maternal

[38] Human Rights Committee, 'General Comment No. 20: Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (article 7)' (1992), paras 5-6.
[39] Human Rights Committee, 'General Comment No. 36 on article 6: right to life', (2019) UN Doc CCPR/C/GC/36, para 8.
[40] *ibid.*, para 8.
[41] UN Human Rights Council, 'Report of the Working Group on the issue of discrimination against women in law and in practice' (2016), UN Doc A/HRC/32/44, para 107(b).

deaths".[42] It observed further that, whilst the Committee noted the Special Commission set up at the time (in around 2014) to review the abortion law, it remained concerned about the excessive delays in reforming the law and recommended that Malawi "urgently review its legislation on abortion and provide for additional exceptions in cases of pregnancy resulting from rape or incest and when the pregnancy poses a risk to the health of women" and that "the law should ensure that reproductive health services are accessible for all women and adolescents".[43]

117. The Center pointed out that, as noted by the Committee, the position is similarly expressed where the mother and victim of rape is an adolescent girl. In the case of *LMR v Argentina*, the Human Rights Committee found that the State violated the complainants' Article 7 rights to be free from cruel, inhuman and degrading treatment, by failing to guarantee her right to a termination of pregnancy as a result of rape (as provided under the Argentina criminal code), as this caused her physical and mental suffering. This was made especially serious "by the victim's status as a young girl with a disability."[44] In that case, the complainant was a girl who suffered from a permanent mental impairment, and had been diagnosed as having a mental age of between 8 and 10 years old.

118. The Center asserted that even outside of the situation of rape, the Human Rights Committee has recognized the vulnerable position of adolescent girls carrying a pregnancy to term. In the case of *KL v Peru*[45], which was heard by the Human Rights Committee, and in respect of which the Center intervened, the complainant was a girl who discovered at age 17 she was pregnant with an anencephalic fetus – meaning that the fetus was developing without parts of its brain or skull and had no chance of survival after birth. As the prospect of carrying a non-viable pregnancy to term exposed KL to severe mental suffering, emotional instability, and symptoms of depression, she sought to terminate the pregnancy. Although Peru's law permits abortion where pregnancy poses a risk to the person's life or health, the hospital staff refused to administer abortion services to KL and the

[42] Human Rights Committee, Concluding observations on the initial periodic report for Malawi' (2014) UN Doc CCPR/C/MWI/CO/1/Add.1, para 9.
[43] *ibid*., para 9.
[44] Human Rights Committee, *L.M.R v Argentina* (2017) UN Doc CCPR/C/101/D/1608/2007, para 9.2.
[45] Human Rights Committee, *K.L. v Peru* (2005) UN Doc CCPR/C/85/D/1153/2003, paras 6.3-6.5.

Ministry of Health refused to intervene on her behalf. KL was compelled to carry the pregnancy to term and breastfeed the baby over the course of the two days it survived, ultimately leaving her in a deep state of depression. The Human Rights Committee determined that denying abortion services to a child carrying a non-viable pregnancy, which posed a risk to her life and her physical and mental health, violated her rights under the ICCPR, including the rights to be free from cruel, inhuman and degrading treatment (Article 7), to privacy (Article 17), to special protection as a minor (Article 24), and to a legal remedy (Article 2). Significantly, the Human Rights Committed acknowledged "the special vulnerability of the [complainant] as a minor girl".[46]

119. The Center then noted that whilst the ICCPR's lens for scrutinising abortion restrictions has stemmed from the right to life and to be free from cruel, inhuman or degrading treatment or punishment, the ICESCR has adopted a sexual and reproductive health-rights lens to the issue. It observed that Article 12(1) of the ICESCR recognizes the right of everyone to the enjoyment of the "highest attainable standard of physical and mental health", which includes both "*physical and mental health*". And that Article 3 guarantees the equal right of men and women to the enjoyment of all economic, social and cultural rights. [47]

120. The Center pointed out that the Committee on Economic, Social and Cultural Rights ("ICESCR Committee"), the treaty monitoring body overseeing implementation of the ICESCR, has directed in its General Comment No. 22 (2016) (on the right to sexual and reproductive health under Article 12) that:

> States parties are under immediate obligation to eliminate discrimination against individuals and groups and to guarantee their equal right to sexual and reproductive health. This requires States to repeal or reform laws and policies that nullify or impair the ability of certain individuals and groups to realize their right to sexual and reproductive health… for example criminalization of abortion or restrictive abortion laws.[48]

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[46] *ibid*., para 6.5.

[47] ICESCR, art 3: "*The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant*."

[48] ICESCR Committee, 'General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' (2016) UN Doc E/C.12/GC/22, para 34.

121. It posited that this reflects the ICESCR Committee's views in an earlier General Comment No. 16 (2005) on Article 3, that the implementation of Article 3, in relation to Article 12, requires at a minimum "removal of legal restrictions on reproductive health provisions".[49] The Committee has also emphasized more generally the need for States to provide access to sexual and reproductive health services, without distinction, to adolescents. [50]

122. The Center then submitted on the Convention on the Elimination of All Forms of Discrimination against Women. It asserted that restrictions on access to abortion, particular to victims of rape, amounts under international law to discrimination in the form of gender-based violence. It observed that Malawi has committed to end all forms of discrimination against women (including girls) in its accession to the Convention on the Elimination of All Forms of Discrimination against Women[51] ("CEDAW") in March 1987.

123. It then asserted that Article 12 of CEDAW requires State parties to take appropriate measures in the field of health care. And that the Committee for CEDAW in its General Recommendation No. 24 (1999) on Article 12, which applies equally to adolescents and girls[52], has called on States to implement national strategies to "ensure universal access for all women to a full range of high-quality and affordable health care, including sexual and reproductive health services".[53] And that the Committee further observed that:

> It is only women that must live with the physical and emotional consequences of unwanted pregnancy. Denying women access to medical services that enable them

[49] ICESCR Committee, 'General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3)' (2005) U.N. Doc. E/C.12/2005/4, para. 29. See also the ICESCR Committee, 'General Comment No. 14: The right to the highest attainable standard of health (Art 12)' (2000) UN Doc E/C.12/2000/4, para 21.

[50] The ICESCR Committee has urged a State Party to "*ensure that sexual and reproductive health services, including abortion… services and information, are available, accessible and affordable without discrimination, including to adolescents*." ICESCR Committee, 'Concluding observations on the combined third to fifth periodic reports of Romania' (2014) UN Doc. E/C.12/ROU/CO/3-5, para 22.

[51] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), 1249 UNTS 13 ("**CEDAW**")

[52] Paragraph 7 of the General Comment No. 24 notes that "*women*" includes girls and adolescents.

[53] CEDAW Committee, 'General Recommendation No. 24: Article 12 of the Convention (Women and Health)' (1999) UN Doc A/54/38/Rev.1, Chap.I, para 29.

to regulate their fertility or terminate a dangerous pregnancy amounts to a refusal to provide health care that only women need.[54]

124. The Center contended that it is clear that the CEDAW Committee considers that abortion bans without any exception for rape amount to violations of State Party obligations under the CEDAW. And that in the context of an inquiry into the position in Northern Ireland, the CEDAW Committee found "grave violations of rights under the Convention", considering that the State's "criminal law compels… victims of rape or incest to carry pregnancies to full term, thereby subjecting them to severe physical and mental anguish, constituting gender-based violence against women".[55]

125. The Center noted that, moreover, the CEDAW Committee has observed the 'mental suffering' resulting from a woman who was a victim of rape, finding the State to be in violation of its obligations under the Convention. In the case of *LC v Peru*[56] (a case in which the Center acted) the CEDAW Committee found that Peru had violated an adolescent girl's rights to freedom from stereotyping (Article 5), health (Article 12) and to a remedy (Article 2), in denying her urgently needed spinal surgery on the basis that it could harm the unborn fetus. The complainant was a 13-year-old girl who had been repeatedly raped by an older neighbour. When the girl discovered she fell pregnant, she attempted suicide and suffered a severe spinal injury which required urgent surgical treatment in order to avoid likely paralysis. Despite an exception under Peruvian law for abortions where the mother's health and life were at risk, the hospital board denied the girl's request for termination of her pregnancy on the basis that her life was not in danger, and the hospital would not conduct the spinal surgery whilst she remained pregnant. The CEDAW Committee found, in respect of the violation of the right to health under Article 12, that the complainant had not been given access to an effective and accessible procedure allowing her to establish the medical services that her physical and mental state required, being spinal surgery and

[54] CEDAW Committee, 'General Recommendation No. 24: Article 12 of the Convention (Women and Health)' (1999) UN Doc A/54/38/Rev.1, Chap.I, as cited in the Report of the Law Commission on the Review of the Law of Abortion (15 March 2016, Commission Report No. 29), p.29.

[55] CEDAW Committee, 'Report of the Committee: Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' (2018) UN Doc CEDAW/C/OP.8/ GBR/1, para. 83 (a).

[56] CEDAW Committee, *L.C. v Peru* (2011) UN Doc CEDAW/C/50/D/22/2009.

therapeutic abortion. This was "even more serious considering that she was a minor and a victim of sexual abuse", noting that her suicide attempt was a "demonstration" of the amount of mental suffering she had experienced.[57] Peru was ordered to amend its law to allow women to obtain an abortion in cases of rape and sexual assault.

126. The Center then pointed out that, in its most recent Concluding Observations of Malawi's country reports, the CEDAW Committee has expressed concern over the continuing criminalization of abortion without any express exception for rape. That, in its 2015 Concluding Observations of Malawi's Seventh Period Report, the CEDAW Committee noted concerns of "the criminalization of abortion, except when the life of the pregnant woman or girl is at risk, and the impact that such criminalization has on the maternal mortality ratio, as well as compelling women, in particular women under 25 years of age and girls, to resort to unsafe abortion",[58] and recommended Malawi to "amend legal provisions regulating abortion to legalize it… at least in cases in which the life and/or health of the pregnant woman or girl is at risk, and in cases of rape, incest and serious impairment of the fetus".[59] Further, that in its 2023 Concluding Observations of Malawi's Eighth Period Report, the CEDAW Committee went even further to express its continuing concerns about "the criminalization of abortion in all cases, punishable by up to 14 years of imprisonment, except when the life of the pregnant woman or girl is in danger, the lack of clarity surrounding the law on abortion and the restrictive understanding of the criteria to determine that a life is in danger, notwithstanding the High Court ruling in 2021 that encompasses risks to physical and mental health".[60] And that the Committee recommended Malawi to "immediately implement" the Law Commission's recommendation to legalize abortion in cases of rape, incest or defilement, risks to the life or health of the pregnant woman and severe fetal impairment, and consider the decriminalization of abortion in all other cases.[61]

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[57] *ibid*., para 8.15.
[58] CEDAW Committee, 'Concluding observations on the seventh periodic report of Malawi' (2015) UN Doc CEDAW/C/MWI/CO/7, para 34(b).
[59] *ibid*., para 35(c).
[60] CEDAW Committee, 'Concluding observations on the eighth periodic report of Malawi' (2023) UN Doc CEDAW/C/MWI/CO/8, para 35(b).
[61] *ibid*., para 36(b).

127. The Center then submitted on the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. It asserted that, as set out above in respect of Article 7 of the ICCPR, denying a woman or adolescent girl an abortion in cases of rape may also amount to cruel, inhuman or degrading treatment in light of the mental suffering of the woman that could result. It pointed out that Malawi acceded to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment[62] (the "CAT") on 11 June 1996, which is a convention that deals specifically with this issue. Further, that the treaty monitoring body, the Committee against Torture (the "CAT Committee"), has criticized abortion bans that do not have exceptions for rape and incest, noting that such situation "entails constant exposure to the violation committed against her and causes serious traumatic stress and a risk of long-lasting psychological problems such as anxiety and depression."[63]

128. The Center then submitted regarding the Convention on the Rights of the Child. It observed that, whilst international human rights protections apply equally to minors, there are two instruments, which Malawi has ratified, that enshrine specific provisions for children and adolescents. And that the primary instrument protecting the rights of children[64] under international law is the Convention on the Rights of the Child[65] (the "CRC") to which Malawi acceded on 2 January 1991, and is the most widely ratified human rights treaty in the world with 196 state parties. It noted that, as recognized in the Preamble to the CRC, "the child, by reason of his physical and mental immaturity, needs special safeguards and care". Further, that Article 24 of the CRC specifically recognizes the right of the child to the enjoyment of the highest attainable standard of health, and the realization of the right to health is "indispensable

[62] Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ("**CAT**").

[63] CAT Committee, 'Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding observations of the Committee against Torture: Nicaragua' (2009) UN Doc. CAT/C/NIC/CO/1, para 16. See also CAT Committee, 'Concluding Observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013)' (2013) UN Doc. CAT/C/KEN/CO/2, para 28.

[64] The CRC defines children as persons under the age of 18 years old unless, under the law applicable, majority is attached earlier (CRC, art 1).

[65] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 ("**CRC**").

for the enjoyment of all the other rights in the Convention".[66] The Center pointed out that Committee on the Rights of the Child (the "CRC Committee"), the CRC's treaty monitoring body, has expressly opined on the importance of providing adolescents access to sexual and reproductive health services, including to abortion care. For instance, that in its General Comment 15 (2013) (commenting on Article 24 of the CRC), the CRC Committee urged states to "ensure universal access to a comprehensive package of sexual and reproductive health interventions",[67] and recommended that "States ensure access to safe abortion and post-abortion care services, irrespective of whether abortion itself is legal".[68] Further, that the CRC Committee also expressly recognized that:

> [g]iven the high rates of pregnancy among adolescents globally and the additional risks of associated morbidity and mortality, States should ensure that health systems and services are able to meet the specific sexual and reproductive health needs of adolescents, including family planning and safe abortion services.[69]

129. The Center noted that the provision of safe abortion services to adolescents in Malawi is therefore well below the standards promulgated in the CRC and anticipated by the CRC Committee. It pointed out that in response to the country reports submitted by Malawi, the CRC Committee raised concerns in its 2017 Concluding Observations, regarding adolescent health "the criminalization of abortion, except when the life of the pregnant girl is at risk, leading to girls resorting to risky abortions"[70] and recommended Malawi to:

> decriminalize abortion in all circumstances and remove barriers to abortion, such as the requirement to report to the police before having an abortion in the case of rape, ensure girls' access to safe abortion and post-abortion care services, and ensure that the views of the child are always heard and given due consideration in abortion decisions.[71]

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[66] CRC Committee, 'General Comment No. 15 on the right to the child to the enjoyment of the highest attainable standard of health (art 24)' (2013) UN Doc CRC/C/GC/15, para 7.
[67] *ibid*., para 53-54.
[68] *ibid*., para 70.
[69] *ibid*., para 56.
[70] CRC Committee, 'Concluding observations on the combined third to fifth periodic reports of Malawi' (2017) UN Doc CRC/C/MWI/CO/3-5, para 34(c).
[71] *ibid*., para 35(c).

130. The Center pointed out that the position of girls who are subject to sexual violence and rape is even more acute. And that the CRC Committee expressed "grave concerns" of "high incidence of sexual violence, including rape... in all settings, including in the family and in schools", and "poor access and availability of the one-stop centres that provide comprehensive service to child survivors of sexual and physical violence".[72]

131. The Center then submitted with reference to the African Charter on the Rights and Welfare of the Child. It indicated that at the regional level, the African Charter on the Rights and Welfare of the Child[73] (the "ACRWC") was ratified by Malawi on 16 September 1999 and entered into force on 29 November 1999. Further, that it has been ratified by 50 of 55 member states of the African Union. And that of particular relevance, Article 14 guarantees standards with respect to health and health services, and Article 16 protects children against child abuse and torture, requiring State Parties to take "specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman and degrading treatment".

132. The Center indicated that, along with the African Commission on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child (the "ACRWC Committee") (the treaty monitoring body for the ACRWC) issued a joint general comment in 2017 on ending child marriage, noting that because girls in child marriages were at high risk of pregnancy-related health complications, "medical abortion in the instances contemplated by Article 14(2)(c) [of the Maputo Protocol] is of great consequence and must be provided."[74]

133. The Center then noted that in a 2022 decision of *Legal and Human Rights Centre and Center for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania* (which concerned the question of whether forced pregnancy testing and subsequent mandatory compulsion of pregnant girls from school contravened the State's obligations under the ACRWC), the ACRWC Committee considered in passing the position of adolescent girls who fall

[72] *ibid*., para 22.
[73] African Charter on the Rights and Welfare of the Child (adopted on 1 July 1990, entered into force 29 November 1999) CAB/LEG/24.9.49 ("**ACRWC**").
[74] 'Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on ending child marriage' (2017), para 37.

pregnant as a result of rape or sexual violence.[75] It indicated that, noting that Tanzania's law on abortion does not provide an exception for cases of rape, the ACRWC Committee observed that:

> the prevalence of teenage pregnancy among schoolgirls is a result of a lack of sexual reproductive health services… in some instance, it is also a result of the lack of services available for survivors of sexual violence… The lack of such services also forces schoolgirls to resort to unsafe abortions which further endangers their life, survival and development.[76]

134. The Center pointed out that the ACRWC Committee ultimately found that the practice of enforcing mandatory pregnancy testing on schoolgirls and subsequently expelling them from school amounts to a violation of, *inter alia*, Article 14 of ACRWC (the right to health), and amounted to a violation of Article 16 of ACRWC (prohibition against torture and child abuse).[77] And that the Committee observed that "rape is the worst form of sexual abuse and is severely physically and psychologically damaging to children… sexual violence is itself a form of cruel, inhuman and degrading treatment and a violation of article 16 of the Charter" and that "forced pregnancy testing, expulsion of the pregnant girls, and their illegal detention is cruel, inhuman and degrading treatment and subjects them to further trauma if these girls are survivors of sexual violence."[78]

135. The Center then alluded to decisions of other regional human rights bodies. It pointed out that cases before regional human rights bodies (in respect of which Malawi is not bound as a State party) has also firmly recognized that victims of rape -- who are often adolescent girls -- denied timely access to legal abortion are not treated in accordance with State obligations under regional human rights law. and it noted that by way of example: The European Court of Human Rights expressly noted in the case of *P&S v Poland*, determined in 2013, that the complainant had only been 14 years old at the relevant time and a victim of rape, when her access to abortion care had been obstructed and delayed. The Court found that Poland violated

[75] African Committee of Experts on the Rights and Welfare of the Child, *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania*, Decision No 002/2022.
[76] *ibid*, para 87.
[77] *ibid*, para 88.
[78] *ibid*, para 37.

her rights to liberty, respect for private and family life, and to be free from inhuman and degrading treatment.[79] An that, the Inter-American Commission on Human Rights heard the case of *Paulina Ramírez v Mexico* (a case in which the Center submitted an *amicus curiae* brief), in which the complainant, who fell pregnant at 13 years old as a result of rape by an intruder into her home, was forced to continue her pregnancy after public health officials used a series of obstacles to convince her to withdraw her request for an abortion as a victim of sexual assault, which is a permitted exception to abortion bans in the Mexican State of Baja California. In 2007, the complainant reached a settlement with the State government, in which the government, *inter alia*, admitted responsibility and agreed to issue a decree regulating guidelines for access to abortion for rape victims.

136. Lastly, but not least, the Center alluded to the U.N. Special Rapporteur Reports. It indicated that, comments made by the U.N. Special Rapporteurs are also illuminating. For instance, that a 2019 report by the U.N. Special Rapporteur on violence against women, its causes and consequences unequivocally recommended that States must:

> Repeal laws which criminalize abortion in all circumstances, remove punitive measures for women who undergo abortion, and at the very minimum, legalize abortion in cases of sexual assault, rape, incest, and when the continued pregnancy endangers the mental and physical health of the woman or the life of the woman, and provide access to safe, quality post-abortion care[80]

137. Having considered the foregoing, this Court wishes to expressly agree with the Center in its submission herein, that it is clear from the above survey of the international and regional legal landscape that a State party's restrictions on a woman or girl's access to abortion services in circumstances following rape are inconsistent with:

a. Malawi's express obligation under Article 14 of the Maputo Protocol to take "all appropriate measures" to authorize medical abortions in the case of rape;

[79] *P. and S. v. Poland*, 57375/08 HEJUD [2012] ECHR 1853 (30 October 2012).
[80] UN General Assembly report of the Special Rapporteur on violence against women, its causes and consequences, 'A human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence' (2019) UN Doc A/74/137, para 81(q).

b. the Human Rights Committee's interpretation of the right to life under Article 6 of the ICCPR, which encompasses the right to "enjoy a life with dignity", as requiring a mother to carry a pregnancy to term following rape would "cause the pregnant woman or girl substantial pain or suffering";
c. the right to be free from cruel, degrading and inhuman treatment pursuant to Article 7 of the ICCPR, as further emphasized by criticisms levelled by the CAT Committee of abortion bans without a rape exception;
d. the right to be free from discrimination in accessing sexual and reproductive health services, as noted by the ICESCR Committee (in respect of Article 12 of ICESCR) and as noted by the CEDAW Committee (in respect of Article 12 of CEDAW), given that forcing a mother to carry a pregnancy to term following rape leads to "severe physical and mental anguish, constituting gender-based violence".

138. And that, moreover, as a State party to both the CRC and the ACRWC, Malawi is encouraged to ensure that safe abortion services are provided to adolescents, which includes decriminalizing abortion in all circumstances, and removing barriers to its access.

139. The Center then submitted on comparative jurisprudence on the subject matter herein. It asserted that it is clear that the legal position in Malawi is anomalous amongst the regional and international stage. And that the present case therefore provides an opportunity to this Court to consider an appropriate interpretation of the Gender Equality Act and the Penal Code – in particular the exception regarding "preservation of the life of the mother" -- consistently with that regional and international jurisprudence. In this final section, the brief considers how other national courts have interpreted provisions similar to the exception in the Penal Code, and how legislation has developed within the region.

140. The Center noted that the Penal Code was introduced in 1930 during the British colonial period. And that as a result, many of its provisions, including those concerning abortion, are reflective of English statutes in force at the time, in particular: Sections 58 & 59 of the Offences Against the Persons Act 1861 which render abortion a criminal offence; and Section 1 of the Infant

Life (Preservation) Act 1929 which provides an exception, "for the purpose only of preserving the life of the mother".[81] It noted further that the same is true for a number of African countries which were former British colonies and had continued to adopt English legislation as in force from the late 1800s to early 1900s. Accordingly, that many African countries pre-independence took their cue from the English courts when interpreting domestic penal provisions.

141. It pointed out that of relevance in this regard is the English case of *R v Bourne* [1939] 1 K.B. 687. It indicated that the case concerned prosecution of a surgeon who had performed an abortion for a 14-year-old girl who was pregnant as a result of rape. In his statement and direction to the jury, Judge Macnaghten considered the meaning of the words 'preserving the life of the mother' and the distinction between danger to life and danger to health. The judge commented that "I have found it difficult to understand what the discussion really meant, since life depends upon health, and it may be that health is so gravely impaired that death results."[82] He went on to note that the words 'preserving the life of the mother':

> Ought to be construed in a reasonable sense, and if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor…is operating for the purpose of preserving the life of the mother.[83]

142. And that applying this to the circumstances of the case, the judge directed the jury, to:

> consider the evidence about the effect of rape, especially on a child….no doubt you will think it is only common sense that a girl who for nine months has to carry in

[81] In England, abortion remains a criminal offence under the Offences Against the Persons Act 1861, however broad exceptions are provided under the Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990) which legalizes abortion if it is performed by a registered medical practitioner, authorised by two doctors acting in good faith, on one or more of the following grounds: (a) the pregnancy has not exceeded its twenty-fourth week and continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman or any existing children; (b) termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; (c) continuance of the pregnancy would involve risk to the life of the pregnant woman; or (d) there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

[82] *R v Bourne* [1939] 1 K.B. 687, 692.

[83] *R v Bourne* [1939] 1 K.B. 687, 694.

> her body the reminder of the dreadful scene and then go through the pangs of childbirth must suffer great mental anguish.[84]

143. The Center noted that the jury, following the judge's direction, acquitted the surgeon finding that the prosecution had failed to prove beyond reasonable doubt that the surgeon had not performed the abortion in good faith for the purpose of preserving the victim's life.

144. It observed that *R v Bourne* has subsequently been followed and upheld in several African jurisdictions having been affirmed in the cases of *R v Edgal, Idike and Ojugwu* (1938) WACA 133 heard in the West African Court of Appeal (now defunct) and *Mehar Singh Bansel v R* (1959) EALR 813 heard in the East African Court of Appeal (now defunct). It observed further that *R v Bourne* continues to be applied post-independence, as evidenced by the Zambian case of *The People v Gulshan, Smith and Finlayson* (1971) High Court of Zambia (Criminal) HP 11/1971. In that case, three doctors were charged with unlawfully procuring an abortion contrary to Section 151 of the Zambia Penal Code. Section 151 of the Zambia Penal Code mirrors Section 149 of the Penal Code, which in turn mirrors Section 58 of the Offences Against the Person Act 1861. In their defence, the doctors submitted that they had performed the abortion at the woman's request on the basis that she was not mentally in a position to accept the pregnancy and carry it to term. The trial judge followed the reasoning in *R v Bourne*. Acquitting the doctors, the judge said:

> [A]bortion is lawful where it is done in good faith and with reasonable grounds and adequate knowledge to save the life and prevent grave permanent injury to the physical or mental health of the mother.[85]

145. The Center then submitted that, in light of the above, it is artificial to consider interpretation of the Penal Code in isolation from its wider context. It added that, even in instances where there is no express exception under statute for victims of rape to procure an abortion, regional courts have

[84] *ibid*.
[85] *The People v Gulshan, Smith and Finlayson* (1971) High Court of Zambia (Criminal) HP 11/1971.

consistently interpreted provisions to include considerations of mental health, which are particularly acute in instances of rape, when determining whether an abortion is performed to preserve the life of the mother.

146. It then asserted that, in any event, since the 1960s, countries which had adopted colonial provisions concerning abortion have followed a trend of subsequently implementing new statutes to permit express exceptions in the case of rape or injury to the mother's mental health, recognising the damaging effects on victims to carry a child to term and in alignment with international consensus that any abortion ban should include exceptions for cases of rape and incest. It pointed out that, by way of example: Following the decision in the *People v Gulshan*, the Zambian Parliament enacted the Termination of Pregnancy Act of 1972, which explicitly permits abortions in cases where it is determined by three medical practitioners that there is a risk of injury to the physical or mental health of the pregnant woman or, as determined by one medical practitioner where they are of the opinion that the termination is immediately necessary to save the life of or prevent grave and permanent injury to the physical or mental health of the pregnant woman (Section 3 of the Termination of Pregnancy Act 1972). Similarly, that the Kenya Penal Code (as amended) adopts the same provisions as the Malawi and Zambia Penal Codes criminalizing abortion except in instances of preservation of the mother's life (Articles 158-160, 228 and 240). And that, in 2010, the Constitution of Kenya was amended to specifically enshrine a right to abortion in instances where "the life or health of the mother is in danger". It pointed out that this provision was tested in the Kenyan High Courts in the 2019 case of *FIDA Kenya and Others v Attorney General and Others* in which the High Court emphasized the right to health includes complete physical, mental, and social wellbeing and that victims of sexual violence in Kenya have the constitutional right to abortion. The Center also pointed out that the same is true in South Africa where, pre-1975, South African legislation carved an exception for abortion only in relation to preservation of a mother's life. And that this exception was then broadened in the Abortion and Sterilisation Act 1975 ("1975 Act"), as subsequently amended by the Choice on Termination of Pregnancy Act 1996, which expressly permitted abortions in instances of rape and incest as well as in cases of severe fetal deformity and where the woman is mentally incompetent.

147. In conclusion, the Center posited that given that approximately 47% of the Malawi's total population is women of reproductive age (between 15 and 49 years old), and that adolescent girls and young women comprise 18% of the Malawi population,[86] it is imperative that the State takes seriously the protection of women and girls, including their ability to exercise reproductive freedom without restriction. Further, that Malawi's archaic criminalization of abortion with a narrow and unclear exception only to preserve the life of the mother remains out of step with human rights jurisprudence on access to safe abortion, in particular its failure to make express exception for cases of rape and to recognize, and take steps towards ensuring, the special protection required of adolescent girls.

148. It asserted that the present case accordingly provides a significant opportunity for this Court to provide clarity and interpret the provisions of the Gender Equality Act (in light of the exception in the Penal Code) in accordance with Malawi's international and regional human rights obligations, to recognize that the "preservation of the life of the mother" must be construed broadly to encompass the need to provide access to abortion services to, at the least, victims of rape including to adolescent girls, in recognition of the severe mental and physical suffering that would be endured through forced continuation of pregnancy in those circumstances.

149. The Center further asserted that, as this brief has explained, there is broad consensus amongst regional and international human rights bodies that at a minimum any abortion bans should include an exception for pregnancy as a result of rape (in particular as expressly set out in the Maputo Protocol), and that to force a woman or girl to continue pregnancy in those circumstances violates States' obligations to eliminate discrimination and amounts to cruel and inhuman and degrading treatment. And that the sexual and reproductive rights of adolescent girls have been recognized in the CRC and the ACRWC, and findings of the Human Rights Committee in individual cases specifically takes into account the vulnerable position of minor girls, particularly those who are victims of rape; and that the "preservation of the mother's life"

[86] Defined as girls and women between the ages of 15-24, as at 2018. *See* Health Policy Plus, 'Adolescent Girls and Young Women in Malawi: National – and District- Level Factsheets' (September 2019) < http://www.healthpolicyplus.com/ns/pubs/15338-15615_HPPlusMalawiAGYWBooklet.pdf > accessed on 5 April 2024.

exception to the abortion ban in Malawi's Penal Code, a remnant of colonial legal architecture, has been interpreted broadly in English legal jurisprudence, and adopted by other post-colonial African states, to include situations where the pregnancy has resulted from rape which would prejudice the mother's mental health.

150. This Court wishes to indicate that it agrees with the position advanced by the claimant and elaborated by the Center herein, pertaining to the legal framework on reproductive health in Malawi. That, in that regard, the Gender Equality Act enshrines the right to adequate sexual and reproductive health for every person. And that this right includes the right to access sexual and reproductive health services and to choose whether to have a child as provided in section 19 of the Gender Equality Act.

151. This Court is persuaded that, as contended by the claimant and as elaborated in the brief submitted by the Center, the consensus under international human rights jurisprudence both in the Africa region and beyond is that the right to access sexual and reproductive health services encompasses, at least in specific circumstances, the right to safe and legal termination of pregnancy. Contrary to the submission by the 1st , 2nd and 3rd defendants, this Court upon careful reflection, further agrees with the claimant's contention and submissions by the Center that, while the Gender Equality Act guarantees this right, the Penal Code broadly criminalizes the administration of an abortion[87], with the only stated exception provided at Section 243 of the Penal Code. And that, that section states that a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation on any person for her benefit, or on an unborn child for the preservation of the mother's life.

152. This Court observes that indeed, as exemplified in the present case by the conduct of the 1st defendant in deciding not to administer a safe abortion sought by the claimant victim of a sexual offence and her parent, the meaning of 'preservation of the mother's life' has remained ambiguous to the health care caders as indicated by Dr. Chisale Mhango. It is important for the sake

[87] Under Section 149 of the Penal Code, it is a criminal offence to unlawfully administer to a woman any noxious substance or use any force with the intent to procure a miscarriage. Section 150 of the Penal Code makes it a criminal offence to unlawfully supply to or procure for any person anything with the knowledge that it is intended to be unlawfully used to procure the miscarriage of a woman. Section 151 of the Penal Code criminalizes the supply of drugs or instruments to procure an abortion.

of girls who become pregnant as a result of criminal conduct on the part of their assailants that this position be clarified. Otherwise, as noted by the Law Commission in its 2016 report advocating abortion law reform[88]: "health professionals are not clear on what could fall under the exception provided by the law and that has meant that safe abortion services on the available exception has largely been inaccessible.

153. This Court is bound in this case, to bear in mind that, as pointed out by the claimant and elaborated by the Center, it ensures that the interpretation it gives to section 19 of the Gender Equality Act and the applicable section 243 Penal Code exception should be one that as much as possible avoids conflict with Malawi's obligations under international human rights instruments regardless of whether the same are domesticated or not. See *In the Matter of CJ (A Female Infant)* [2009] MLR 220 (SC).

154. Having considered the vast wealth of human rights treaty authorities from the Africa region and beyond as well as comparable persuasive foreign case law on the subject of access to abortion by minor girls victims of rape, defilement and other sexual offences as alluded to by the claimant and elaborated by the Center herein, this Court has no doubt in its mind that a purposive interpretation of section 19 of the Gender Equality Act entails the following. That a girl victim of a sexual offence who is pregnant as a result of such an offence definitely has a right to seek an abortion automatically upon indications that she had become pregnant as a result of a sexual offence being perpetrated on her. Further, as rightly alluded to by the claimant and elaborated by the Center, such a girl cannot be said to have exercised her right in section 19 of the Gender Equality Act to choose to have a child by falling pregnant following perpetration of a sexual offence on her. It follows that such a girl will inevitably suffer mental health ruin as a result of keeping this unwanted pregnancy to term. It is harsh and inhumane to insist that such a girl keep the pregnancy in such circumstances. It is therefore only logical and in accord with her sexual and reproductive health rights that such a girl be allowed, without let or hindrance, to demand if she so wishes upon exercise

[88] The Center recognizes that upon the recommendation of the Malawi Law Commission to reform and significantly liberalise abortion laws (further to its 2016 report), the Termination of Pregnancy Bill had been presented to the Malawi National Assembly in 2017, but did not progress and has since been withdrawn. *See* VOA, 'Malawi Parliament Withdraws Abortion Rights Bill after Objections' (19 June 2021) <https://www.voanews.com/a/africa_malawi-parliament-withdraws-abortion-rights-bill-after-objections/6207221.html> accessed 8 April 2024.

of her free will, access to abortion services so that her life be preserved from ruin by either mental or physical challenges associated with such an unwanted pregnancy.

155. The claimant herein is no exception. At the material time, she was automatically entitled to an abortion as a victim of a sexual offence, in exercise of her right to access sexual and reproductive health rights under section 19 (1) (a) and 19 (2) of the Gender Equality Act. Regrettably, the 1st defendant only examined the claimant's physical health relative to the pregnancy but did not record any examination of her mental health to determine associated risks. Dr Zumazuma's psychiatric report shows that the claimant had a metal health risk which is the usual in cases of this nature according to the vast wealth of the relevant research literature, alluded to by the claimant and the Center herein. In denying her that access to an abortion in the circumstances of this case, the 1st defendant therefore breached the claimant's rights under section 19 (1) (a) and 19 (2) of the Gender Equality Act. This Court has absolutely no hesitation to find that, in the circumstances, 1st defendant thereby breached his statutory duty to provide the access to the abortion herein which was subsequently afforded to the claimant by a specialist at Queen Elizabeth's Central Hospital. The Gender Equality Act having been passed into law specifically to protect sexual and reproductive health rights of people like the claimant herein.

156. This Court further agrees with the claimant and the submission of the Center that the term 'preservation of life' in section 243 of the Penal Code, must therefore be purposively read to mean that not only physical health of a pregnant victim of a sexual offence is considered by the health care cadres in decision making regarding abortion in such cases. Preservation of the victim's mental health must also be considered at the same level and no less.

157. A different result would perpetuate the situation borne out of the data provided by the Center and also scenario expressed by Dr Chisale Mhango, whereby there would be dire consequences and unnecessary mortality associated with efforts to get abortions through unsafe means due to desperation on the part of victims of sexual offences such as the claimant herein who are denied access to safe abortion.

158. This Court also finds that the 1st defendant failed to provide relevant information regarding the sexual and reproductive health rights to the

claimant in the circumstances when he denied her access to an abortion following a sexual offence perpetrated on the claimant and instead insisted that she carry the unwanted pregnancy to term. Contrary to the contention of the 1st, 2nd and 3rd defendant, the 1st defendant failed to uphold the dictates of section 20 (1) (d) of the Gender Equality Act as correctly submitted by the claimant.

159. In the foregoing premises, this court answers in the affirmative, the question whether or not the 1st defendant's refusal to terminate the claimant's pregnancy herein breached section 19 (1) (a), 19 (2) and 20 (1) (d) of the Gender Equality Act.

160. This Court appreciates that the 3rd defendant came up with the Standards for Post Abortion Care, 2020 which guide health service care cadres on abortion and post abortion care. These Standards are a vital tool that serve to guide the health care cadres accordingly when dealing with abortion and post abortion care as indicated by the 1st defendant herein. However, it is clear from the evidence of the 1st defendant as buttressed by that of Dr. Chisale Mhango, that there still remains very consequential lack of clarity in the said Guidelines particularly regarding how health care cadres are to proceed when presented with a case of a child who gets pregnant as a result of sexual violence or offence in terms of whether such a child can access safe termination of pregnancy under the law.

161. In view of the immediately foregoing finding, this Court is compelled to answer the next issue for determination herein in the affirmative, namely, whether or not the 3rd defendant breached its obligations or mandate as the Government Minister responsible for health for failing to promulgate clear guidelines that a girl child who gets pregnant as a result of sexual violence or offence can access safe termination of pregnancy under the law.

162. This Court next considers whether or not the 4th defendant breached its obligations under sections 8 and 9 (2) of the Gender Equality Act and section 13 (1) (d) and (e) of the Human Rights Commission Act.

163. Section 8 of the Gender Equality Act provides that the Human Rights Commission shall be responsible for the enforcement of the provisions of this Act.

164. Further, section 9 (2) (c) of the Gender Equality Act provides that, the Commission shall perform the following functions in the exercise of its

powers in relation to this Act, namely, consider, deliberate on and make recommendations to the Minister on any gender issues.

165. Furthermore, section 13 (1) (d) and (e) of the Human Rights Commission Act provides as follows:

> (1) The duties and functions of the Commission shall be—
> …
> (d) to consider, deliberate upon, and make recommendations regarding any human rights issues, on its own volition or as may be referred to it by the Government;
> (e) to study the status and effect of legislation, judicial decisions and administrative provisions for the protection and promotion of human rights and to prepare reports on such matters and submit the reports, with such recommendations or observations as the Commission considers appropriate, to the authorities concerned or to any other appropriate authorities;

166. The the claimant submits that the Human Rights Commission, the 4th defendant, failed in its statutory and constitutional duties to enforce, protect and promote the claimant's rights under the Gender Equality Act and the Human Rights Commission Act ("HRC Act"). And that this failure constitutes a breach of duty that directly contributed to the violation of the claimant's reproductive health rights.

167. The claimant submitted on the duties of the 4th defendant under the Gender Equality Act. She noted that section 8 of the Gender Equality Act states clearly that the 4th defendant shall be responsible for the enforcement of the provisions of the Gender Equality Act. And that these provisions include section 19 (1) (a) and 19 (2), which guarantee access to sexual and reproductive health services, and Section 20(1), which imposes a duty on health officers to impart all necessary information to enable informed decision-making. She claimed that, as the designated enforcement authority under the Gender Equality Act, the 4th defendant had an affirmative duty to monitor compliance with these rights, promote their implementation, and intervene where violations occurred. The claimant submits that the 4th defendant failed in each of these respects.

168. The claimant asserted that, since the Gender Equality Act came into force in 2014, there is no evidence that the 4th defendant has taken proactive

or authoritative steps to implement and enforce the sexual and reproductive health rights contained therein. Specifically, that it has failed to initiate programs, issue guidance, or conduct training for health professionals on the meaning and scope of lawful termination of pregnancy under the Gender Equality Act as read together with section 243 of the Penal Code, particularly in relation to minors and survivors of sexual violence. She pointed out that this institutional inertia has perpetuated a widespread and dangerous misconception that termination of pregnancy is illegal in all cases in Malawi, thereby obstructing access to lawful termination of pregnancy for eligible persons such as the claimant. Further, that this failure of oversight and leadership directly contributed to the denial of reproductive health services that the claimant lawfully sought.

169. The claimant then submitted on the duties under Section 9(2)(c) of the Gender Equality Act and Sections 13(1)(d) and (e) of the Human Rights Commission Act. She observed that, in addition to its enforcement role under section 8 of the Gender Equality Act, the 4th defendant has a broader policy and advocacy role under section 9(2)(c) of the Gender Equality Act and sections 13(1)(d) and (e) of the Human Rights Commission Act. She noted the provisions of section 9 (2) (c) of the Gender Equality Act and those of section 13 (1) (d) and (e) of the Human Rights Commission Act.

170. She contended that the foregoing provisions obligate the 4th defendant to consider and make recommendations on any gender issues; deliberate upon and advise on human rights issues on its own motion; and study the impact of legislation, judicial decisions, and administrative actions on human rights, and to submit appropriate reports and recommendations to authorities. She argues that the 4th defendant failed in this broader mandate as well. She observed that it has neither studied nor issued substantive recommendations to the Ministry of Gender, the Ministry of Health or the Ministry of Justice on the urgent need to implement the provisions of the Gender Equality Act relevant to access to safe and legal abortion, including to protect vulnerable groups such as children from being compelled to carry risky pregnancies to term. She asserted that this failure is egregious in light of the evidence presented by Dr. Chisale Mhango, who testified that unsafe termination of pregnancy is responsible for 79 deaths per 100,000 live births in Malawi. She added that this is a public health emergency with direct implications for the rights and

lives of women and girls. Yet, that the 4th defendant has done little to address this issue through policy advocacy or legal reform.

171. Further, the claimant argues that the assertion by the 4th defendant's witness in re-examination that the Commission only acts where there is a public issue is incorrect in law and directly contradicted by section 9(2)(c) of the Gender Equality Act and Section 13(1)(d) of the Human Rights Commision Act, both of which empower the Commission to act on its own volition.

172. The 4th defendant then submitted as follows on whether or not the 4th defendant breached its obligations under sections 13(1)(d) and (e) of the Human Rights Commission Act. It noted that the claimant stated that it breached the aforementioned provisions in the Human Rights Act. Further, that the claimant stated that the 4th defendant had not set up programs to look at lawful termination of pregnancy with the provisions of section 243 of the Penal Code particularly on relation to child victims. The defendant asserted that the claimant, however, failed to provide evidence showing how the 4th defendant has not done this. It pointed out that the two claimant's witnesses that were paraded did not, in any way, show this Court how the provisions were contravened by the 4th defendant. It added that, besides, in her testimony the 4th defendant's witness explained to the Court the works and activities being implemented by the 4th defendant in respect of the Human Rights Commission Act. And that, on the evidence of the claimant then, the 4th defendant cannot, therefore, be said to have breached any of its obligations under the aforementioned Act.

173. The 4th defendant then submitted on whether or not the 4th defendant breached its duties under the Gender Equality Act. It referred to section 9 (2) (c) of the Gender Equality Act and asserted that the claimant misleads this Court by insinuating that the 4th defendant has not made any recommendations to the Minister pertaining to any gender issues since the enactment of the law in question. It claimed that it runs a Gender Directorate that tirelessly protect and promote human rights in that aspect and releases annual reports which are presented to parliament and the ministry of gender.

174. The 4th defendant noted that section 8 of the Gender Equality Act endows the 4th defendant the responsibility to enforce the provisions of the Act. And that section 19(1) of Gender Equality Act guarantees a person's right

to sexual and reproductive health and subsection (2) of the same states that, 'subject to any other law, every person has the right to choose whether or not to have a child.' And that section 20(1)(d) of the Act, on the other hand, provides that, 'in addition to the duties imposed or powers conferred on the health officers by the Public Health Act or any other relevant law, every health officer shall impart all information necessary for a person to make a decision regarding whether or not to undergo any procedure or to accept any service affecting his or her sexual and reproductive health.' It claimed that the claimant's assertion that the 4th defendant breached statutory duties in respect of these foregoing provisions is unfounded.

175. It observed that the claimant states that the 4th defendant failed to enforce the provisions of the Gender Equality Act. It asserted that, however, the claimant has failed to demonstrate how the 4th defendant has failed to enforce the provisions. It asserted further that the facts and evidence at hand have not disclosed any defect in the said provisions *per se* but rather an unfortunate isolated incident relating to the claimant. It added that the 4th defendant would only get involved where the alleged conduct had been brought to its attention either as a complaint or through any media outlet. It added further that, in her own words, the 1st claimant's witness stated that she never reported to the 4th defendant neither was she ever made aware of the existence of the 4th defendant by Nyale Institute which is one of the organisations where here case was reported. It indicated that the claimant has failed to show that either of the two happened and the 4th defendant never took any action. It then contended that it is a cardinal principle of law that he who asserts must prove. And that the claimant cannot, therefore, rely on a single incident which was not brought to the attention of the 4th defendant for action to make a general conclusion condemning the 4th defendant for a breach of its statutory duties. The 4th defendant therefore argues that it did not breach any of the provisions under the Gender Equality Act.

176. This Court wishes to deal with the important aspect of proof alluded to by the 4th defendant. The Supreme Court of Appeal dealt with this very important subject of proof on allegation of failure to perform duties by duty bearers, such as the 4th defendant herein. In the case of *Mutharika and Another v Chilima and Another* [2020] MELR 406 (SC), the Supreme Court of Appeal held that the petitioner bore the initial burden of proof to establish breaches

on a *prima facie* standard and that thereafter the burden shifted and the Electoral Commission bore the burden of proof to dispute the claimant's case on a balance of probabilities. This is because the Commission, as a duty bearer, is conferred the relevant functions and powers which it exercises under the Constitution and statute. It is the considered view of this Court that the 4th defendant is no exception to this foregoing principle elaborated by the Supreme Court of Appeal. The claimant herein similarly bears the initial burden to prove her case to a *prima facie* standard and thereafter the burden shifts and the Human Rights Commission bears the burden of proof to dispute the claimant's case on a balance of probabilities. This is because the Human Rights Commission, as a duty bearer, is conferred the relevant functions and powers which it exercises under statutes and the Constitution. It would be unfair and too onerous to saddle the claimant with proof on a balance of probabilities in such circumstances.

177. In view of the foregoing, regarding the present case, the claimant has discharged her initial burden, contrary to the submissions by the 4th defendant that she has no proved the 4th defendant's breach to the requisite standard. The claimant has shown that there have been adverse comments by Treaty Bodies on the unsatisfactory nature of the legal scenario regarding the right to access to safe abortions by girl child victims of sexual offences, which would have motivated the 4th defendant to take appropriate action as alluded to by the claimant. But no action has been shown to have been taken by the 4th defendant apart from unsupported assertions about workshops et cetera made by its witness herein. Further, as indicated by the claimant, her case is only one among many cases that shows systemic failure in the health care system set up to accord her access to safe abortion according to the data presented by the Center and Dr Chisale Mhango. The 4th defendant surely should have done more within its mandate to deal with this serious systemic issue as asserted by the claimant, particularly pertaining to the girl child that is impregnated by a perpetrator of a sexual offence and who consequently seeks a safe abortion.

178. It is interesting to observe that, in its defence, the 4th defendant specifically claimed that the claimant's scenario is not under its purview but subject of another law under a Bill, which is self-contradictory as a Bill is not law. However, no evidence was led by the 4th defendant on this aspect how the claimant's scenario is outside its purview under the Gender Equality Act.

There is therefore no proof in this regard. In fact, there is no reference to this defence at all in the 4th defendant's evidence and in the final submissions of the 4th defendant. Instead, in its evidence, the 4th defendant relied on it not being advised about the claimant's case herein. As it turns out, this is not an adequate defence herein. No evidence has therefore been presented to absolve the 4th defendant of the allegation against it in the circumstances of this case. This Court is therefore compelled to answer in the affirmative, the question whether the 4th defendant has breached its statutory duties herein.

179. Last, but not least, this Court has absolutely no doubt that the claimant suffered injury and loss due to the mental anguish attendant to her being compelled to carry the unwanted pregnancy longer than necessary herein, that is, for the duration between her being unlawfully denied access to a safe abortion by the 1st defendant to the time she eventually was afforded the right to access by the specialist at Queen Elizabeth Central Hospital.

180. In the foregoing circumstances, this Court finds that the claimant has made out her case and that she is entitled to all the declarations and reliefs sought herein. She shall also get the costs of these proceedings. The Registrar shall assess the damages and costs herein if the same are not agreed within 14 days.

Made in open court at Blantyre this 28th October, 2025.

M.A. Tembo
JUDGE