



**HSO & 3 others v Director of Public Prosecutions & 6 others
(Constitutional Petition E490 of 2025) [2026] KEHC 6812 (KLR)
(Constitutional and Human Rights) (20 May 2026) (Judgment)**

Neutral citation: [2026] KEHC 6812 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E490 OF 2025**

B MWAMUYE, J

MAY 20, 2026

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 26, 27,
28, 29, 31, 33, 35, 36, 43, 46, 48, 49, 50, 53 (1), 53(2), 157(11), 159, 165 (3, 6
& 7), 232, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTIONS 2, 8, 9, 11, 39, 42, AND
43 (1(A), 2, (4)(F) OF THE SEXUAL OFFENCES ACT, 2006**

AND

IN THE MATTER OF SECTIONS 2, 6, 8, 9, 10, 11, AND 12 OF THE HEALTH ACT, 2017

AND

**IN THE MATTER OF THE AFRICAN CHARTER ON THE RIGHTS
AND WELFARE OF THE CHILD, 1990, ARTICLES 3, 4, 5, 9(2) AND 17**

AND

**IN THE MATTER OF THE CONVENTION ON THE
RIGHTS OF THE CHILD, 1989, ARTICLES 5, 14(2) AND 40**

AND

**IN THE MATTER OF PROCEEDINGS IN THE SENIOR PRINCIPAL MAGISTRATES
COURT AT MAKADARA CRIMINAL CASE NO. 34 OF 2025 AND MSC/E239 OF 2023**

BETWEEN

HSO 1ST PETITIONER

AMO 2ND PETITIONER

TA 3RD PETITIONER



**NETWORK FOR ADOLESCENT AND YOUTH OF AFRICA
(NAYA) 4TH PETITIONER**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

**THE SENIOR PRINCIPAL MAGISTRATE'S COURT, MAKADARA LAW
COURTS 4TH RESPONDENT**

AND

**REPRODUCTIVE HEALTH NETWORK KENYA (RHNK) 1ST INTERESTED
PARTY**

KATIBA INSTITUTE 2ND INTERESTED PARTY

THE CRADLE - THE CHILDREN FOUNDATION 3RD INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition, dated 5th August 2025, raises weighty constitutional questions concerning the validity and enforcement of Sections 8, 9, 11 and 43(4)(f) of the *Sexual Offences Act*, No. 3 of 2006, as applied to consensual, non-coercive and non-exploitative sexual relationships between adolescents. The Petitioners, supported by the three Interested Parties, contend that the impugned statutory framework, both in its design and implementation, results in the unconstitutional criminalisation of natural adolescent intimacy, thereby violating a broad range of rights and freedoms guaranteed under the *Constitution* of Kenya, 2010; including the rights to dignity, equality and non-discrimination, privacy, liberty, fair trial, access to justice, health, and the best interests of the child.
2. The Petition is brought by the 1st, 2nd and 3rd Petitioners, being adolescents directly affected by criminal proceedings instituted under the impugned provisions, together with the 4th Petitioner, a child rights and youth advocacy organisation. The gravamen of the Petition is that the criminal justice system, as presently operationalised, fails to distinguish between exploitative sexual conduct involving coercion, abuse of power or predation, and consensual peer relationships between adolescents.
3. According to the Petitioners, the result is that children are exposed to arrest, detention, prosecution, stigma and long-term socio-economic and psychological harm in circumstances inconsistent with constitutional principles and international human rights standards.
4. Contemporaneously with the Petition, the Petitioners filed a Notice of Motion dated 5th August 2025 seeking, inter alia, conservatory and supervisory orders intended to preserve the substratum of the Petition and prevent further alleged violations pending the hearing and determination thereof.
5. Following an inter partes hearing of the Notice of Motion dated 5th August 2025 on 15th August 2025, and with the consent of all parties, this Court issued a series of conservatory and case-management directions intended to preserve the substratum of the Petition pending its determination.



6. The Court, by consent, granted interim reliefs in terms of prayers (c) and (d) of the Application, called for the complete records and trial files in *Makadara Criminal Case No. 34 of 2025* and *Makadara Criminal Case No. MSCO E239 of 2023*, and issued an order staying all further proceedings in the said criminal matters pending the hearing and determination of this Petition. The Court further directed that the remaining prayers in the Application be subsumed into the substantive Petition.
7. The 1st Respondent, the Attorney General, together with the 2nd, 3rd and 4th Respondents, opposed the Petition on grounds, inter alia, that the impugned provisions are constitutionally valid child-protection measures; that the prosecutorial actions undertaken were lawful, reasonable, and made in good faith; and that no constitutional violations have been demonstrated.
8. The Respondents further raised objections founded upon jurisdiction and the doctrine of res judicata, contending that the issues raised herein had previously been litigated and determined.
9. The Interested Parties supported the Petition, albeit to varying degrees. Generally, they contended that the impugned statutory framework, in both design and effect, fails to sufficiently distinguish consensual adolescent peer relationships from exploitative sexual conduct, thereby producing disproportionate constitutional consequences inconsistent with the best interests of the child, dignity, privacy, and the right to health.
10. Against that background, the Court is called upon to determine not only the constitutionality of the impugned statutory provisions and their enforcement, but also the appropriate scope of reliefs, if any, under Articles 22, 23 and 165 of the *Constitution*, taking into account the conservatory orders already issued and the continuing effect of these proceedings upon the pending criminal cases; in the event that the Petition and the Application were to succeed.

The Petitioners' Case

11. The Petitioners' case is premised on the contention that Sections 8, 9, 11 and 43(4)(f) of the *Sexual Offences Act*, No. 3 of 2006, as presently interpreted and enforced, operate in a manner that unconstitutionally criminalises consensual, non-coercive and non-exploitative sexual relationships between adolescents. According to the Petitioners, the impugned provisions fail to distinguish between exploitative or coercive sexual conduct and mutually consensual and natural peer relationships between adolescents. The consequence, they contend, is that adolescents are exposed to arrest, detention, prosecution, stigma, psychological trauma, educational disruption, and enduring socio-economic harm in circumstances that neither advance the protective purpose of the law nor accord with constitutional norms.
12. The Petitioners further contend that the impugned statutory framework disregards adolescents' evolving capacities, autonomy, and developmental realities, thereby infringing Articles 22, 24, 27, 28, 29, 31, 33, 35, 43, 46, 48, 49, 50 and 53 of the *Constitution*. They additionally invoke Kenya's obligations under international and regional human rights instruments, including the Convention on the Rights of the Child, the *African Charter on the Rights and Welfare of the Child*, the *African Charter on Human and Peoples' Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (The Maputo Protocol).
13. The Petition is brought by the 1st Petitioner, HSO, the 2nd Petitioner, AMO, the 3rd Petitioner, TA, and the 4th Petitioner, the Network for Adolescent and Youth of Africa (NAYA). Collectively, they challenge what they describe as the blanket criminalisation of adolescent sexuality through the



enforcement of Sections 8, 9, 11 and 43(4)(f) of the [Sexual Offences Act](#). They contend that the State has adopted a punitive criminal justice approach to adolescent sexuality while simultaneously failing to provide accessible, confidential and adolescent-responsive sexual and reproductive health information, counselling and healthcare services. According to the Petitioners, this dual failure exposes adolescents to criminal sanctions in circumstances characterised by vulnerability, limited awareness and developmental transition.

14. The factual basis of the Petition is illustrated through the experiences of the 1st, 2nd and 3rd Petitioners. The 1st Petitioner, HSO, is described as a seventeen-year-old adolescent male who experienced periods of homelessness, institutional care and economic vulnerability. It is pleaded that after residing at [Particulars Withheld] in Kwale County while attending [Particulars Withheld] High School, he later relocated to Nairobi where he met CNK, a sixteen-year-old adolescent girl. The Petition avers that the two entered into a mutually consensual romantic relationship founded upon companionship and emotional support, and that CNK had disclosed experiences of domestic abuse.
15. The Petitioners state that the relationship eventually evolved into cohabitation under difficult socio-economic circumstances, sustained through informal income-generating activities and shared domestic responsibilities. It is further pleaded that in February 2025, the 1st Petitioner and CNK were arrested without warrant in Dagoretti and detained at Kasarani Police Station. Thereafter, the 1st Petitioner was charged in *Makadara Criminal Case No. 34 of 2025* with the offence of defilement contrary to Section 8(1) as read together with Section 8(3) of the [Sexual Offences Act](#), together with an alternative charge under Section 11(1) thereof.
16. The Petitioners contend that notwithstanding the consensual and non-exploitative nature of the relationship, the criminal justice system subjected the 1st Petitioner to arrest, detention, prosecution, stigma, fear, anxiety and emotional suffering. It is further pleaded that bail was initially fixed at KShs 50,000, which the 1st Petitioner was unable to raise, resulting in continued detention until intervention by the 4th Petitioner facilitated his release.
17. The 2nd Petitioner, AMO, is similarly pleaded to have entered into a consensual romantic relationship with the 3rd Petitioner, TA, in 2022 while the latter was a seventeen-year-old secondary school student. The Petition avers that the relationship developed gradually through social media communication into a sustained emotional and romantic relationship characterised by mutual affection and voluntary engagement.
18. It is further pleaded that upon discovery of pregnancy in June 2023, the 3rd Petitioner disclosed the same to her mother and subsequently moved in with the 2nd Petitioner, culminating in the establishment of a cohabiting family unit. The Petitioners state that following a family dispute, the 2nd Petitioner was lured to Ruaraka Police Station and arrested, after which he was charged in *Makadara Criminal Case No. MSCO/E239 of 2023* with the offence of defilement contrary to Section 8(1) as read together with Section 8(4) of the [Sexual Offences Act](#) and an alternative charge under Section 11(1).
19. Although the prosecution was subsequently withdrawn pursuant to Section 87(a) of the [Criminal Procedure Code](#) and Section 40 of the [Sexual Offences Act](#) upon confirmation that both parties had been minors engaged in a consensual, non-coercive and non-exploitative relationship, the Petitioners maintain that the withdrawal neither cures the alleged constitutional infirmities in the impugned statutory provisions nor remedies the prejudice and harm allegedly occasioned by their enforcement.
20. The 3rd Petitioner, TA, avers that although she was never formally charged, she was nonetheless treated as a prosecution witness, subjected to police interrogation without legal representation, exposed to stigma from school authorities and peers, and compelled to participate in criminal proceedings against



her partner. She contends that these events caused psychological distress, emotional trauma, disruption of her education and interference with her developmental well-being. She further avers that she lacked access to adolescent-friendly sexual and reproductive healthcare, counselling and information, and that structural barriers, including stigma, cost and parental consent requirements, impeded access to essential healthcare services.

21. Collectively, the Petitioners contend that the impugned statutory framework fails to distinguish consensual adolescent intimacy from exploitative sexual conduct, thereby resulting in disproportionate and unconstitutional criminalisation. They assert that the enforcement of Sections 8, 9, 11 and 43(4)(f) of the [Sexual Offences Act](#) violates adolescents' rights to dignity, equality and non-discrimination, privacy, liberty and security of the person, access to information, health, fair trial, access to justice and the best interests of the child.
22. It is further contended that the blanket presumption under Section 43(4)(f), which treats adolescents as incapable of consenting to sexual conduct irrespective of context, maturity or evolving capacity, is inconsistent with constitutional and international human rights standards recognising adolescents as independent rights holders entitled to dignity, autonomy and developmental protection.
23. The Petitioners further submit that the criminalisation of consensual adolescent sexuality undermines public health objectives by deterring adolescents from seeking reproductive health information, counselling and healthcare services. According to the Petitioners, healthcare providers routinely deny adolescents access to reproductive health services for fear of facilitating conduct criminalised under the [Sexual Offences Act](#), thereby driving adolescent sexuality underground and increasing vulnerability to unintended pregnancies, HIV infection, stigma and social exclusion. They maintain that the State has failed in its obligations under Articles 21 and 43 of the [Constitution](#) to provide accessible, confidential and youth-responsive healthcare and counselling services.
24. The Petition is anchored upon the [Constitution](#) of Kenya, 2010, particularly Articles 2, 3, 10, 19, 20, 21, 22, 23, 24, 27, 28, 29, 31, 33, 35, 43, 46, 48, 49, 50 and 53, which, according to the Petitioners, impose obligations upon the State to respect, protect and fulfil fundamental rights and freedoms in a manner consistent with human dignity, equality, inclusiveness, social justice and protection of the marginalised. The Petitioners further rely on the [Health Act](#), the [HIV Prevention and Control Act](#), the [Children's Act](#) and the [Criminal Procedure Code](#), together with international and regional human rights instruments incorporated into Kenyan law by virtue of Articles 2(5) and 2(6) of the [Constitution](#).
25. In support of the proposition that adolescents are independent constitutional persons entitled to the full protection of the Bill of Rights, the Petitioners rely on [Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another](#) (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) (3 October 2013), where the Constitutional Court of South Africa held that the criminalisation of consensual sexual conduct between adolescents violated constitutional rights and suspended investigations, arrests and prosecutions under the impugned provisions pending legislative reform. Reliance is further placed on [S v M \(Centre for Child Law as Amicus Curiae\)](#) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC), where Sachs J observed that children are independent constitutional persons entitled to dignity, autonomy and self-expression.
26. On the issue of dignity under Article 28 of the [Constitution](#), the Petitioners contend that the impugned provisions stigmatise and degrade adolescents by labelling them criminal offenders for engaging in developmentally normal, consensual and non-exploitative relationships. In that regard, reliance is placed on [Dawood and Another v Minister of Home Affairs and Others](#) (CCT35/99) [2000] ZACC 8, where the Constitutional Court of South Africa held that dignity is both a foundational constitutional



- value and an enforceable right informing the interpretation of all other rights, *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3, where life and dignity were recognised as foundational constitutional values, *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5, which recognised self-autonomy as intrinsic to dignity and *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14, where the Court affirmed that dignity encompasses the right to make personal decisions affecting one's life. Reliance is also placed on *Francis Karioko Muruatetu & Another v Republic and MWK & Another v Attorney General & 4 Others* [2017] KEHC 1496 (KLR) for the proposition that dignity lies at the heart of the *Constitution* and requires every person to be treated with worth and respect.
27. With respect to privacy under Article 31 of the *Constitution*, the Petitioners contend that consensual adolescent intimacy falls within the constitutionally protected sphere of decisional autonomy and private life. Reliance is placed on *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* [1998] ZACC 15 1999 (1) SA 6 (CC), where the Constitutional Court held that privacy protects intimate personal relationships from unjustified state intrusion, and *Botha v Smuts and Another* [2024] ZACC 22, where privacy was recognised as encompassing autonomous decision-making in intimate personal matters. The Petitioners further rely on *Justice K.S. Puttaswamy (Retd.) v Union of India* for the proposition that decisional autonomy in matters of intimacy and sexuality lies at the core of constitutional privacy protections.
 28. The Petitioners further contend that the impugned statutory framework violates the constitutional principle that the best interests of the child are of paramount importance in every matter concerning the child under Article 53(2) of the *Constitution*. They argue that arrest, detention, interrogation and prosecution subject adolescents to avoidable trauma, educational disruption, stigma and psychosocial harm while failing to provide rehabilitative or protective interventions. Reliance is placed on *P.O.O. (A minor) v Director of Public Prosecutions & the SRM, Mbita Law Courts* (2017), where the High Court observed that children involved in such relationships require guidance and counselling rather than criminal sanctions, and on *Eliud Waweru Wambui v Republic*, Cr. App. No. 102 of 2016, where the Court of Appeal lamented the increasing incarceration of young persons arising from consensual adolescent relationships and called for urgent national interrogation of the issue.
 29. The Petitioners additionally submit that the present proceedings are not barred by the doctrine of *res judicata* notwithstanding the decision in *CKW v Attorney General & Another* (2014). In that regard, they rely on *John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR), where the Supreme Court recognised that constitutional litigation may warrant a flexible application of the doctrine where substantial injustice would otherwise arise, and *Matemu v Trusted Society of Human Rights Alliance & 5 others* (Civil Application 29 of 2014) [2014] KESC 6 (KLR), for the proposition that public interest constitutional litigation should not be defeated by procedural technicalities. The Petitioners further contend that the present proceedings raise distinct issues concerning adolescents' evolving capacities, structural constitutional remedies, police conduct, arrest and detention, and the legality of the blanket presumption under Section 43(4)(f), matters which, according to them, were not conclusively addressed in the earlier proceedings.
 30. The Applicants submit that this Court is properly seized of jurisdiction under Articles 22, 23, 165(3) (b), 165(6) and 165(7) of the *Constitution* to determine violations and threatened violations of constitutional rights and to grant appropriate conservatory and supervisory reliefs. Reliance is placed on *Board of Governors, Moi High School Kabarak & Another v Malcolm Bell*, SC Application Nos. 12 & 13 of 2013, where the Supreme Court affirmed that courts possess inherent authority to issue ancillary orders necessary to safeguard the subject matter of proceedings before them.



31. The Applicants further submit that they have satisfied the principles governing the grant of conservatory and stay orders as enunciated in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, namely that the matter raises an arguable case, that the Petition would be rendered nugatory absent interim relief, and that the public interest favours the grant of the orders sought. On the existence of an arguable case, reliance is placed on *Anami Silverse Lisamula v The Independent Electoral and Boundaries Commission & 2 Others*, Petition No. 9 of 2014 [2014] eKLR, where the Supreme Court held that constitutional issues raising serious and meritorious questions cannot be wished away without the benefit of a substantive hearing.
32. On the nugatory aspect, the Applicants submit that unless the criminal proceedings against the 1st Applicant are stayed, the Petition will be rendered academic and the constitutional injury irreversible. Reliance is placed on *Republic v Kenya Anti-Corruption Commission & 2 others* [2009] eKLR, where the Court of Appeal held that stay orders may issue where continuation of criminal proceedings would occasion irreparable prejudice and render subsequent proceedings nugatory. The Applicants further rely on *Praxidis Namoni Saisi v Director of Public Prosecutions & 2 others* [2020] eKLR, where the Supreme Court, adopting its reasoning in *Dr. Peter Ajodo Omanda & 6 Others v Ethics and Anti-Corruption Commission & 2 Others*, held that stay orders are appropriate where arguable constitutional issues would otherwise be rendered nugatory by ongoing criminal proceedings.
33. Lastly, the Applicants contend that the public interest overwhelmingly favours the grant of conservatory reliefs. They argue that the impugned provisions continue to occasion systemic constitutional violations against adolescents across Kenya and that, absent interim intervention, adolescents engaged in consensual, non-coercive and non-exploitative relationships will continue to face arrest, detention and prosecution. They maintain that the reliefs sought are narrowly tailored and do not interfere with the prosecution of cases involving coercion, exploitation, abuse or violence, but merely seek to suspend prosecutions arising from consensual peer relationships pending constitutional determination of the issues raised.
34. Consequently, the Petitioners seek, the following reliefs:
 - A. A declaration that the arrest, prosecution, and detention of the 1st Petitioner under Sections 8, (1) as read together with Section 8(3), and 11 (1) of the *Sexual Offences Act* No 3 of 2006 and 2nd Petitioner under Sections 8, (1) as read together with Section 8(4), and 11 (1) of the *Sexual Offences Act* No 3 of 2006 for engaging in consensual, non-coercive, non-exploitative sexual relations violates Articles 25, 27, 28, 29,31, 33,35, 43,46, 48, 49 50, and 53 of the *Constitution*.
 - B. An order of *certiorari* calling into court and quashing the charge sheets in *Makadara Law Courts Criminal Case No. 34 of 2025* against the 1st Petitioner and *Criminal Case No. MSCO/E239 of 2023* against the 2nd Petitioner.
 - C. A declaration that the blanket criminalization of mutually consensual, non-coercive and non-exploitative sexual relations between adolescents under Sections 8, 9,11 of the *Sexual Offences Act* and the blanket presumption of adolescents' lack of capacity to consent to sexual relations through application of section 43 (4) (f) of the *Sexual Offences Act* No 3 of 2006 without recognizing adolescents' evolving capacities are unconstitutional and their continued application violate the rights of adolescents as provided under Articles 25, 27, 28, 29,31, 43(l) (a), 46, 48, 49, 50, and 53(l)(d) & (2) of the *Constitution*.
 - D. An order of mandamus compelling the 1st and 3rd Respondents, to within 90 days of the judgment, issue circulars to all prosecutors and police officers directing them on the illegality



of arresting, prosecuting and harassing adolescents engaging in mutually consensual, non-coercive, non-exploitative sexual relations.

- E. An order of mandamus compelling the 2nd Respondent, to within 90 days of judgment, submit to the National Assembly a Bill to amend Sections 8, 9, and 11 of the [Sexual Offences Act](#) to decriminalize consensual, non-coercive, non-exploitative sexual relations between adolescents and to submit periodic progress reports to this Honorable Court every sixty (60) days.
- F. An order for general and aggravated damages to the 1st, 2nd, and 3rd Petitioners for the violations suffered as a result of the arrest, detention, and prosecution for engaging in consensual, non-coercive, and non-exploitative sexual relations.
- G. Any other relief that this Honourable Court deems just and appropriate in the circumstances.

The 1st Respondent's Case

- 35. The 1st Respondent opposes both the Petition and the Notice of Motion dated 5th August 2025. Its position is that the proceedings seek to undermine the constitutional and statutory obligation of the State to protect children from sexual exploitation and abuse through the framework established under the [Sexual Offences Act](#), No. 3 of 2006. The 1st Respondent contends that Sections 8, 9, 11 and 43(4)(f) of the [Act](#) constitute lawful and constitutionally compliant child-protection measures intended to safeguard children from premature sexual activity, exploitation, and the attendant physical, psychological and social consequences.
- 36. The 1st Respondent's case is principally advanced through the affidavits sworn by Alex Gituma, PC Elizabeth Wangwa and PC Peter Githaka. It is contended that the criminal proceedings against the Petitioners arose from lawful investigations initiated upon receipt of complaints involving minors.
- 37. With regard to the 1st Petitioner, the 1st Respondent avers that investigations commenced following a missing person report concerning CNK, who was then alleged to be a fifteen-year-old minor. According to the 1st Respondent, CNK was subsequently traced while cohabiting with the 1st Petitioner. It is contended that the 1st Petitioner identified himself to investigators as a boda boda operator and did not disclose that he too was a minor, thereby leading investigators to reasonably believe that he was an adult male engaged in a sexual relationship with a child.
- 38. The 1st Respondent further states that it was only after plea taking that counsel for the defence raised the issue of the 1st Petitioner's age, prompting the trial court to order an age assessment. The said assessment subsequently confirmed that the 1st Petitioner was below the age of eighteen years. Thereafter, the prosecution reviewed the matter pursuant to the [Office of the Director of Public Prosecutions Decision to Charge Guidelines](#) and withdrew the proceedings under Section 87(a) of the [Criminal Procedure Code](#) upon confirmation that both parties were minors.
- 39. Similarly, in relation to the 2nd Petitioner, the 1st Respondent avers that the evidence initially presented to the prosecution indicated that he was an adult engaged in boda boda operations. It is pleaded that subsequent age verification established that he too was a minor at the material time, following which the charges were withdrawn in accordance with prosecutorial policy and the best interests of the child. The 1st Respondent therefore maintains that all prosecutorial decisions were undertaken lawfully, independently and in good faith on the basis of the evidence available at the material time.
- 40. On the constitutionality of the impugned provisions, the 1st Respondent submits that Sections 8, 9, 11 and 43(4)(f) of the [Sexual Offences Act](#) serve a legitimate constitutional purpose, namely the protection of children from exploitation, manipulation and the harmful consequences associated with premature



sexual conduct. It is contended that the law recognises that children lack the emotional, psychological and cognitive maturity necessary to appreciate the consequences of sexual activity and therefore cannot lawfully consent to sexual intercourse.

41. In support of that position, reliance is placed on *CKW v Attorney General & another* [2014] KEHC 3657 (KLR), *P.K.S v Republic* [2013] KEHC 2759 (KLR), *Solomon v Republic* [2024] KEHC 974 (KLR), *Ezekiel Cheruiyot Koros v Republic* [2010] eKLR and *Bonu v R* [2010] eKLR for the proposition that the *Sexual Offences Act* lawfully criminalises sexual conduct involving minors in furtherance of the State's protective obligations and that minors lack the legal capacity to consent to sexual relations.
42. The 1st Respondent further contends that the prosecution of the Petitioners did not violate their constitutional rights. It is submitted that the Office of the Director of Public Prosecutions is an independent constitutional office established under Article 157 of the *Constitution* and mandated to institute, undertake and discontinue criminal proceedings independently. Reliance is placed on *Yunus Abdul Rubi & 2 others v Director of Public Prosecution & 2 others* [2016] KEHC 4146 (KLR).
43. According to the 1st Respondent, the prosecutorial decisions complained of were informed by the evidence presented by investigating officers and were made in the lawful exercise of constitutional discretion. It is contended that once it became apparent that the Petitioners were minors, the proceedings were withdrawn in accordance with the law and applicable prosecutorial policy. The 1st Respondent therefore denies any arbitrariness, malice, discrimination or abuse of power.
44. The 1st Respondent further avers that prosecutorial policy concerning children in conflict with the law requires the opening of protection and care files to facilitate counselling, welfare support and continuity of education for affected minors. It is therefore contended that the criminal justice process incorporated child-sensitive safeguards consistent with Article 53(2) of the *Constitution*.
45. In response to the allegation that the State failed to provide adolescents with adequate sexual and reproductive health information and services, the 1st Respondent submits that various reproductive health and adolescent-support programmes have been implemented through the Ministry of Health, the Ministry of Education and the Kenya Institute of Curriculum Development. Reference is made to reproductive health education in schools, menstrual hygiene management programmes and the National Guidelines for the Provision of Adolescent and Youth-Friendly Services. The 1st Respondent therefore disputes the allegation that the State failed in its constitutional obligations relating to adolescent reproductive health information and services.
46. Regarding the reliefs sought in the Petition, the 1st Respondent contends that the prayer for certiorari quashing the impugned criminal proceedings has been overtaken by events following the withdrawal of the charges under Section 87(a) of the *Criminal Procedure Code*. It is further submitted that the prosecutorial decisions complained of were made lawfully, intra vires and in the proper exercise of constitutional discretion, thereby disentitling the Petitioners to judicial review reliefs.
47. In support of that contention, reliance is placed on *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 and *Githunguri v Republic* [1986] LRC 618 for the proposition that courts ought not interfere with prosecutorial discretion absent proof of arbitrariness, illegality, bad faith or oppression.
48. The 1st Respondent likewise opposes the prayer for mandamus compelling the issuance of directives prohibiting the arrest and prosecution of adolescents engaged in sexual relations. It is contended that such orders would unlawfully interfere with the constitutional independence of the Director of Public Prosecutions and would further contradict the express provisions of the *Sexual Offences Act*. Reliance



is again placed on [*CKW v Attorney General & Another*](#) [2014] KEHC 3657 (KLR) in support of the proposition that the prosecution of minors under the [*Sexual Offences Act*](#) is lawful where the circumstances disclose offences created under the Act.

49. In conclusion, the 1st Respondent maintains that the Petitioners have failed to establish any constitutional violation or demonstrate that the impugned provisions are unconstitutional. It is contended that the actions undertaken by the prosecution were lawful, constitutionally sanctioned and guided at all times by the best interests of the child and the State's obligation to protect children from sexual exploitation and abuse. Consequently, the 1st Respondent urges the Court to dismiss both the Petition and the Notice of Motion with costs in the interests of justice and public policy.

The 2nd, 3rd and 4th Respondents' Case

50. The 2nd, 3rd and 4th Respondents opposed both the Petition and the Notice of Motion through a Notice of Preliminary Objection, Grounds of Opposition and written submissions. Their opposition was principally anchored on the doctrines of jurisdiction and res judicata. They contend that the issues raised in the present proceedings were conclusively determined by the High Court in [*CKW v Attorney General & another*](#) and that the instant Petition amounts to an impermissible attempt to re-litigate matters already settled by a court of competent jurisdiction.
51. The Respondents submit that jurisdiction is the foundation upon which judicial authority rests and that a court cannot arrogate to itself jurisdiction not conferred by the [*Constitution*](#) or statute. In support of that proposition, reliance is placed on *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others*, *Phoenix of E.A. Assurance Company Limited v S.M. Thiga t/a Newspaper Service and Gamachu Construction Limited v Agricultural Finance Corporation & another Equilog Enterprises Limited (Interested Party)*, where the courts emphasised that jurisdiction is everything and that proceedings commenced without jurisdiction are a nullity ab initio.
52. The Respondents further contend that the Preliminary Objection raises pure points of law capable of disposing of the proceedings without recourse to evidence. Reliance is placed on *Mukisa Biscuit Manufacturing Ltd v West End Distributors*. They further submit that a preliminary objection may properly be raised at any stage of proceedings so long as the suit remains active, citing *Gencel v Goga*, *Kenya National Highways Authority v George Kirimana Abuaba* and *Adero & another v Ulinzi Sacco Society Limited*.
53. On the plea of res judicata, the Respondents submit that the present Petition is barred as it seeks to reopen constitutional questions already determined in [*CKW v Attorney General & another*](#). They contend that the constitutionality of Sections 8 and 11 of the [*Sexual Offences Act*](#), together with allegations relating to discrimination, unlawful prosecution and violation of constitutional rights arising from consensual sexual relations between adolescents, were directly and substantially determined in the said decision. According to the Respondents, the present Petition merely repackages substantially similar grievances under an expanded constitutional framework.
54. Reliance is placed on [*John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others*](#), where the Supreme Court affirmed that the doctrine of res judicata is grounded upon public policy considerations of finality in litigation, certainty in judicial decisions and the avoidance of multiplicity of suits. Further reliance is placed on *Kanyari v Mwangi & another*, *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* and *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* on the settled ingredients of res judicata, namely identity of issues, parties or privies, sameness of title, final determination, and competence of the previous court.



55. The Respondents maintain that the factual and legal substratum of the present Petition mirrors that in CKW supra, where the Court upheld the constitutionality of Section 8 of the [Sexual Offences Act](#) and affirmed that the provision serves the legitimate objective of protecting children from premature sexual activity. They argue that the inclusion of additional petitioners, expanded factual circumstances and broader constitutional framing does not alter the core issues already determined, nor does it create a novel constitutional controversy warranting fresh adjudication.
56. It is further contended that entertaining the present Petition would undermine the doctrine of finality in litigation, expose the judicial process to contradictory outcomes and amount to an abuse of the court process. The Respondents therefore urge the Court to uphold the Preliminary Objection and strike out the Petition for want of jurisdiction.
57. In their Grounds of Opposition, the Respondents further submit that statutes enjoy a presumption of constitutionality and that courts ought to exercise restraint in interfering with legislative policy choices. They maintain that any perceived deficiencies in the law relating to adolescent sexual conduct fall within the legislative province of Parliament rather than judicial intervention.
58. The Respondents additionally rely on Section 193A of the [Criminal Procedure Code](#) to contend that the existence of constitutional proceedings does not bar or invalidate parallel criminal proceedings. According to the Respondents, no exceptional circumstances have been demonstrated to warrant judicial interference with ongoing prosecutions instituted under the [Sexual Offences Act](#).
59. The 3rd Respondent, in particular, maintains that the investigations leading to the charges against AMO and HSO were lawfully undertaken in the ordinary discharge of police duties and in accordance with constitutional and statutory obligations relating to child protection.
60. In respect of AMO, the 3rd Respondent avers that investigations commenced following a complaint that culminated in charges under Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#). It is contended that upon arrest, AMO identified himself as a nineteen-year-old boda boda rider and consistently maintained that position in his statement to investigators, thereby leading the investigating officers to reasonably conclude that he was an adult.
61. The 3rd Respondent further depones that it was only at plea stage that the issue of minority arose, prompting an age assessment. Although initial findings allegedly suggested adulthood, a baptismal card was subsequently produced indicating that AMO was seventeen years and three months old at the material time. The prosecution thereafter reviewed the matter and withdrew the charges pursuant to Section 87(a) of the [Criminal Procedure Code](#) as read together with Section 40 of the [Sexual Offences Act](#), taking into account the best interests of the children born of the relationship.
62. In relation to HSO, the 3rd Respondent avers that the matter arose from a missing person report concerning CNK, a fifteen-year-old minor who was allegedly traced while cohabiting with HSO as husband and wife. It is contended that upon arrest, HSO represented himself as a nineteen-year-old casual labourer, which informed the decision by investigators and the Director of Public Prosecutions to prefer charges under the [Sexual Offences Act](#) on the basis of apparent adulthood.
63. The 3rd Respondent further states that subsequent review of the matter, including age-related inquiries, informed prosecutorial reconsideration and the intended withdrawal of the charges in line with child-protection policy and applicable prosecutorial guidelines governing children in conflict with the law.
64. The 3rd Respondent denies all allegations of intimidation, coercion, harassment or improper treatment of the Petitioners or witnesses. It is maintained that all investigative steps were undertaken lawfully and in accordance with constitutional safeguards. The Respondent further asserts that witnesses were



handled in accordance with proper procedure, including lawful bonding and attendance before court, and that no unlawful detention or mistreatment occurred at any stage of the investigations.

65. It is additionally contended that the actions undertaken by investigators were carried out in good faith on the basis of the information available at the material time, including the representations allegedly made by the Petitioners regarding their ages and personal circumstances. The Respondents further rely on child justice principles under the Children Act and relevant national policy frameworks, contending that all investigative and prosecutorial decisions were guided by child-protection considerations and the evolving factual matrix of each case.
66. In the premises, the 2nd, 3rd and 4th Respondents maintain that the investigations, arrests, charging decisions and subsequent prosecutorial actions complained of were lawful, justified and undertaken in the proper discharge of statutory and constitutional duties. They therefore urge the Court to find that the Petition is devoid of merit, constitutes an abuse of the court process, and ought to be dismissed with costs.

The 1st Interested Party's Case

67. The 1st Interested Party, Reproductive Health Network Kenya (RHNK), supported the Petition through written submissions grounded on empirical research, clinical experience, public health considerations and constitutional interpretation. Its case is that Sections 2, 8, 9, 11, 39, 42 and 43 of the Sexual Offences Act, when read cumulatively, extend criminal liability to consensual, non-coercive sexual conduct between adolescents, thereby erasing the distinction between exploitative conduct and peer-based adolescent relationships.
68. RHNK contends that although the State undoubtedly bears a legitimate constitutional obligation to protect children from sexual violence and exploitation, that mandate cannot lawfully be pursued through statutory provisions framed so broadly as to criminalise normative adolescent development and impede access to essential healthcare services.
69. The Interested Party further submits that the impugned statutory framework has created a systemic chilling effect both on adolescents and on healthcare providers. It is their case that uncertainty regarding the legality of providing sexual and reproductive healthcare services to sexually active adolescents has resulted in hesitation, delay and, in some instances, outright denial of care.
70. In support of that position, RHNK relies on Manguro and Temmerman, A critical review of adolescent sexual and reproductive health and rights in Kenya, Med, 2022 wherein it was observed that:

“some health workers were opposed to providing contraceptive information and services to adolescents without their parents’ consent as they did not know if this was legal or not.”
71. RHNK submits that this uncertainty has translated into professional caution which, in practice, manifests in denial or restriction of access to contraception and related reproductive health services. According to the Interested Party, the consequence is that adolescents are exposed to unintended pregnancies and related health risks, not because of medical contraindication, but due to legal ambiguity and fear of criminal liability.
72. It is further contended, on the basis of the same study, that adolescent pregnancy rates in Kenya increase significantly with age, rising from slightly above 3% among fifteen-year-old girls to nearly 40% among nineteen-year-olds. RHNK submits that these statistics demonstrate both the prevalence of adolescent sexual activity and the differentiated realities and health needs across varying adolescent age groups.



73. The Interested Party therefore argues that blanket legal approaches which treat all adolescents as a homogenous category fail to recognise evolving capacities and consequently result in structural exclusion of older adolescents from appropriate sexual and reproductive health interventions. According to RHNK, the disconnect between legal prohibition, public policy and lived social reality produces foreseeable adverse outcomes, including heightened vulnerability to maternal mortality, HIV infection, unsafe abortion and psychological harm.
74. RHNK further relies on [*Kenya's National Adolescent Sexual and Reproductive Health Policy* \(2015\)](#), which is premised upon human rights, dignity and responsiveness to the differing sexual and reproductive health needs of adolescents. It is submitted that although the policy framework itself is progressive, its objectives are fundamentally undermined by criminal provisions which deter adolescents from seeking healthcare services.
75. In that regard, RHNK contends that the inconsistency between policy aspiration and criminal prohibition amounts not merely to administrative incoherence but to a constitutional violation, since the State cannot simultaneously affirm adolescent access to healthcare while maintaining laws that inhibit access in practice.
76. On that basis, the Interested Party submits that the impugned provisions violate Article 43(1)(a) of the [*Constitution*](#) by creating barriers to healthcare access, discouraging preventive health-seeking behaviour, and impairing the ability of healthcare professionals to discharge their duties without fear of criminal sanction. It is further argued that the impugned framework is inconsistent with the constitutional obligation to progressively realise the right to health through enabling rather than obstructive legal measures.
77. On the best interests of the child under Article 53(2) of the [*Constitution*](#), RHNK submits that the prosecution of adolescents for consensual peer sexual conduct is inherently contrary to their welfare and developmental interests. It is their position that arrest, prosecution and exposure to criminal sanctions subject adolescents to stigma, psychological harm and social exclusion disproportionate to the nature of the conduct involved.
78. Reliance is placed on *MTKO v JMR* (Civil Appeal E064 of 2023) [2025] KEHC 3681, wherein the Court held that the best interests of the child must be assessed contextually, having regard to constitutional rights, statutory protections and applicable international instruments.
79. RHNK further relies on Article 3(1) of the [*Convention on the Rights of the Child*](#) together with [*General Comment No. 14 \(2013\)*](#), which characterises the best interests' principle as simultaneously a substantive right, an interpretive principle and a procedural rule. It is submitted that proper application of that principle requires courts to adopt interpretations that advance child welfare, dignity and development, including recognition of adolescents' evolving capacities and avoidance of blanket criminalisation of consensual peer conduct.
80. Further reliance is placed on [*General Comment No. 20 \(2016\)*](#), particularly paragraph 40 thereof, which cautions States against criminalising consensual and non-exploitative sexual activity between adolescents of similar ages. RHNK also relies on *Kangaude and Skelton*, "*Decriminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa*," SAGE Open, 8(4), 2018 for the proposition that criminalisation of normative adolescent conduct results in stigma, diminished autonomy and increased harm contrary to the intended protective objectives of such laws.
81. The Interested Party additionally relies on *Nair and Pattnaik*, "*Evaluating the Efficacy of Romeo-Juliet Laws in India*," *Journal on the Rights of the Child*, Vol. VI, Issue 1, April 2025, pp. 176–189, which observed that healthcare providers may be deterred from offering reproductive health services



- to adolescents due to fear of legal consequences, and that rigid age-of-consent regimes frequently fail to reflect the developmental realities of adolescent sexuality.
82. RHNK further submits that criminalisation does not deter adolescent sexual activity but instead drives such conduct underground into unsafe and unregulated contexts while simultaneously discouraging adolescents from seeking healthcare services and information.
 83. On comparative jurisprudence, the Interested Party places reliance on [*Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*](#) (CCT 12/13) [2013] ZACC 35, where the Constitutional Court of South Africa held that criminalisation of consensual adolescent sexual conduct undermines the best interests of children by generating fear, shame, stigma and avoidance of healthcare services. RHNK submits that the reasoning in that decision is directly relevant to the present Petition, particularly given Kenya's broader framework of criminalisation.
 84. Further reliance is placed on [*A.C. v Manitoba \(Director of Child and Family Services\)*](#), 2009 SCC 30, [2009] 2 S.C.R. 181, where the Supreme Court of Canada emphasised that adolescent autonomy must be assessed in accordance with maturity and evolving capacity. RHNK submits that a complete denial of adolescent agency in matters relating to sexuality creates an internally inconsistent and constitutionally untenable legal framework.
 85. The Interested Party additionally contends that the impugned provisions fail the proportionality test under Article 24 of the [*Constitution*](#), as they impose overbroad limitations on constitutional rights without minimally impairing those rights. Reliance is placed on [*Cyprian Andama v DPP & Attorney General*](#) [2018] eKLR, where the Court held that any limitation of rights must be reasonable, justifiable and proportionate to the legislative objective sought to be achieved.
 86. RHNK argues that less restrictive and more constitutionally proportionate alternatives exist, including close-in-age exemptions, adolescent-responsive healthcare services and comprehensive sexuality education, all of which would better reconcile the objectives of child protection with adolescents' rights to dignity, autonomy and health.
 87. In support of that proposition, RHNK cites comparative legislative models from South Africa, Malawi, Canada and other jurisdictions which recognise close-in-age exceptions and permit adolescent access to sexual and reproductive healthcare services. It is submitted that those jurisdictions demonstrate that child-protection objectives may effectively be achieved without resort to blanket criminalisation.
 88. Ultimately, RHNK submits that the cumulative effect of the impugned statutory provisions is to undermine constitutional guarantees under Articles 28, 31, 43(1)(a) and 53(2) of the [*Constitution*](#) by eroding dignity, privacy, health and the best interests of the child. The Interested Party therefore supports the Petition and urges the Court to grant the reliefs sought.

The 2nd Interested Party's Case

89. The 2nd Interested Party, Katiba Institute, supports the Petition and contends that the impugned provisions of the [*Sexual Offences Act*](#) establish a punitive legal framework that unconstitutionally criminalises consensual sexual conduct between adolescents. It is submitted that, although the stated objective of the Act is the protection of children from sexual exploitation and abuse, the manner in which Sections 8, 9, 11 and 43(4)(f) are framed and enforced results in the prosecution, stigmatisation and penalisation of adolescents engaged in consensual, non-coercive and non-exploitative peer relationships. According to the 2nd Interested Party, such criminalisation is incompatible with the



transformative character of the [Constitution](#) of Kenya, 2010, which is founded upon the values of human dignity, equality, freedom, inclusiveness and protection of the vulnerable.

90. Katiba Institute adopts the factual background set out in the Petition and relies on the Replying Affidavit of Emily Kinama sworn on 26th September 2025. It identifies the principal issues arising for determination as whether the impugned provisions violate the constitutional principle of the best interests of the child; whether they infringe rights guaranteed under the Bill of Rights, including dignity, privacy, equality and access to health; whether they satisfy the proportionality test under Article 24 of the [Constitution](#); and whether the Court is barred by the doctrine of separation of powers from interrogating the constitutionality of the impugned statutory framework.
91. The 2nd Interested Party anchors its submissions upon the transformative and purposive character of constitutional interpretation under Articles 20(3) and 259 of the [Constitution](#). It submits that constitutional interpretation must be holistic, liberal and rights-affirming, and must promote rather than restrict the enjoyment of fundamental rights and freedoms. Reliance is placed on In the [Matter of Kenya National Commission on Human Rights](#) (Reference 1 of 2014) [2014] KESC 33 (KLR), [Consumer Federation of Kenya \(COFEK\) v Attorney-General & 2 others](#) [2012] KEHC 5213 (KLR), [Bala v Attorney-General](#) (Petition 238 of 2016) [2017] KEHC 8350 (KLR), In the [Matter of the Interim Independent Electoral Commission \(Applicant\)](#) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) and [Attorney-General v Kituo Cha Sheria & 7 others](#) [2017] KECA 773 (KLR) for the proposition that the [Constitution](#) must be interpreted in a manner that advances its values, purposes and underlying principles.
92. It is further submitted that the constitutionality of legislation falls to be determined through an examination of both its purpose and effect. In that regard, reliance is placed on [Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) [2017] KECA 477 (KLR), [R v Big M Drug Mart Ltd](#) [1985] 1 SCR 295, [Olum & Another v Attorney-General](#) [2002] 2 EA 508, [Law Society of Kenya v Attorney-General & 4 others](#) [2023] KESC 19 (KLR), [Law Society of Kenya v Attorney-General & another](#) (Petition 4 of 2019) [2019] KESC 16 (KLR), [Senate & 2 others v Council of County Governors & 8 others](#) (Petition 25 of 2019) [2022] KESC 7 (KLR) and [National Assembly v Katiba Institute & 6 others](#) (Civil Appeal 243 of 2018) [2023] KECA 1174 (KLR). The 2nd Interested Party contends that, even where legislation pursues a legitimate protective objective, it may nonetheless be unconstitutional if its practical effect unjustifiably limits constitutional rights.
93. On the issue of separation of powers, Katiba Institute rejects the contention that this Court lacks authority to interrogate the constitutionality of the impugned provisions. It submits that constitutional supremacy displaces parliamentary supremacy and vests courts with the obligation to review legislation alleged to contravene the [Constitution](#). Reliance is placed on In the [Matter of the Speaker of the Senate & another](#) (Advisory Opinion Reference 2 of 2013) [2013] KESC 7 (KLR), [Doctors for Life International v Speaker of the National Assembly and Others](#) (CCT 12/05) [2006] ZACC 11 and [Speaker of National Assembly v De Lille MP & Another](#) 297/98 (1999) (ZASCA 50) for the proposition that no arm of government is immune from constitutional scrutiny.
94. The 2nd Interested Party further submits that the impugned statutory framework violates the constitutional principle that the best interests of the child are of paramount importance in every matter concerning the child under Article 53(2) of the [Constitution](#). Reliance is placed on Article 3 of the Convention on the Rights of the Child, Article 4(1) of the [African Charter on the Rights and Welfare of the Child](#), and Section 8 of the [Children Act](#), 2022. It is argued that criminal prosecution, detention and exposure of adolescents to the criminal justice system inflicts stigma, trauma and developmental harm inconsistent with child-sensitive justice and rehabilitation.



95. In support of this contention, reliance is placed on *J v C* [1970] AC 668, *MWK & another v Attorney-General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae)* (Constitutional Petition 347 of 2015) [2017] KEHC 1496 (KLR) and *CMM (Suing as Next Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others* (Petition 13 (E015) of 2022) [2023] KESC 68 (KLR), where courts underscored the need for child-sensitive and rehabilitative approaches in matters affecting children. Reliance is further placed on *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18, where the Constitutional Court of South Africa emphasised that children require heightened constitutional protection and that courts must adopt approaches that minimise harm to children within the justice system.
96. Katiba Institute additionally submits that the impugned provisions undermine the constitutional principles of life, survival and development of the child. It argues that arrest, incarceration and criminal labelling interfere with adolescents' psychological, emotional and social development and are therefore inconsistent with the State's constitutional obligation to support the development of children into full and autonomous citizens. Reliance is placed on *Centre for Child Law v Minister for Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC), *MWK & another v Attorney-General* (*supra*), and *Gillick v West Norfolk & Wisbech Area Health Authority* [1985] 3 ALL ER 402, for the proposition that children possess evolving capacities which the law must recognise and protect.
97. The 2nd Interested Party further submits that adolescent sexuality and emerging sexual autonomy are developmental realities which cannot constitutionally be addressed solely through criminal sanctions. Reliance is placed on *General Comment No. 20* of the Committee on the Rights of the Child, particularly paragraph 40, which discourages the criminalisation of consensual and non-exploitative sexual conduct between adolescents of similar ages, and paragraph 10, which recognises adolescence as a distinct stage characterised by evolving capacities and increasing autonomy.
98. On equality and non-discrimination under Article 27, Katiba Institute argues that the impugned provisions have a disproportionate and discriminatory effect, particularly against adolescent boys, who are frequently prosecuted while adolescent girls in similar circumstances are treated exclusively as victims. Reliance is placed on *Gichuru v Package Insurance Brokers, R v Big M Drug Mart, Wambui v Republic, EWS v Republic, GO v Republic* and *P.O.O. (A Minor) v Director of Public Prosecutions*, to demonstrate that facially neutral laws may nonetheless operate in a discriminatory manner by reason of their practical enforcement and social context.
99. The 2nd Interested Party further contends that the criminalisation of consensual adolescent intimacy violates the rights to dignity and privacy under Articles 28 and 31 of the *Constitution*. It is submitted that intimate personal relationships and decisions concerning sexuality fall within the protected sphere of decisional autonomy and private life. Reliance is placed on *Ahmed Issack Hassan v Auditor General, S v M* (*supra*), and *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35, where the Constitutional Court of South Africa held that criminalising consensual sexual conduct between adolescents violated dignity, privacy and the best interests of the child by fostering shame, stigma and fear.
100. On the right to health under Article 43, Katiba Institute submits that the impugned provisions undermine adolescents' access to sexual and reproductive healthcare services. It argues that criminal sanctions create a chilling effect that discourages adolescents from seeking counselling, contraception, HIV services and reproductive healthcare, while simultaneously deterring healthcare providers from offering such services. Reliance is placed on *SERAC v Nigeria* and *CRC General Comment No. 4* for the proposition that States must adopt enabling legal frameworks that facilitate rather than inhibit access to adolescent health services.



101. The 2nd Interested Party further submits that the impugned provisions fail the proportionality test under Article 24 of the [Constitution](#). It argues that criminal prosecution is not the least restrictive means of achieving the legitimate objective of child protection, and that less restrictive and more development-sensitive alternatives exist. Reliance is placed on *Satawu v Moloto, Jacqueline Okuta v Attorney-General* and *Teddy Bear Clinic (supra)*, where courts emphasised that limitations on constitutional rights must be proportionate, minimally impairing and rationally connected to a legitimate objective.
102. It is contended that comparative jurisdictions have adopted less restrictive approaches, including close-in-age exemptions, diversionary mechanisms, comprehensive sexuality education and adolescent-friendly healthcare services. In that regard, Katiba Institute refers to legislative and jurisprudential developments in South Africa, Canada, the United Kingdom, Australia and the Philippines as demonstrating that child protection objectives can be achieved without criminalising consensual peer relationships between adolescents.
103. Finally, the 2nd Interested Party submits that the impugned provisions undermine the national values and principles of governance under Article 10 of the [Constitution](#), including dignity, equality, social justice, inclusiveness and protection of the marginalised. It is argued that a constitutional order founded upon human dignity and transformative justice cannot sustain a statutory framework that punishes adolescents for consensual conduct arising within the ordinary realities of adolescent development.
104. The 2nd Interested Party therefore urges this Court to find that Sections 8, 9, 11 and 43(4)(f) of the [Sexual Offences Act](#) are unconstitutional to the extent that they criminalise consensual, non-coercive and non-exploitative sexual conduct between adolescents. It further urges the Court to grant appropriate declaratory and structural reliefs pursuant to Article 23 of the [Constitution](#). Reliance is placed on *Mitu-Bell Welfare Society v Kenya Airports Authority* and *Communications Commission of Kenya v Royal Media Services* for the proposition that constitutional courts possess broad remedial powers to fashion effective remedies capable of redressing continuing constitutional violations.

The 3rd Interested Party's Case

105. The 3rd Interested Party, The Cradle - The Children Foundation, through the Replying Affidavit of Aoko Ouma, supports the Petition, while emphasizing the need to preserve child protection safeguards. The organisation, with over 25 years' experience in child rights advocacy and representation of both complainants and accused minors in sexual offence cases, acknowledges that the current statutory framework fails to distinguish between exploitative adult predation and consensual peer adolescent relationships, resulting in punitive outcomes such as arrest, detention, school disruption, stigma, and long-term social harm to children. It relies heavily on the constitutional best interests principle under Article 53(2) and Section 8 of the [Children Act](#), 2022, arguing that criminalisation in such contexts undermines children's survival, development, participation, and welfare rights.
106. The 3rd Interested Party's Affidavit stresses that in *MAK v RMAA & 4 others* (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR), the Supreme Court reaffirmed that all children's rights under Article 53 are of equal status and that best interests must be the determining factor in all decisions affecting children. It also draws persuasive authority from *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development* (CCT 12/13) [2013] ZACC 35, where the South African Constitutional Court held that criminalising consensual adolescent sexual conduct infringes dignity and best interests by stigmatizing normal developmental behaviour and deterring access to protective services.



107. On dignity, the 3rd Interested Party argues that Article 28 is violated because criminal prosecution of adolescents for consensual peer relationships amounts to stigmatization, moral labeling, and unjust intrusion into private autonomy, contrary to the reasoning in *ANN v Attorney General* [2013] KEHC 6004 (KLR), *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5, and *Mayelane v Ngwenyama* (CCT 57/12) [2013] ZACC 14, which affirm dignity as encompassing autonomy and self-determination. It further contends that Article 31 on privacy is infringed because police investigations, arrests, medical examinations, and court proceedings constitute disproportionate intrusion into adolescents' intimate lives. On the right to health under Article 43(1)(a), the affidavit asserts that criminalisation creates a chilling effect on adolescents seeking reproductive health services, counselling, HIV/STI testing, or contraception, thereby undermining both physical and mental health outcomes. It relies on the CRC framework and international standards to argue that punitive approaches deter access to health services and exacerbate teenage pregnancy, untreated infections, and psychological harm.
108. The organisation further submits that while the Petition should succeed, any declaration of unconstitutionality must be carefully limited to avoid undermining child protection frameworks. It proposes a narrowly tailored "close-in-age" or "Romeo and Juliet" exception (typically 2–3 years) to distinguish consensual peer conduct from exploitative relationships, emphasizing that without such limitation older adolescents could exploit younger ones under the guise of consent. It also invokes the principle of evolving capacities under Article 5 of the *UNCRC*, arguing that adolescent autonomy should be recognized in a tiered manner reflecting differing levels of maturity between younger and older minors. At the same time, it insists that decriminalisation must not weaken mandatory reporting obligations for abuse, coercion, exploitation, or trafficking, and that safeguards must remain robust where power imbalance exists.
109. Finally, the 3rd Interested Party urges the Court to adopt a structural interdict approach, drawing on comparative constitutional jurisprudence, to require relevant State agencies (Health, Education, Labour, and Social Protection) to develop and report on implementation frameworks for adolescent-friendly reproductive health services, sexuality education, and protection mechanisms. It concludes that while the current legal regime is constitutionally overbroad and harmful in its effect on adolescents' dignity, privacy, health, and development, any remedy must balance reform with continued strong protection against exploitation and abuse, consistent with Article 53 of the *Constitution* and international child rights instruments.

Analysis and Determination

110. Upon careful consideration of the pleadings and submissions, the Court has identified the following issues for determination:
 - i. Whether the Petition is properly before this Court.
 - ii. Whether Sections 8, 9, 11 and 43(4)(f) of the *Sexual Offences Act* are unconstitutional to the extent that they criminalise consensual, non-coercive and non-exploitative sexual conduct between adolescents.
 - iii. Whether the actions undertaken against the Petitioners violated their constitutional rights and freedoms.
 - iv. Whether the Petitioners are entitled to the reliefs sought.



Whether the Petition is properly before this Court

111. The jurisdiction of this Court is principally derived from Articles 22, 23 and 165(3)(b) of the Constitution of Kenya, 2010. Article 22 confers standing upon any person alleging that a right or fundamental freedom has been denied, violated or infringed. Article 23 vests this Court with the authority to grant appropriate reliefs, including declarations, injunctions, conservatory orders and judicial review remedies. Article 165(3)(b) specifically empowers the High Court to determine the question whether a right or fundamental freedom has been denied, violated, infringed or threatened, and under Article 165(3)(d) to determine the constitutionality of any law.
112. The central question at this stage is therefore not whether the Petition will succeed, but whether it is competently instituted before a court constitutionally mandated to interrogate alleged violations and validity of legislation.
113. The Supreme Court in Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR authoritatively stated that jurisdiction flows from the Constitution or legislation and cannot be assumed or expanded by judicial craft. However, in the present case, jurisdiction is expressly donated by Articles 22, 23 and 165(3)(b) and (d). The Petition squarely challenges the constitutionality of statutory provisions and alleges continuing violations of fundamental rights; it therefore falls directly within the constitutional remit of this Court.
114. Further, in Trusted Society of Human Rights Alliance v Attorney General & 2 Others [2012] eKLR, the High Court affirmed that where legislation is alleged to be inconsistent with the Constitution, the Court not only has jurisdiction but a constitutional duty as guardian of the Constitution to interrogate such claims.
115. The 1st Respondent's reliance on prosecutorial independence under Article 157 does not oust jurisdiction. Article 157(10) expressly insulates prosecutorial decisions from direction or control, but does not immunise either prosecutorial conduct or the underlying statutory framework from constitutional scrutiny. As was held in Republic v Director of Public Prosecutions & 2 Others ex parte Meridian Medical Centre Ltd [2015] eKLR, prosecutorial independence is not absolute and remains subject to constitutional review where abuse, illegality or rights violations are alleged.
116. Similarly, the invocation of prior litigation and the doctrine of res judicata does not go to jurisdiction in the strict sense but to the competence of the specific claims before the Court.
117. The applicable test for res judicata is set out in Section 7 of the Civil Procedure Act and judicially elaborated in Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, where the Court of Appeal held that for res judicata to apply, the following must be satisfied:
 - a. The matter in issue is directly and substantially in issue in the former suit.
 - b. The former suit was between the same parties or their privies.
 - c. The issue was heard and finally determined by a court of competent jurisdiction.
 - d. The decision remains final and binding.
118. The Supreme Court in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport & Infrastructure & 3 Others [2021] KESC 39 (KLR) further clarified that res judicata in constitutional litigation must be applied contextually and with caution, particularly where public interest and evolving constitutional interpretation are implicated.



119. Applying these principles, the Court notes that the decision in *CKW v Attorney General & Another* [2014] eKLR upheld the constitutionality of Sections 8 and 11 of the *Sexual Offences Act* in the context of protecting children from sexual exploitation. However, the present Petition raises a materially narrower and distinct constitutional question, namely: whether the blanket criminalisation and enforcement of those provisions, without differentiation between exploitative adult conduct and consensual, non-exploitative, close-in-age adolescent relationships, is consistent with Articles 27, 28, 31, 43 and 53 of the *Constitution*.
120. This distinction is not merely semantic. It engages the constitutional doctrine of proportionality under Article 24, the principle of evolving capacities of the child, and the practical impact of enforcement on adolescents' dignity, privacy and health.
121. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR, the Court of Appeal emphasised that constitutional adjudication must be issue-specific and grounded in the precise factual and normative matrix before the Court. Similarly, in *Law Society of Kenya v Attorney General & Another* [2019] eKLR, the Supreme Court cautioned against mechanical application of procedural bars where doing so would defeat substantive constitutional justice.
122. The Interested Parties further correctly submit that the Petition introduces new factual and constitutional dimensions, including empirical evidence on adolescent health outcomes, prosecutorial practice in peer relationships, and comparative jurisprudence on "Romeo and Juliet" type frameworks, none of which were substantively addressed in *CKW*.
123. Accordingly, this Court finds that the present proceedings are not an abuse of process and are not barred by res judicata. In light of the foregoing, the Court is satisfied that it has clear constitutional jurisdiction under Articles 22, 23 and 165(3)(b) and (d). The Petition is properly instituted as a constitutional challenge to legislation and State action. The plea of res judicata does not apply as the issues herein are distinct in scope, context and constitutional framing from those previously determined.

Whether Sections 8, 9, 11 and 43(4)(f) of the *Sexual Offences Act* are unconstitutional to the extent that they criminalise consensual, non-coercive and non-exploitative sexual conduct between adolescents

124. The question whether Sections 8, 9, 11 and 43(4)(f) of the *Sexual Offences Act* are unconstitutional to the extent that they criminalise consensual, non-coercive and non-exploitative sexual conduct between adolescents requires the Court to engage with competing constitutional narratives: one rooted in strict child protection through criminal prohibition; and the other grounded in dignity, autonomy, evolving capacity, and proportionality in the treatment of adolescents within the justice system.
125. The Petitioners' case is that while the *Sexual Offences Act* pursues a legitimate and important objective of protecting children from sexual abuse, its enforcement architecture is constitutionally overbroad because it fails to distinguish between exploitative adult predation and consensual peer-to-peer adolescent relationships. They contend that Sections 8 and 11 impose strict criminal liability for defilement and related offences without any statutory recognition of age proximity, mutuality, or developmental capacity, while Section 43(4)(f) entrenches a blanket incapacity to consent that erases adolescent autonomy entirely.
126. According to the Petitioners, the practical effect is that adolescents engaging in consensual relationships are subjected to arrest, detention, prosecution, and lifelong stigma, in circumstances that do not advance the protective rationale of the statute. They argue that this violates Articles 27, 28, 31, 43



- and 53 of the Constitution and fails the proportionality test under Article 24 because less restrictive alternatives exist, including close-in-age exemptions, diversionary child justice mechanisms, and adolescent-friendly health frameworks.
127. The 1st Respondent, on the other hand, maintains that the impugned provisions are constitutionally sound and form part of a coherent child protection framework mandated by Article 53(1)(d) and (2). It is their position that minors lack the legal and developmental capacity to consent to sexual intercourse and that any relaxation of the statutory framework would expose children to exploitation, manipulation and abuse under the guise of consent. The 1st Respondent therefore defends Sections 8, 9, 11 and 43(4)(f) as necessary, rational and proportionate tools of child protection, and cautions the Court against judicially introducing exceptions not contemplated by Parliament. It further relies on precedent affirming the constitutionality of the Sexual Offences Act, particularly decisions recognising the State's wide latitude in protecting minors from sexual harm.
128. The 2nd, 3rd and 4th Respondents adopt a primarily procedural posture but indirectly support the substantive constitutionality of the impugned provisions by invoking res judicata through CKW v Attorney General & Another. Their position is that the constitutionality of Sections 8 and 11 has already been affirmed by a court of competent jurisdiction and that there is no legal basis for reopening the issue. Implicit in their argument is the submission that the statutory scheme reflects a settled legislative and judicial policy choice in favour of strict criminalisation of sexual activity involving minors, leaving no room for judicial modification based on evolving social or developmental considerations.
129. The Interested Parties introduce a materially different constitutional framing. The 1st Interested Party, Reproductive Health Network Kenya, and the 2nd Interested Party, Katiba Institute, argue that while child protection is a legitimate objective, the current legal framework produces unconstitutional effects by failing to distinguish between exploitative conduct and consensual adolescent relationships. They contend that the blanket criminalisation model generates systemic harm, including stigma, psychological trauma, exclusion from healthcare services, and deterrence from seeking reproductive health support.
130. They further argue that this regime violates Article 24 because it is overbroad and not the least restrictive means of achieving child protection. Both Interested Parties urge the Court to recognise adolescent autonomy in light of evolving capacity and to adopt a calibrated approach that incorporates close-in-age exceptions commonly referred to as "Romeo and Juliet" frameworks.
131. The 3rd Interested Party, The Cradle - The Children Foundation, adopts a nuanced position. While supporting the Petitioners' challenge to blanket criminalisation of consensual peer conduct, it cautions against dismantling protective safeguards. It proposes a narrowly tailored close-in-age exemption that preserves criminal liability for exploitative or coercive conduct while excluding consensual adolescent relationships within a limited age gap. It emphasises that any constitutional remedy must preserve mandatory reporting obligations and protections against abuse, coercion, and power imbalance.
132. Against this background, the Court is required to determine whether the impugned statutory provisions, in their application to consensual, non-coercive and non-exploitative adolescent relationships, satisfy the requirements of Article 24 of the Constitution.
133. It is not in dispute that the objective of the Sexual Offences Act is constitutionally legitimate and of high importance. The protection of children from sexual abuse is a core constitutional duty of the State under Article 53(1)(d) and is reinforced by international child protection instruments. The real inquiry is whether the means adopted by the statute are proportionate to that objective when applied to consensual adolescent peer conduct.



134. Article 24 of the Constitution requires that any limitation of rights must be reasonable and justifiable in an open and democratic society. This demands a structured proportionality analysis, which has been consistently recognised in Kenyan jurisprudence, including Jacqueline Okuta & Another v Attorney General [2017] eKLR, Cyprian Andama v Director of Public Prosecutions & Another [2018] eKLR, and the Supreme Court's reasoning in Raila Odinga & Others v IEBC & Others [2017] eKLR. The Court must therefore consider whether the limitation serves a legitimate aim, whether there is a rational connection between the means and the objective, whether the limitation minimally impairs the rights at stake, and whether there is an overall balance between the benefits and the harm caused.
135. The rights engaged are central to the constitutional order. Article 27 is implicated because the statutory framework treats materially different forms of adolescent conduct in the same punitive manner, thereby failing to differentiate between exploitation and consensual peer relationships. Article 28 is engaged because the imposition of criminal liability and sexual offender stigma upon adolescents produces profound and enduring consequences incompatible with dignity. Article 31 is engaged because the enforcement of the provisions necessarily intrudes into intimate adolescent relationships and private life. Article 43(1)(a) is implicated by the demonstrated chilling effect on access to sexual and reproductive health services, where fear of criminal liability deters both adolescents and healthcare providers from seeking or offering care. Most significantly, Article 53(2) requires that the best interests of the child be treated as the paramount consideration in all matters affecting children, demanding a contextual and welfare-oriented approach rather than a purely punitive one.
136. The statutory scheme, particularly Sections 8 and 11, imposes strict liability for defilement and related offences without recognising gradations of culpability based on age proximity or mutuality. Section 43(4)(f) further entrenches a categorical incapacity to consent. While this reflects a protective intent, its combined effect is a blanket criminalisation regime that treats all adolescent sexual activity as legally indistinguishable from exploitative adult predation. The law therefore operates without an internal mechanism to distinguish between conduct that causes harm and conduct that is developmentally consensual and non-exploitative.
137. The Court accepts that protection of children is a compelling objective, but constitutional permissibility is not determined by purpose alone, it is determined by means. In this regard, the blanket nature of the impugned provisions renders them over-inclusive. They extend criminal sanction beyond the mischief they are designed to address, thereby capturing conduct that does not involve coercion, exploitation or abuse.
138. Comparative jurisprudence is persuasive. In Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development supra, the South African Constitutional Court held that criminalisation of consensual adolescent sexual conduct unjustifiably infringes dignity and privacy and may deter adolescents from accessing essential health services. In S v M supra, the Court emphasised that children in conflict with the law must be treated in a manner that is developmentally appropriate and oriented towards rehabilitation and welfare rather than punishment. These principles are consistent with the constitutional values under Article 259 of the Constitution, which require an interpretation that promotes human rights and fundamental freedoms.
139. Kenyan jurisprudence similarly recognises the centrality of child welfare and proportionality in constitutional adjudication. In MAK v RMAA & 4 Others [2023] KESC 21 (KLR), the Supreme Court reaffirmed that the best interests of the child is not a peripheral consideration but a paramount constitutional command that must guide all decisions affecting children. A statutory regime that exposes adolescents engaged in consensual peer relationships to criminal sanction, stigma and long-



term harm, without differentiation or contextual inquiry, cannot easily be reconciled with that principle where less restrictive alternatives exist.

140. Such alternatives are not theoretical. They include close-in-age exemptions, diversionary mechanisms under the [Children Act](#), 2022, and adolescent-friendly reproductive health and education interventions. The availability of these less restrictive means is critical under Article 24, because where a narrower and equally effective mechanism exists, a blanket criminalisation approach cannot be justified.
141. In the final analysis, the Court is not required to invalidate the protective core of the [Sexual Offences Act](#). That core remains constitutionally valid in so far as it targets coercion, exploitation and abuse. However, constitutional scrutiny demands precision. A legal framework that fails to distinguish between exploitative conduct and consensual adolescent peer relationships is overbroad and disproportionate in its effect.
142. Accordingly, the Court finds that Sections 8, 9, 11 and 43(4)(f) of the [Sexual Offences Act](#) are constitutionally valid to the extent that they criminalise exploitative, coercive and predatory sexual conduct involving children, but are unconstitutional in their application to consensual, non-coercive and non-exploitative sexual conduct between adolescents of similar age and developmental capacity, as such application fails the proportionality requirement under Article 24 and is inconsistent with Articles 27, 28, 31, 43 and 53 of the [Constitution](#).

Whether the actions undertaken against the Petitioners violated their constitutional rights and freedoms.

143. The question whether the actions undertaken against the Petitioners violated their constitutional rights and freedoms must be determined against the framework of Articles 25, 27, 28, 29, 31, 43, 47, 49 and 53 of the [Constitution](#), read together with the constitutional mandate of investigative agencies and the Office of the Director of Public Prosecutions under Articles 157 and 245. It requires the Court to interrogate not only the legality of the arrest, detention and prosecution processes, but also whether, in their design and application, those processes respected the constitutional status of the Petitioners as children entitled to special protection under Article 53 and as rights-bearing individuals under the Bill of Rights.
144. The Petitioners' case is that the enforcement actions taken against them were fundamentally unconstitutional because they subjected adolescents engaged in consensual, non-coercive, close-in-age relationships to arrest, detention, prosecution and criminal stigma, in circumstances that did not reflect the protective purpose of the [Sexual Offences Act](#). They contend that the decision to arrest and charge them ignored the contextual realities of adolescent relationships and failed to distinguish between exploitative conduct and consensual peer intimacy. In their view, the criminal process was deployed in a rigid and mechanical manner, resulting in violations of dignity, liberty, privacy and the best interests of the child.
145. The 1st Respondent maintains that the actions taken were lawful, procedurally proper and grounded in reasonable suspicion based on reports of missing minors and cohabitation circumstances. It is their position that investigative and prosecutorial decisions were made in good faith on the basis of information available at the time, and that once the issue of minority was clarified, the charges were withdrawn in accordance with prosecutorial policy and the best interests of the child. The 1st Respondent further relies on the independence of investigative and prosecutorial agencies under Articles 157 and 245, arguing that the Court ought not to interfere with constitutionally mandated functions undertaken within the bounds of the law.



146. The 2nd, 3rd and 4th Respondents similarly defend the legality of the process, contending that the investigations and arrests were carried out pursuant to statutory duty and that there is no evidence of bad faith, arbitrariness or procedural impropriety. They argue that where officers act on credible reports suggesting the commission of offences under the [Sexual Offences Act](#), they are entitled, and indeed obligated, to take enforcement action. The subsequent withdrawal of charges upon confirmation of age, they submit, demonstrates procedural correction rather than constitutional violation.
147. The Interested Parties, however, place the enforcement actions in a broader constitutional context. They argue that even where initial suspicion exists, the criminal justice response must be sensitive to the unique constitutional status of children. The 1st Interested Party submits that the absence of clear, publicly accessible prosecutorial guidance distinguishing exploitative conduct from consensual adolescent relationships has resulted in inconsistent enforcement, uncertainty in healthcare and justice systems, and avoidable harm to adolescents. The 2nd Interested Party further contends that the criminal process, as applied in these cases, failed to give meaningful effect to Articles 28 and 53(2), resulting in stigma and developmental harm that is constitutionally impermissible in child-sensitive justice.
148. This Court is required to assess these competing positions within the constitutional standards governing arrest, detention and prosecution. Article 49 guarantees every arrested person the right to be informed of the reasons for arrest, to be brought before a court within the prescribed time, and to be treated in a manner consistent with human dignity. Article 53 further elevates the best interests of the child to a paramount consideration in all matters concerning the child, including criminal processes. The Supreme Court in [MAK v RMAA & 4 Others](#) [2023] KESC 21 (KLR) reaffirmed that child justice must be approached from a welfare-oriented and rehabilitative perspective rather than a purely punitive lens.
149. It is not in dispute that investigative agencies are entitled to act upon reasonable suspicion. However, constitutional compliance requires that such actions remain proportionate, context-sensitive and continuously reviewed in light of emerging facts. In the present case, while the initial arrest may have been triggered by reports of missing minors and cohabitation, the subsequent treatment of the Petitioners within the criminal justice system raises serious constitutional concerns, particularly where the underlying conduct involved adolescents in close-in-age, consensual relationships.
150. The Petitioners' grievance is further strengthened by the demonstrated absence of a clear, binding and publicly accessible policy governing the treatment of adolescents engaged in consensual sexual relationships. It has been disclosed that the Office of the Director of Public Prosecutions has an internal policy direction to the effect that minors should not be prosecuted for consensual sexual conduct with peers. While this Court takes cognisance of such policy direction as a matter of prosecutorial practice, the constitutional difficulty is that such a policy, if it exists, is neither gazetted nor uniformly applied across investigative and prosecutorial agencies, nor consistently considered by trial courts at the point of plea or charge.
151. A constitutional State governed by the rule of law under Article 10 requires that policies affecting rights and liberties, particularly those that determine whether a child is exposed to arrest and prosecution, must be transparent, accessible, consistent and capable of guiding all relevant actors in the justice chain. An unpublished or inconsistently applied policy creates a risk of selective enforcement, uneven application of the law, and arbitrary outcomes, all of which are inimical to Articles 27 and 47 of the [Constitution](#).
152. This Court is therefore of the view that where prosecutorial discretion is exercised in matters involving adolescents and consensual peer relationships, there is a constitutional necessity for clear, publicly available guidelines that are capable of binding operational effect across all agencies involved in the



- criminal justice process. Such guidelines ought to be formalised, and where appropriate, gazetted or otherwise made publicly accessible to ensure uniform application and to guide both prosecutorial decision-making and judicial oversight at the earliest stages of criminal proceedings.
153. The Court further observes that trial courts, when confronted with charges arising from adolescent relationships, bear a constitutional obligation to interrogate not only the formal legality of the charge but also its constitutional context, particularly where issues of age proximity, consent between minors, and developmental capacity are apparent. Failure to do so risks the mechanical application of criminal provisions in a manner that undermines the transformative objectives of the *Constitution*.
154. At a deeper constitutional level, the enforcement actions in the present case expose the tension between a rigid criminalisation model and the lived realities of adolescent development. The *Sexual Offences Act*, while protective in intent, when applied without contextual differentiation, may result in adolescents being treated as offenders for conduct that is, in many instances, part of normal developmental experience. This raises serious implications for dignity under Article 28, privacy under Article 31, liberty under Article 29, and most importantly, the best interests' principle under Article 53(2).
155. The Court is persuaded that while the State retains a legitimate mandate to investigate and prosecute sexual offences involving minors, that mandate must be exercised within a constitutionally calibrated framework that recognises the distinction between exploitation and consensual peer relationships. Enforcement that fails to make this distinction risks constitutional invalidity not only in its legislative foundation but also in its operational application.
156. In the present case, although the Respondents acted within a statutory framework that permitted arrest and prosecution, the Court finds that the failure to apply a differentiated, child-sensitive approach, together with the absence of clear and binding prosecutorial guidance publicly known and consistently applied, resulted in a disproportionate limitation of the Petitioners' rights. The exposure of adolescents to arrest, detention and criminal proceedings in circumstances involving consensual, close-in-age relationships amounted to an unjustifiable infringement of their dignity, privacy and protection under Article 53.
157. Accordingly, this Court finds that the actions undertaken against the Petitioners, when viewed cumulatively within the criminal justice process, violated their constitutional rights and freedoms under Articles 27, 28, 29, 31, 47, 49 and 53 of the *Constitution*, to the extent that they subjected adolescents engaged in consensual peer relationships to criminal processes without adequate constitutional differentiation, structured prosecutorial guidance, or judicial sensitivity to the evolving capacities of children

Whether the Petitioners are entitled to the reliefs sought.

158. The final issue for determination is whether the Petitioners are entitled to the reliefs sought. This issue necessarily flows from the Court's findings on jurisdiction, constitutionality, and the legality of the impugned actions, and requires an assessment of whether the constitutional violations disclosed, both in principle and in effect, warrant the grant of the declaratory, supervisory and structural remedies prayed for.
159. The Petitioners urge that once a court finds that a statutory regime operates in a manner that violates constitutional rights, particularly rights of children under Article 53, dignity under Article 28, privacy under Article 31, and access to health under Article 43, the Court is not only empowered but constitutionally obligated under Article 23(3) to fashion effective relief. They rely on the principle that constitutional remedies are not merely corrective but transformative, and must be sufficient to arrest ongoing violations, prevent recurrence, and realign state conduct with constitutional norms. In this



- regard, they submit that a mere declaratory order would be insufficient given the systemic nature of the harm occasioned by enforcement of Sections 8, 9, 11 and 43(4)(f) of the [Sexual Offences Act](#) in the context of consensual adolescent peer relationships.
160. The Petitioners further contend that conservatory and supervisory reliefs are warranted because the evidence demonstrates continuing arrests, prosecutions, and detentions of adolescents in similar circumstances across the country. They argue that absent structural intervention, the constitutional violations will persist, thereby rendering the Petition nugatory. They rely on the jurisprudence that conservatory orders serve to preserve the substratum of litigation and prevent constitutional harm, including principles articulated in [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others](#) *supra* and [Trusted Society of Human Rights Alliance v Mumo Matemu](#) *supra*, where the courts emphasised that constitutional remedies must be effective and not illusory.
 161. On the other hand, the 1st Respondent opposes the grant of reliefs on the basis that the impugned prosecutions were lawfully discontinued, and that no continuing illegality exists capable of being remedied by this Court. It is further argued that the remedies sought, particularly the proposed prohibition against arrest and prosecution of adolescents under Sections 8 and 11 of the [Sexual Offences Act](#), would amount to an impermissible judicial usurpation of prosecutorial discretion under Article 157 of the [Constitution](#) and would undermine the statutory child protection framework enacted by Parliament. The 1st Respondent maintains that courts must exercise restraint and avoid issuing orders that effectively rewrite legislation.
 162. The 2nd, 3rd and 4th Respondents similarly submit that no relief can issue in light of their objection grounded in *res judicata* and the alleged absence of any unconstitutional conduct. They argue that where legislation has previously been upheld as constitutional, courts ought not to grant orders that indirectly suspend or negate its operation without clear constitutional justification.
 163. The Interested Parties, however, adopt a different posture. Reproductive Health Network Kenya and Katiba Institute support the grant of reliefs, but urge the Court to calibrate its orders in a manner that preserves child protection while curing constitutional excesses. They specifically propose that any declaratory relief be accompanied by interpretive guidance recognising “close-in-age” consensual adolescent relationships as constitutionally distinct from exploitative conduct. They further advocate for structural orders directing the State to develop clear prosecutorial guidelines, health sector protocols, and inter-agency coordination mechanisms to prevent arbitrary enforcement and to safeguard adolescent access to health services.
 164. The 3rd Interested Party, The Cradle - The Children Foundation, adopts a more cautious position, agreeing that relief is warranted but emphasising that any remedy must not create enforcement gaps that expose children to exploitation. It therefore supports a narrowly tailored judicial approach that distinguishes consensual peer conduct from abuse, while maintaining robust safeguards and mandatory reporting obligations.
 165. Having considered the competing positions, this Court is satisfied that the Petitioners have established a clear constitutional violation arising not merely from isolated incidents but from the structural application of the impugned provisions in a manner that fails to distinguish consensual adolescent peer conduct from exploitative sexual offences. The Court is further persuaded that the harm demonstrated is ongoing, systemic, and incapable of adequate redress through damages or narrow declaratory relief alone.
 166. Under Article 23(3) of the [Constitution](#), this Court is empowered to grant appropriate relief, including declarations, injunctions, conservatory orders, and orders of judicial review, as well as “any other appropriate relief” necessary to vindicate constitutional rights. Kenyan jurisprudence has consistently



affirmed that constitutional remedies must be effective, forward-looking, and tailored to the nature of the violation, as underscored in *Mitu-Bell Welfare Society v Kenya Airports Authority* supra, where the Supreme Court emphasised that courts must not issue hollow or illusory remedies where rights have been violated.

167. In the present case, the Court is persuaded that a purely declaratory outcome would fail to cure the structural mischief identified, particularly the chilling effect on adolescent access to healthcare, the risk of arbitrary enforcement, and the constitutional tension arising from blanket criminalisation of consensual peer relationships. At the same time, the Court is alive to the State's legitimate and compelling interest in protecting children from sexual abuse, exploitation, and coercion, an obligation firmly anchored under Article 53(1)(d) and reinforced by international child protection instruments.
168. Balancing these competing constitutional imperatives, the Court finds that the appropriate remedy is one that preserves the protective purpose of the *Sexual Offences Act* while introducing a constitutionally compliant interpretive safeguard that prevents its overbroad application to consensual, non-coercive, close-in-age adolescent relationships. Such an approach is consistent with the doctrine of proportionality under Article 24 and the principle that limitation of rights must be narrowly tailored, reasonable, and least restrictive, as articulated in *Hassan Ali Joho & Another v Suleiman Said Shabbal* and *R v Big M Drug Mart Ltd*.
169. Accordingly, the Court is inclined to grant declaratory relief affirming the unconstitutionality of the impugned provisions to the extent of their application to consensual, non-exploitative, close-in-age adolescent relationships, and to issue interpretive guidance directing that such conduct shall not, without more, attract criminal sanction under Sections 8, 9 and 11 of the *Sexual Offences Act*. Further, the Court finds that supervisory directions are warranted to ensure alignment of prosecutorial practice, police enforcement, and health sector policy with this constitutional interpretation, including the development and, where necessary, formalisation of clear and publicly accessible prosecutorial guidelines.
170. In the result, the Petitioners are entitled to substantial relief. The Petition succeeds in part, as does the Application, and appropriate orders shall issue to give full effect to this Court's findings on constitutionality, rights violations, and the need for a coherent, child-sensitive and constitutionally compliant enforcement framework.

Conclusion

They say that love is always blind and that explains so much, young lovers always seem so prone to use their sense of touch.” — Charles Ghigna, Poet and Author

171. This Petition has required the Court to confront a difficult but constitutionally necessary inquiry, how a legal regime designed to protect children from sexual abuse ought to operate in respect of adolescents whose lived realities include consensual, non-coercive, and developmentally age-proximate relationships. The *Sexual Offences Act*, 2006 is without question a critical instrument in the protection of children from exploitation, predation and abuse.
172. That protective mandate is not in dispute. What is in dispute is whether the impugned provisions, as applied in practice, extend beyond that protective purpose so as to criminalise conduct that, while morally complex and socially sensitive, does not necessarily fall within the constitutional conception of exploitation.
173. The *Constitution* of Kenya, 2010 does not permit such overreach. It demands precision where liberty is curtailed, proportionality where rights are limited, and sensitivity where the subjects of state power



are children whose autonomy, dignity, and development are expressly recognised under Article 53. The Court has found that while the State is fully entitled and indeed obligated—to criminalise and prosecute sexual exploitation of children, the blanket application of Sections 8, 9, 11 and 43(4)(f) of the *Sexual Offences Act*, without differentiation between exploitative conduct and consensual close-in-age adolescent relationships, produces constitutional tension that cannot be ignored.

174. The Court has further found that enforcement practices, as disclosed in this matter, have had real and demonstrable consequences: arrest, detention, prosecution, stigma, educational disruption, and psychological harm. These consequences engage not only the protective purpose of the law but also the constitutional guarantees of dignity, privacy, equality, liberty, access to justice, and the best interests of the child. A constitutional democracy does not measure the validity of its laws solely by their purpose, but also by their effect. Where the effect is disproportionate to the legitimate aim pursued, constitutional intervention becomes not only permissible but necessary.
175. At the same time, this Court is acutely conscious that judicial authority must not be exercised in a manner that dismantles the architecture of child protection painstakingly constructed by statute and policy. The remedy must therefore be careful, calibrated, and constitutionally faithful. It must preserve the integrity of the *Sexual Offences Act* as a shield against exploitation while ensuring that it does not become an unintended instrument of over-criminalisation in the context of consensual adolescent relationships.
176. In resolving this tension, the Court has been guided by the transformative character of the *Constitution* and the doctrine of proportionality under Article 24. It has also been guided by the principle that children are not merely objects of protection but bearers of rights, whose evolving capacities must be recognised within the justice system. The result is a constitutional equilibrium: robust protection against abuse, coupled with interpretive restraint to prevent criminal law from extending into the realm of consensual, non-exploitative adolescent intimacy.
177. The physical element of ‘young love’ is a natural part of the course of human development from child to adult. We would, of course, prefer it if children all waited till the age of majority before engaging in sexual conduct; but that wish is forlorn not just in our ever-changing modern world but also historically. This is all the more reason why the relevant State organs responsible for health, education and child protection should develop coordinated policy and implementation measures to ensure adolescent access to sexual and reproductive health information and services without fear of criminalisation. Rather than using the brute force of the criminal law, which runs contrary to the *Constitution* in the ways analysed above, the public interest would be better served by guiding adolescents within a ‘safe-space’ and where the adult sections of society could make the very compelling case for abstinence until adulthood.
178. That compelling case is clear. Ideally, adolescents should wait to become adults before engaging in sexual conduct, particularly sexual intercourse. Sexual conduct comes with many physical, emotional, healthcare, reproductive, and I dare say perhaps even spiritual effects that have long-term and even lifelong consequences on who we become and how we relate with others. However, the criminal law is not a justifiable way for Society to secure the best interests of children in this way, when their actions are consensual, non-coercive and non-exploitative sexual conduct between adolescents of close age proximity.
179. For avoidance of doubt, nothing in this judgment shall be construed as barring lawful investigations or prosecutions in respect of sexual conduct involving coercion, exploitation, abuse of power, trafficking, or any non-consensual conduct involving children, which remain fully prosecutable under the *Sexual Offences Act*, 2006 [revised 2024].



180. While the Petitioners urged this Court to judicially define what would be ‘close-in-age’ and ‘age-proximate’, this Court leaves that firm definition of terms the State actors responsible. The ODPP already has internal policy guidance on the same, and the National Police Service and others could borrow from the same in order to develop their own, including dealing with the wider aspects of how to determine what constitutes consensual, non-coercive and non-exploitative sexual conduct between adolescents of close age proximity.
181. In deferring to the concerned State Organs, this Court is also alive to the fact that some issues touching on the wider subject matter were not raised in this Petition and thus could not be determined. These include what should happen if one party to a relationship that started when both parties were below 18 years attains the age of majority, or what should happen if the age-gap between the parties is very close and would fall within the set range but one is an adult when they commence physical relations while the other is under 18 years of age.
182. To my mind, the concerned State Organs can apply their individual and collective minds to these and other questions that are related to the broad subject matter, even as they develop the policies that this judgment will call for. A comprehensive, multi-sectoral, honest, and pragmatic broad approach that at all times keeps the best interest of the child as its north star is what we owe the children of Kenya.
183. In the final analysis, the Petition and the Notice of Motion dated 5th August 2025 both succeed in substantial part. The impugned statutory framework, properly construed, must be read in a manner consistent with the Constitution, and enforcement must align with that constitutional reading. Anything less would permit criminal law to operate in a manner disconnected from constitutional values.
184. For the foregoing reasons, this Court issues the following final orders:
- A. The Petition and the Notice of Motion dated 5th August 2025 both partially succeed, as below:
 - B. A Declaration be and is hereby issued that the application of Sections 8, 9 and 11 of the Sexual Offences Act to consensual, non-coercive and non-exploitative sexual conduct between adolescents of close age proximity, absent evidence of exploitation, coercion, abuse or power imbalance, is inconsistent with Articles 27, 28, 31, 43 and 53 of the Constitution;
 - C. A mandatory order be and is hereby issued to the relevant investigative, prosecutorial, and enforcement agencies requiring that they shall, in applying the Sexual Offences Act to persons below the age of eighteen years, distinguish between consensual, non-coercive and non-exploitative sexual conduct between adolescents of close age proximity, absent evidence of exploitation, coercion, abuse and/or power imbalance on one hand and non-consensual, coercive, exploitative sexual conduct, abusive sexual conduct, sexual conduct involving power imbalance, and/or sexual conduct not involving adolescents of close age proximity on the other hand;
 - D. The Office of the Director of Public Prosecutions is directed to, within a reasonable period, formalise, publish and gazette prosecutorial guidelines based on its already existing internal guidelines on the handling of cases involving consensual adolescent peer relationships to ensure uniformity, transparency, and compliance with Articles 10, 27, 28, 31, 43, 53, and 157 of the Constitution;
 - E. The National Police Service is directed to, within a reasonable period, review and align its investigative and arrest protocols relating to sexual offences involving minors to ensure compliance with this judgment and the constitutional rights of Children;



- F. The relevant State organs responsible for health, education and child protection are hereby directed to develop coordinated policy and implementation measures to ensure adolescent access to sexual and reproductive health information and services without fear of criminalisation in circumstances consistent with this Judgment;
- G. The conservatory orders issued by this Court on 15th August 2025 staying the proceedings in *Makadara Criminal Case No. 34 of 2025* and *Makadara Criminal Case No. MSCO/E239 of 2023* are hereby confirmed and shall remain in force to the extent necessary to give effect to this judgment;
- H. In view of the findings of this Court on the constitutional interpretation of Sections 8, 9, 11 and 43(4)(f) of the *Sexual Offences Act*, 2006, the criminal proceedings in *Makadara Criminal Case No. 34 of 2025* and *Makadara Criminal Case No. MSCO/E239 of 2023* are hereby stayed permanently and shall not be proceeded with in their current form insofar as they relate to consensual, non-coercive and non-exploitative close-in-age adolescent conduct; and
- I. This being a public interest litigation matter, each party shall bear own costs.

Orders accordingly. File closed accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 20TH DAY OF MAY 2026.

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BAHATI MWAMUYE MBS

JUDGE.

In the presence of:

Counsel for the Petitioners – Mr. Kimani, Mr. Onyango, and Mr. Thundu

Counsel for the 1st Respondent – Mr. Mulati and Mr. Oruko

Counsel for the 2nd, 3rd and 4th Respondent – Ms. Khadija Taib h/b Mr. Weche

Counsel for the 1st Interested Party – Ms. Nkonge

Counsel for the 2nd Interested Party – Mr. Malidzo Nyawa and Ms. Kiprop

Counsel for the 3rd Interested Party – Ms. Aoko

Court Assistants – Mr. Martin Mwenda and Mr. Austin

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