



Strathmore University
Law School

**DISPARATE IMPACT DISCRIMINATION: THE
PREDICAMENT OF ATTEMPTED SUICIDE SURVIVORS**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore University Law School

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DECLARATION

I, **NYARERU BECKY MORAA**, do hereby declare that this research is my original work and that, to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: *Nyareru*

Date:26th March 2024.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:  2nd April 2024

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ABSTRACT

This study seeks to identify the link between attempted suicide and the law and to determine whether the legal provisions that criminalise the offence of attempted suicide are discriminatory against survivors of attempted suicide that suffer from mental health conditions such as depression. It further analyses the impact of these laws on the affected persons. The study also outlines recommendations for alternative interventions.

In pursuit of the objectives of the study, a descriptive literature review on arguments made for and against the decriminalization of suicide is conducted. Further, evidence that allows one to generate a perspective on the decriminalization of suicide is incorporated through a descriptive analysis of the theoretical relationship between attempted suicide and discrimination. The research incorporates tests developed by courts and case law on discrimination matters.

The study finds that the law criminalising the offence of attempted suicide and other related laws negatively impact survivors of attempted suicide due to the relationship that exists between suicide and mental health. The laws discriminate against a protected group of persons and further impact other rights of the affected persons. The study then proposes the decriminalization of attempted suicide in Kenya and the formulation of public health legislation to identify and prevent suicides without the discriminatory effect. The study concludes that the decriminalization of suicide would be more beneficial to the state as opposed to the continuous criminalization of the same.

Keywords: attempted suicide, mental health, discrimination

LIST OF ABBREVIATIONS

COK: Constitution of Kenya

CPC: Criminal Procedure Code

KNCHR: Kenya National Commission on Human Rights

MHA: Mental Health Act

MOH: Ministry of Health

ODPP: Office of the Director of Public Prosecutions

WHO: World Health Organization

SCORK: The Supreme Court of Kenya

LIST OF CASES

Beatrice Ngwasi Kyusya v Republic (2013) eKLR.

Beatrice Ngwasi Kyusya v Republic (2016) eKLR.

Constitutional Petition NO E045 of 2022.

Cradle – The Children Foundation (suing through the trustee Geoffrey Maganya) v Nation Media Group Limited ex parte (2011) eKLR.

Deepak Chamanlal Kamani v Principal Immigration Officer & 2 others (2007) eKLR

Griggs v Duke Power Company (1971), The Supreme Court of the United States.

James Nyasora Nyarangi & 3 others v Attorney General (2008) eKLR.

Kelin and 3 others v Cabinet Secretary Ministry of Health and 4 others [2016] eKLR.

Kenya Human Rights Commission v Communications Authority of Kenya & 4 others (2018), eKLR.

Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested parties) (2020) eKLR.

M A O & another v Attorney General & 4 others (2015)eKLR.

Methodist Church in Kenya v Mohamed Fugicha & 3 others (2016) eKRL.

Methodist Church in Kenya v Mohamed Fugicha & 3 others (2019) eKRL.

Ontario Human Rights Commission and Theresa O'Malley (Vincent) v. Simpsons - Sears Ltd, The Supreme Court of Canada.

Peter K. Waweru v Republic (2006) eKLR.

R v Oakes (1986), Supreme Court of Canada.

Roe v Wade (1973), The Supreme Court of the United States.

Simon Gitau Gichuru v Package Insurance Brokers (2021) eKLR.

Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) eKLR.

Washington v. Davis (1976), The Supreme Court of the United States.

Watkins-Singh, R (on the application of) v The Governing Body of Aberdare Girls' High School & another (2008), The United Kingdom Administrative Courts.

V M K v C U E A [2013] eKLR.

LIST OF LEGAL INSTRUMENTS

Constitution of Kenya (2010)

Penal Code (2012)

Criminal Procedure Code (2014)

Health Act (2017)

Persons with Disabilities Act (2003)

Mental Health Act (2012)

Data Protection Act (2019)

Defamation Act (1970)

Suicide Act (1961)

Universal Declaration of Human Rights, 10 December 1948.

Convention on the Rights of Persons with Disabilities, 23 June 1973.

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND

Attempted suicide is a criminal offence in Kenya and is defined as a deliberate but unsuccessful attempt by a person to take his or her own life.¹ Attempted suicide is classified as a misdemeanour by the penal code of Kenya and is punishable by imprisonment for a period not exceeding two years, a fine, or both.² Therefore, attempted suicide is a matter adjudicated upon by the formal justice system, a system that mainly offers retributive and punitive justice, as seen in the provisions for the punishment of the offence.³ The punishment is meant to rehabilitate an offender before reintroducing them to society.⁴

The constitution of Kenya hereinafter referred to as the constitution, in Article 43(1) (a), provides for the right to health. The World Health Organisation defines health as a condition of complete physical, mental, and social well-being, rather than simply the absence of disease or disability.⁵ This definition includes mental health, depression, and other mental illnesses, which are the leading causes of suicide.⁶ The Health Act, in stating its objectives⁷ and the responsibilities of the state, provides that, “ the state bears the responsibility of protecting, respecting, promoting, and fulfilling the health rights of all persons in Kenya to the progressive realisation of their right to the highest attainable standard of health, including the right to

¹ Merriam Webster Dictionary, 4th ed.

² Section 226, Penal Code (Act No 19 of 2014).

³ Section 36, Penal Code (Act No 19 of 2014).

⁴ Paternoster R, ‘How Much Do We Really Know About Criminal Deterrence?’ 100 *Journal of Criminal Law and Criminology* 3, 2010, 765.

⁵ Preamble, World Health Organization Constitution.

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<https://mental.health.go.ke/download/mental-health-and-wellbeing-towards-happiness-national-prosperity-a-report-by-the-taskforce-on-mental-health-in-kenya>, Mental Health Taskforce Report, 2020, 10.

⁷ Section 3(b), Health Act (Act No 21 of 2017).

emergency medical treatment.”⁸ The same act, in section 5, states that, “every person has the right to the highest attainable standard of health, which shall include progressive access for the provision of promotive, preventive, curative, palliative, and rehabilitative services.”⁹

The constant rise in the number of suicidal deaths in Kenya indicates that suicide is a serious public health problem.¹⁰ The former president of the country, Uhuru Muigai Kenyatta, acknowledged that mental health is a problem in the country in a speech addressing the nation in 2019, where he stated that depression is now a widespread issue that affects people of all ages and lifestyles.¹¹ Soon after the speech, the mental health taskforce was created, with the main objective being to examine the state of mental health in Kenya, related causes and contributing risk factors to bad mental health, and offer revolutionary ways to improve mental health systems.¹² The task force's report included a suggestion to decriminalise suicide. This would assist to eliminate stigma and discrimination, promoting early detection, management, and follow-up for those at risk of suicide.¹³ The World Health Organization health ministers, during the World Health Assembly in 2019, agreed that decriminalising suicide was an effective way to reduce deaths.¹⁴ Singapore, India, Malaysia, Pakistan, and Ghana are just but a few of the states that have taken steps to ensure that their laws do not infringe on people's rights by repealing laws that criminalize suicide. Kenya has made significant steps in the past few years towards promoting mental health awareness; however, attempted suicide remains a crime in Kenya.¹⁵

The constitution of Kenya also provides for equality and freedom from discrimination.¹⁶ It provides that, “the state shall not discriminate directly or indirectly against any person on any

⁸ Section 4 (a), Health Act (Act No 21 of 2017).

⁹ Section 5 (1), Health Act (Act No 21 of 2017).

¹⁰ <https://aphrc.org/blogarticle/world-mental-health-day-suicide-in-kenya> on 10 October 2019.

¹¹ <https://repository.kippira.or.ke/handle/123456789/3222>, Uhuru’s Madaraka Day speech, 2019.

¹² <https://mental.health.go.ke/mental-health-taskforce>, Mental Health Taskforce Report, 2020, 3.

¹³ <https://mental.health.go.ke/mental-health-taskforce>, Mental Health Taskforce Report, 2020, 4.

¹⁴ <https://www.who.int/publications/i/item/9789240031029>, WHO Mental Health Action Plan for 2021-2030.

¹⁵ <https://www.who.int/publications/i/item/9789240031029>, WHO Mental Health Action Plan for 2021-2030.

¹⁶ Article 27 (1), Constitution of Kenya (2010).

ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”¹⁷ The Health Act provides that, “every person shall have the right to be treated with dignity and respect and to have their privacy respected in accordance with the Constitution and the Health Act.”¹⁸ This affords equal and non-discriminatory treatment for all citizens in relation to health. Attempted suicide is often a matter of medical concern rather than legal. The laws criminalising suicide appear to be discriminatory, as they are punitive towards people suffering from mental illnesses. The move by the mental health taskforce towards removing the word ‘committing’ from suicide was based on the discriminatory nature of punishing a person for having an illness; committing suicide perpetuates the notion that suicide is a crime. Justification for the laws may be purported to be the prevention of suicide, but rather than being a preventive measure, the criminalization of suicide impedes attempts to prevent, diagnose, and treat mental health disorders that can lead to suicide and/or attempted suicide. It also alienates people suffering from mental health conditions and labels the effects of such conditions as criminal rather than medical. Punishing suicidal persons does not deter them from acting on their suicide ideas; rather, it prevents them from reaching out for help and impedes attempts to prevent, diagnose, and treat mental health disorders. The recent Shakahola tragedy, in which hundreds of individuals starved themselves in the sake of religion, sparked additional worries about charging sick people in need of immediate medical care with suicide. The Kenya National Commission on Human Rights requested that the victims be placed in a medical facility to get medical care rather than being charged as criminals. The Constitution provides that, “courts shall adopt an interpretation that favours the enforcement of a right or fundamental freedom in the application of a provision of the Bill of Rights.”¹⁹ As a result, when interpreting the Bill of Rights, courts and other relevant authorities, “must promote the values that underpin an open and democratic society founded on

¹⁷ Article 27 (4) Constitution of Kenya (2010).

¹⁸ Section 5 (2), Health Act (Act No 21 of 2017).

¹⁹ Article 20 (3) (b), Constitution of Kenya, (2010).

human dignity, equality, equity, and freedom,²⁰ the spirit, purpose, and intent of the Bill of Rights.²¹

1.2 STATEMENT OF THE PROBLEM

The constitution of Kenya provides protection against discrimination by the state, whether directly or indirectly, against any individual on any basis, including health status.²² The constitution of Kenya, further, in Article 43(1) (a), provides that, “every person has the right to the highest attainable standard of health, which includes the right to health care services.”²³ The Penal Code of Kenya categorises attempted suicide as a criminal offense,²⁴ a misdemeanour, punishable by imprisonment for a period not exceeding two years, a fine, or both.

²⁵ Mental health illnesses, such as depression, are the leading cause of suicide and attempted suicide in Kenya.²⁶ Attempted suicide is a health concern. The law criminalizing suicide therefore seems to infringe on the affected person's right to freedom from discrimination based on their health status. Mental illness is just like any other illness and therefore does not warrant incarceration as a punishment but instead, as per the law, requires emergency medical help and other forms of treatment.²⁷ Therefore, the penal code's provisions appear to be in conflict with the constitutional provisions under the Bill of Rights. As a result, this study will examine whether criminalising suicide violates the right to be free of health-based discrimination.

²⁰ Article 20 (4) (a), Constitution of Kenya, (2010).

²¹ Article 20 (4), Constitution of Kenya, (2010).

²² Article 27 (4), Constitution of Kenya (2010).

²³ Article 27 (4), Constitution of Kenya (2010).

²⁴ Section 226, Penal Code (Act No 19 of 2014).

²⁵ Section 36, of Penal Code (Act No 19 of 2014).

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<https://mental.health.go.ke/download/mental-health-and-wellbeing-towards-happiness-national-prosperity-a-report-by-the-taskforce-on-mental-health-in-kenya>, Mental Health Taskforce Report, 2020, 10.

²⁷ Sec 43(2), Constitution of Kenya (2010).

1.3 RESEARCH OBJECTIVES

1. To assess the legal provisions and the rationale of laws on attempted suicide in Kenya
2. To examine the link between the rights to freedom from discrimination based on health status and the laws on attempted suicide
3. To investigate the impacts of the laws on attempted suicide the rights of affected persons.

1.4 RESEARCH QUESTIONS

1. What is the history and rationale of the legal provisions on attempted suicide?
2. What is the link between laws on attempted suicide and discrimination in Kenya?
3. Do the laws on attempted suicide discriminate against persons based on health status and how does the criminalization of suicide impact the right to health of affected persons and other rights?

1.5 HYPOTHESIS

The recent discussions by the various lawmakers, organizations, and mental health activists on suicide as a crime in Kenya have been a huge development, as they have brought the country a step closer to decriminalising suicide. However, despite the events in the country that have sparked discussions on the illegality of suicide, suicide remains a crime that appears to be discriminatory against people suffering from mental health conditions. Therefore, the laws on suicide should be reassessed and reformulated to regulate suicide without being discriminatory. This is due to the state being bound by the constitution to observe the civil right to freedom from discrimination and to respect, protect, and promote this right.

1.6 JUSTIFICATION

This study is of relevance as it seeks to establish the discriminatory nature of the laws against suicide in Kenya and the impact of such discrimination, thus resulting in the observance, protection, and promotion of the right to be free of health based discrimination. Whereas other authors have addressed the illegality of the laws against suicide, they adopt the view of illegality based on the infringement of the right to the highest possible standard of health. This study will focus on illegality based on an interpretation of the right to be free from discrimination based on health status that is consistent with Article 20(3)(c) of the Kenyan Constitution, which requires the adoption of the interpretation that most favours the enforcement of a right or fundamental freedom.²⁸ This paper will yield information that is relevant and practical to researchers, policymakers, lawmakers, and adjudicators in that it will bring clarity to the ongoing debate as to whether suicide should be decriminalized in Kenya.

1.7 METHODOLOGY

The study aims to assess whether the laws on suicide are discriminatory and will thus delve into suicide as a crime and the punishment of the said crime. The nature of my research will be qualitative, and the main source will be secondary sources of data such as books, journals, and articles. The study will also rely on primary sources of data, including the constitution, statutes, and case law. I hope to arrive at my findings using the deductive method of research where the study shall formulate a hypothesis and use an existing theory to analyse data and prove or refute the hypothesis.²⁹ This research method enables the study to make arguments while remaining grounded in factual premises. The research objectives of the study set premises that will help me arrive at my answers in the chapters. The study will also rely on doctrinal analysis, a critical, qualitative analysis of legal materials to support a hypothesis, to analyse legal documents such as statutes, case law, and international instruments to understand the right to freedom from

²⁸ Article 20 (3) (c), Constitution of Kenya (2010).

²⁹ Kothari C, '*Research Methodology : Methods and Techniques*' 3 ed, New Age International (P) Ltd., Publishers, 2004, 5-7.

discrimination and the laws criminalising suicide in Kenya.³⁰ The study uses the doctrinal analysis because it facilitates a thorough definition and explanation of the rule although it may lead to an oversimplification of the legal doctrine.³¹ Lastly, the study shall rely mainly on desktop research, which is a research method for gathering information about a particular problem by exploring data from existing secondary data.³²

1.8 CHAPTER BREAKDOWN

Chapter one shall serve as the introductory part of the dissertation. It lays down the research question and gives a background on it, thus setting the foundation for subsequent chapters. Chapter Two shall complete the introductory part of the research by laying out the theoretical framework and by conducting a literature review of the research problem.

Chapter three shall assess the legal provisions on attempted suicide in Kenya, the history of said laws, and the rationale behind the laws. It shall define the offence of attempted suicide and analyse the kind of punishment and remedy that is by the formal Kenyan criminal justice system for the offence. The chapter will further assess the consequences of committing this offence and the rationale of the punishment meted out in Section 36 of the Penal Code.³³ Chapter three will also tackle the link between attempted suicide and discrimination from the perspective of health and related rights. The chapter will define what discrimination is and whether the differential treatment meted out to people who survive attempted suicide meets the constitutional metrics that constitute discrimination. The chapter will further explore whether attempted suicide laws in Kenya are discriminatory through a test established by the courts.

³⁰ Hoecke M, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* 1 ed, Oxford Hart Publishing, Oxford, 2011.

³¹ Hoecke M, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* 1 ed, Oxford Hart Publishing, Oxford, 2011.

³² Kothari C, *Research Methodology : Methods and Techniques* 3 ed, New Age International (P) Ltd., Publishers, 2004, 5-7.

³³ Section 36, Penal Code (Act No 19 of 2014).

Chapter Four will assess the impact of the criminalization of suicide various rights of the affected persons. The chapter will focus on the health of affected persons and will assess the rights of persons affected by mental health disorders, which are the main causes of suicide, and the differential treatment they receive as a result. The chapter will analyse the process of access to health care and the various forms of differential treatment for the aforementioned persons using the disparate impact discrimination theory and using the test established in Mohammed Fugicha to establish whether discrimination has occurred. The chapter will also assess how the disparate impact affects other protected rights and thus the lives of people struggling with their mental health.

Chapter Five shall serve as the conclusion and shall contain the recommendations of this study. The chapter will further discuss an intervention to address the problem.

CHAPTER TWO: THEORETICAL FRAMEWORK AND LITERATURE REVIEW

2.1 THEORETICAL FRAMEWORK

2.1.1 The Theory of Disparate Impact Discrimination

The theory of disparate impact discrimination is defined as the selective negative impact of a seemingly neutral legislation, requirement, or process on individuals belonging to a constitutionally protected group that lacks any legitimate justification.³⁴ The term "protected groups" refers to groups of individuals who are legally protected from being harmed by laws, practices, and policies that discriminate against them because of a shared feature. This protection may be granted based on race, gender, age, disability or sexual orientation.³⁵ Disparate impact discrimination was first accepted and used in a case where the judges held that voting laws that adversely and disparately affected individuals based on race, colour, or ethnic origin were illegal under civil rights statutes.³⁶ Furthermore, disparate impact evaluations have been used to identify discrimination based on race, colour, ethnic origin, religion, gender, sexual orientation, age, disability, pregnancy, and other factors in housing, employment, credit, education, and other domains.³⁷ The American Supreme Court, in one of the earliest cases to apply the theory,³⁸ held that in determining whether there was disparate impact caused by policies, the absence of the intention to discriminate against the affected protected group did not affirm the absence of discrimination. Further, the decision in another case³⁹ effectively approved the statutory use of a

³⁴ Arneson R, 'Discrimination, Disparate Impact and Theories of Justice', in Hellman D and Moreau S (eds) *Philosophical Foundations of Discrimination Law*, Oxford Academy Press, Oxford, 2013, 87-112.

³⁵ Sheik Z, 'The legal perspective of human rights and development in Kenya' Published LLB Dissertation, University of Nairobi, Nairobi, 2018.

³⁶ Stephanopoulos N, 'Disparate Impact, Unified Law' 128 Yale Law Journal 1566, 2018, 1570.

³⁷ Stephanopoulos N, 'Disparate Impact, Unified Law' 128 Yale Law Journal 1566, 2018, 1570.

³⁸ *Griggs v Duke Power Company* (1971), The Supreme Court of the United States.

³⁹ *Washington v. Davis* (1976), The Supreme Court of the United States.

disparate impact or effect as a test for deciding whether a government action is discriminatory. The disparate effect theory has since been used by the courts to develop a standard for determining whether discrimination occurred. The test consists of three questions. First, determine whether the policy or practice has an unfavourable effect on members of a protected group. Second, determine whether the policy or practice has a substantial reasonable justification. Finally, consider whether there is an alternative that achieves the same goal while being less discriminating.

The theory of disparate impact has been critiqued. Selmi M, in his analysis of whether the theory was a mistake, found that the theory was flawed in two ways: it was assumed easier to prove and discrimination could be redefined only by legal doctrine.⁴⁰ He finds that the theory tried to alter our concept of discrimination by focusing on unequal outcomes. The public does not generally accept defining equality or discrimination based on results or achievements, as evidenced by the ongoing debate over affirmative action policies. The theory has led to a limited understanding of intentional discrimination, which is still linked to animus and conscious motives. This leaves us with racial and gender inequities but no clear responsibility or liability. Selmi M was of the opinion that the legal doctrine should not have been developed and that the legal field ought to have further developed the theory of intent in a manner that includes indirect discrimination. He also argues that the disparate impact theory was a mistake that needs to be corrected. He opines that theory ensures more discrimination and less efficiency and productivity and thus results in abuse of the civil rights laws. He further argues that the abolition of the doctrine from law would ensure that civil rights bar discrimination based decisions.

The theory has been applied in various instances in Kenya. Courts have analysed decisions made based on religion, health status, race and ethnicity and given rulings on whether indirect/disparate impact discrimination has occurred. The application of the theory in Kenya has enabled people who have faced discrimination due to seemingly neutral laws access justice. In the Kenyan context, courts apply the four-part test established in the Fugicha case to analyse

⁴⁰ Selmi M, 'Was the Disparate Impact Theory a Mistake?' 53 UCLA LAW REVIEW 701, 2006, 767-776.

whether disparate impact discrimination has occurred.⁴¹ The test comprises four questions. Firstly, to establish the relevant provision, criterion, or practice that is applicable. Secondly, to address the issue of disparate impact, identify a group and compare the relevant disadvantages. Thirdly, to determine if the provision, criterion, or practice was detrimental to the claimant personally and lastly, to assess whether the policy is objectively supported by a legitimate aim and whether this is an appropriate means to achieve the aim. In this instance, the high court opined that the refusal by a school to allow female Muslim students to wear their religious headdress to school constituted indirect discrimination. The courts, in another case, also applied the theory to an employment matter and determined that the dismissal of an employee based on his health status was discriminatory.⁴²

This study will analyse the provisions of the law that criminalize suicide and the provisions that protect the right to freedom from discrimination through the lens of the disparate impact theory to determine whether the criminalization of suicide is an infringement on the right to freedom from discrimination. The study shall apply the theory to chapter three to establish whether the seemingly neutral laws on suicide are unintentionally discriminatory against survivors of suicide, whether the survivors are part of a protected group of persons under the constitution of Kenya, and whether the laws are justified. This shall be key in proving or refuting the hypothesis of the study. The study shall also apply the theory in chapter four to analyse the disparate impacts of the laws on suicide on the survivors of attempted suicide.

⁴¹ *Methodist Church in Kenya v Mohamed Fugicha & 3 others* (2016) eKRL.

⁴² *Simon Gitau Gichuru v Package Insurance Brokers* (2021) eKLR.

2.2 LITERATURE REVIEW

Various literature documents analyse the infringement of suicide laws on various rights of protected persons. These rights include the right to health and health care, the right to human dignity, and the right to freedom from discrimination. This particular research problem appears to be a worldwide ongoing debate, with several literature pieces written all over the world. However, most authors focus on the problem and its significant infringement on the right to health and health care, particularly the right to the highest attainable standard of health. Ochieng J and Kamau L, in their article, critically analyse Section 226 of the Penal Code and propose the reforms needed.⁴³ The article delves into the history of attempted suicide as a crime and critiques its origins. The authors mainly focus on critiques based on human rights. The article also focuses on the impacts of decriminalization of suicide. Although the authors analyse the positive impact of decriminalization, they also highlight that decriminalization of suicide in Kenya would lead to a gap in the law and law enforcement agencies losing their jurisdiction to handle people who engage in criminal activities and threaten the government with suicide. They do this to ensure that the government bends to their unreasonable or illegitimate demands. The authors argue that the government would lack basis to convict such people for attempted suicide. The authors further point out the need for a clear distinction between people who are driven to suicide due to mental illness and terrorists such as suicide bombers who end up not blowing themselves up. The distinction should also include terrorists who use cyanide pills to erase evidence. The article suggests that there should be separate legislation to cover the perpetrators that attempt suicide for criminal reasons. The article concludes that decriminalization of suicide will not be sufficient and that therefore there is a need to follow up decriminalization with various reforms and policies in order to boost the impact of decriminalization positively.⁴⁴

⁴³Olayo J and Kamau L, 'Critical Analysis of Section 226 of Kenya Penal Code: A Case for Urgent Reform' 1 *International Journal of Law and Policy* 1, 2021, 30.

⁴⁴ Olayo J and Kamau L, 'Critical Analysis of Section 226 of Kenya Penal Code: A Case for Urgent Reform' 1 *International Journal of Law and Policy* 1, 2021, 38.

Otieno D, in his research paper titled ‘Decriminalization Of Attempted Suicide In Kenya: Research On How Criminalization Of Attempted Suicide Infringes On The Right To Health Under The Constitution’,⁴⁵ focuses on the infringement of the right to health and the consequences of the said infringement. His scholarly work analyses the provisions of Section 226 of the Penal Code⁴⁶ and section 36 of the same act⁴⁷ and divulges the impacts of these laws on the Right to Health. The author’s conceptualisation of the right to health is based on a domestic and international legal framework. The link between attempted suicide and access to the highest attainable standard of health is analysed and the author draws the conclusion that criminalization of suicide is an infringement on the right to health.

Stefan S, in her book ‘Rational Suicide, Irrational Laws’, discusses the causes of suicide in depth.⁴⁸ These causes range from social factors to mental factors and criminal motives. She discusses medical causes of suicide and lists them i.e., depression. She then discusses various factors and laws on suicide in various countries and the social and economic disposition of these countries. Stefan dedicates a chapter in her book to discuss discrimination based on suicidality.⁴⁹ The chapter investigates suicide-related discrimination, with a focus on employment, higher education, and healthcare. It examines the relationship between the fear of tort liability and the liability for discrimination. This tension has pushed colleges and universities to adopt discriminatory and ineffective policies, prompting private parties and the Department of Justice to sue higher education institutions. The differences in tactics taken by the Justice and Education Departments to this subject are examined. Employers have responded to employees' suicidal thoughts in a number of ways; model responses are described in the chapter. She concludes by

⁴⁵ Otieno D, ‘Decriminalization of Attempted Suicide In Kenya: Research On How Criminalization Of Attempted Suicide Infringes On The Right To Health’ Published LLB Dissertation, Kabarak University, Nakuru, 2022.

⁴⁶ Section 226, Penal Code (Act No 19 of 2014).

⁴⁷ Section 36, Penal Code (Act No 19 of 2014).

⁴⁸ Stefan S, *Rational Suicide, Irrational Laws: Examining Current Approaches to Suicide In Policy and Law, 1st Ed*, Oxford University Press, New York, 2016, 378.

⁴⁹ Stefan S, *Rational Suicide, Irrational Laws: Examining Current Approaches to Suicide In Policy and Law*, 372-411.

analysing the laws on suicide, particularly in America and concludes that the laws imposed on victims of mental health conditions is irrational.⁵⁰

Sheila Moore, in her thesis titled ‘The Decriminalization of Suicide’, sought to demonstrate that suicide would not have been decriminalised without the actions of three very specific human agents, and at the same time showed how these actions were shaped by, and their success dependent upon, structural elements that both constrained and guided them.⁵¹ She discusses the history of the crime of attempted suicide in England and Wales and divulges key information on what led to the decriminalization and how it occurred. The author notes that the lawmakers decided that suicide is a medical matter and not a criminal matter but he critiques the move to decriminalize suicide for it leaves open gaps in the law.⁵²

The authors, in ‘Centering decriminalization of suicide in low – and middle – income countries on effective suicide prevention strategies,’ conduct an analysis based on statistics and focus on the policies and efforts of effective suicide prevention.⁵³ The chapter focuses on the aftermath of decriminalization of suicide in Africa. The authors note that policy makers will have to come up with strategies and policies for effective suicide prevention to ensure that the high suicide rates come down. Further the chapter points that the criminalization of suicide in several countries hinders help seeking, increases the stigmatization of those who attempt suicide and obstructs the accurate tracking of suicides. It highlights the negative effects of suicide criminalization and discusses evidence-based strategies for suicide prevention such as means restriction, improved

⁵⁰ Stefan S, *Rational Suicide, Irrational Laws: Examining Current Approaches to Suicide In Policy and Law*, 402.

⁵¹ Moore S, ‘The decriminalisation of suicide’ Published PhD thesis, London School of Economics and Political Science, London, 2000.

⁵² Moore S, ‘The decriminalisation of suicide’ Published PhD Law Thesis, London School of Economics and Political Science, London, 2000.

⁵³ Ochuku B, Johnson N and Osborn T, ‘Centering decriminalization of suicide in low – and middle – income countries on effective suicide prevention strategies’ 13 *Frontiers Psychiatry*, 2022.

mental health literacy and access to psychosocial support, and responsible media coverage of suicide.⁵⁴

The contribution that this study seeks to make to the ongoing academic discourse on whether suicide should be decriminalized will be made through analysis of the subject matter through the lens of the disparate impact theory. This study shall examine the provisions of section 226 of the Penal Code using the disparate impact theory to determine whether the seemingly neutral law has disparate impacts on attempted suicide survivors suffering from mental health conditions. The study shall do this using the test established in *Methodist Church in Kenya v Mohamed Fugicha*,⁵⁵ a test used in the disparate impact theory and explained further in chapter three, which is used to ascertain the presence of direct impact discrimination and thus an infringement on the right to freedom from discrimination as guaranteed by the constitution of Kenya. Whereas many authors focus on the illegality of the laws on the criminalization of suicide based on the right to health, which is a socio-economic right, this study shall focus on the right to freedom from discrimination, a civil right that includes the preservation and protection of peoples' physical and mental integrity. This decision is because the state can be compelled to guarantee a civil right as opposed to a socio-economic right that is to be realised progressively as per Constitution.⁵⁶ This might accelerate the efforts to decriminalize suicide in Kenya, which have been going on for over a decade. The parliament received a bill in 2021 for the decriminalization of suicide but it was rejected. Suicide is a prevailing issue in Kenya, which was made more apparent by the Shakahola tragedy, and the constantly rising number of suicides reported annually.

⁵⁴ Ochuku B, Johnson N and Osborn T, 'Centering decriminalization of suicide in low – and middle – income countries on effective suicide prevention strategies' 13 *Frontiers Psychiatry*, 2022.

⁵⁵ *Methodist Church in Kenya v Mohamed Fugicha & 3 others* (2019) eKRL.

⁵⁶ Article 23, Constitution of Kenya (2010).

CHAPTER THREE: THE CRIME OF ATTEMPTED SUICIDE IN KENYA AND THE LINK BETWEEN ATTEMPTED SUICIDE AND DISCRIMINATION

3.1 THE CRIME OF ATTEMPTED SUICIDE IN KENYA

Attempted suicide in Kenya is criminalized under the Penal Code's Section 226 provisions, which render any person who attempts suicide as a criminal guilty of a misdemeanour.⁵⁷ The act further defines a misdemeanour as any offence that is not a felony.⁵⁸ The punishment meted out by the act's provisions, for misdemeanours, is imprisonment for a term not exceeding two years, a fine, or both. In *Beatrice Ngwasi Kyusya v Republic*,⁵⁹ The court tried the accused on two charges. Attempted murder and attempted suicide. She was found guilty on both counts and was sentenced to the maximum imprisonment penalty, two years, for the second count of attempted suicide. She appealed to a higher court but the judge maintained the sentences that were to run concurrently.⁶⁰ Two years imprisonment for attempted suicide is excessive particularly because the accused does not get any medical care to ascertain whether she has a mental health condition that requires medical care during her incarceration. The first part of this chapter shall delve into a historical analysis on the laws on suicide in order to determine the origin of these laws and the link between the law and suicide. The chapter shall also analyse the state's rationale for criminalising suicide in order to determine whether the justification is purposeful.

3.1.1 A HISTORICAL PERSPECTIVE ON SUICIDE AND THE LAW

Historically, the criminalization of suicide appears to have been influenced by colonisation, religious beliefs, and politics. Religious influence can be traced to Saint Augustine's early works,

⁵⁷ Section 226, Penal Code (Act No 19 of 2014).

⁵⁸ Section 4, Penal Code (Act No 19 of 2014).

⁵⁹ *Beatrice Ngwasi Kyusya v Republic* (2013) eKLR.

⁶⁰ *Beatrice Ngwasi Kyusya v Republic* (2016) eKLR.

which interpreted the Christian commandment "thou shall not kill" to include suicide.⁶¹ This appears to be the reason why suicide has been criminalised in mostly Christian countries.⁶² Sharia Law, which guides legal processes in many Islamic regimes, also considers suicide a sin.⁶³ Politically, the relationship between suicide and the law dates back to the seventh century.⁶⁴ However, in 1562, an English court ruled that suicide was a punished crime since it was disrespectful to God, the natural order, and the King.⁶⁵ Following that, Blackstone's codification of English defined suicide as "self-murder" and confirmed its classification as an atrocious offence. In contrast to murder, the punishment for suicide was an undignified burial late at night at a crossroads with a stake driven through the torso and a stone on the deceased's face. In addition, the individual who committed suicide surrendered all of his property to the King.⁶⁶ The latter punishment was imposed in the hope that "care for either his own reputation or the welfare of his family" would be enough to deter him from such a desperate and immoral conduct.⁶⁷ The punishment of undignified burial in the middle of the night may have perpetuated the stigma that surrounds suicide until date. Suicide is one of the topics that are avoided in Kenyan society. Families often try to dissociate themselves from suicide as the cause of death of their loved ones and people that have survived suicide attempts are isolated from society. The additional punishment of relinquishing property to deter suicidal acts appears to advance the stigma that surrounds suicide thus hampering efforts to prevent suicide.

⁶¹ Lewis P, *Assisted Dying and Legal Change*, 1 ed, Oxford University Press, Oxford, 2007.

⁶² Lewis P, *Assisted Dying and Legal Change*, 1 ed, Oxford University Press, Oxford, 2007.

⁶³ Lester D, 'Suicide and Islam' 10 *Archives of Suicide Research* 1, 2006, 77– 97.

⁶⁴ Zell M, 'Suicide in Pre-Industrial England' 11 *Social History* 3, 1986, 303-317.

⁶⁵ Bloch K, 'The Role of Law in Suicide Prevention: Beyond Civil Commitment. A Bystander Duty to Report Suicide Threats' 39 *Stanford Law Review* 4 , 1987, 929.

⁶⁶ Olayo J and Kamau L, 'Critical Analysis of Section 226 of Kenya Penal Code: A Case for Urgent Reform' 1 *International Journal of Law and Policy* 1, 2021, 32.

⁶⁷ Olayo J and Kamau L, 'Critical Analysis of Section 226 of Kenya Penal Code: A Case for Urgent Reform' 1 *International Journal of Law and Policy* 1, 2021, 32.

Despite widespread opposition to the legalisation of suicide, both suicide and attempted suicide remained punishable common law crimes in England until 1961, when suicide was decriminalised.⁶⁸ However, although Kenya adopted these laws from the British colonialists, they remain in effect in Kenya. This legislation, which stems from the colonial era, is based on laws imposed by the colonialists rather than the autochthonous needs of the country.

There have been several instances where important steps have been taken towards repealing Section 226 of the Penal Code. However, thus far, none of the attempts to decriminalise suicide has been successful. In 2021, a bill whose purpose was to amend the penal code by deleting section 226 of the Penal Code, which criminalises attempted suicide, was rejected by parliament.⁶⁹ Further, the Kenya National Commission on Human Rights launched a suit against the Attorney General of Kenya petitioning the decriminalization of suicide.⁷⁰ The petition was based on several provisions of the law that provided for protection of human rights. The provisions contravened include the provisions on right to health, right to freedom from discrimination, right to equal benefit of the law, right to human dignity and several other provisions. The petition also claimed that colonialists who have since, decriminalized suicide influenced the law. The attorney general replied in stating that the role of amending laws is the parliament's jurisdiction and not within the confines of the roles of the office of the attorney general.⁷¹ A decision is yet to be made on the same.

3.1.2 RATIONALE FOR THE LAWS ON ATTEMPTED SUICIDE

Several theories support the legality of government involvement to prevent suicide.⁷² The state is interested in protecting both the overall value of life and the value of an individual person's life. The criminalization of suicide is an attempt to protect an individual's life as well as societal life

⁶⁸ Section 2, Suicide Act (1961).

⁶⁹ Section 3, The Penal Code Amendment Bill (2021).

⁷⁰ Constitutional Petition NO E045 (2022) eKLR.

⁷¹ Constitutional Petition NO E045 (2022) eKLR.

⁷² G Peters, 'The State's Interest in the Preservation of Life: From Quinlan to Cruzan.' 50 *Ohio State Law Journal* 891, 1989, 891.

value.⁷³ The state asserts this interest in various ways under the law. For example, the laws on suicide, abortion, and euthanasia.⁷⁴ In the case of euthanasia, states have an equal interest in preventing the cessation of life-sustaining or life-extending interventions. In the context of abortion, the United States Supreme Court determined that the state's interest in safeguarding a mother's life was compelling enough to preserve both the maternal parent's essential constitutional right to privacy and her derivative freedom to receive an abortion after the first trimester.⁷⁵ However, the court determined that the state's interest in the unborn child's potential life was sufficient to justify barring abortion after the second trimester.⁷⁶ Similarly, in suicide cases, the courts underline the state's interest in life preservation. The courts opine that the protection of life has an outstanding social significance in our culture, and suicide is regarded as a "grave public wrong." The state's interest in life preservation extends beyond preserving social life to protecting every person from injury, even harm inflicted on oneself.⁷⁷ The state relies on its powers in the context of suicide to protect people, particularly suicidal people suffering from mental illnesses, from self-inflicted injury, assuming that the individual is unable to protect himself or herself at the time.⁷⁸ Suicidal people with mental illnesses are thought to have lost their ability to make reasonable decisions, and as a result, the state assumes decision-making power and exercises it in favour of life, at least until the individual has recuperated.⁷⁹ This is helpful in preventing second attempts, however, using this power to also subject attempted suicide survivors suffering from mental health conditions to the criminal justice system is counter-productive to their recuperation.

⁷³Thomas M, 'Parens Patriae and The States' Historic Police Power' 69 *SMU Law Review* 4, 2016, 759.

⁷⁴ The penal code (Act No 19 of 2014).

⁷⁵ *Roe v Wade* (1973), The Supreme Court of the United States.

⁷⁶ *Roe v Wade*, The Supreme Court of the United States.

⁷⁷ G Peters, 'The State's Interest in the Preservation of Life: From Quinlan to Cruzan.' 50 *Ohio State Law Journal* 891, 1989, 891.

⁷⁸ Bloch K, 'The Role of Law in Suicide Prevention: Beyond Civil Commitment, A Bystander Duty to Report Suicide Threats' 39 *Stanford Law Review* 4, 1987, 929.

⁷⁹ G Peters, 'The State's Interest in the Preservation of Life: From Quinlan to Cruzan.' 50 *Ohio State Law Journal* 891, 1989, 891.

Furthermore, the theory of deterrence rationalises the punishment for attempted suicide meted out in Section 36 of the Penal Code. The state aims to protect individuals by criminalizing suicide. According to Black's Law Dictionary, 'deterrence is the act or process of discouraging certain behaviour, particularly by fear, especially as a goal of criminal law.'⁸⁰ Raymond Paternoster defines deterrence in criminal law as the concept of deterrence in criminal justice: the omission of a criminal act because of the fear of sanctions or punishment.⁸¹ The possibility of conviction and punishment minimises the loss from criminal offences, hence increasing societal welfare by discouraging some offenders.⁸² The theory of deterrence predicts that a credible threat of punishment from a well-enforced criminal justice system will decrease crime by discouraging individuals from committing crimes in the first place or from recurring criminal offences.⁸³ While specific deterrence is directed at the individual who committed a crime, general deterrence is meant to make the general population and potential offenders reconsider breaking the law. Specific and broad deterrence are not mutually exclusive. By using both types of deterrence, the punishment will dissuade the accused from re-offending as well as others from committing the same or similar crimes. The state relies on this theory to discourage people from attempting suicide. The theory of deterrence in this instance appears to fall short of deterring the crime of suicide that has been constantly on the rise over the past decade. The rationale of the laws on suicide when analysed through the lens of the disparate impact theory fails to meet the justification requirement of the theory's test that requires that the benefits of the rule outweigh its negative impacts. Therefore, the state ought to look at other measures of curbing the growing rates of suicide and attempted suicide. The study analyses the history and rationale of the laws on

⁸⁰ Black's Law Dictionary, 3rd ed.

⁸¹ Paternoster R, 'How Much Do We Really Know About Criminal Deterrence?' 100 *Journal of Criminal Law and Criminology* 3, 2010, 765.

⁸² Becker G, 'Crime and Punishment: An Economic Approach', 76 *Journal of Political Economy* 2, 1968, 169-204.

⁸³ Dutton Y, 'Crime and Punishment: Assessing Deterrence Theory in the Context of Somali Piracy', McKinney School of Law Research Paper Number 38, 2014, 607

<https://ssrn.com/abstract=2534069> on 4th December 2018.

suicide in order to determine whether the laws are justified. This aspect is further analysed while answering the question of proportionality under part 3.2.4 of this chapter.

3.2 THE LINK BETWEEN ATTEMPTED SUICIDE AND DISCRIMINATION

Discrimination is defined as the unfair or prejudiced treatment of individuals and groups based on factors such as race, gender, or age.⁸⁴ According to Black's Law Dictionary, discrimination is the failure to treat all individuals equally when there is no legitimate distinction between those who are favoured and those who are not.⁸⁵ There are two types of discrimination, direct discrimination and indirect discrimination/disparate impact discrimination. This study will focus on indirect discrimination, henceforth referred to as disparate impact discrimination, which occurs when there is a policy that applies in the same way for everybody but disadvantages a group of people who share a protected characteristic.⁸⁶ A policy, in this instance, can include a practice, a rule or an arrangement.⁸⁷

The Kenyan Constitution provides each citizen with protection against discrimination from the state in Article 27(4) that, “states that the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.” Furthermore, Article 27(1) ensures equal protection and benefit of the law, while Article 27(2) covers the full and equal enjoyment of all rights and fundamental freedoms under the canopy of equality. The Mental Health Act also provides that, “mentally sick persons shall be accorded protection of the right to freedom from discrimination based on mental health status,” under section 3(c).⁸⁸ The study in this section of the chapter shall analyse the laws on attempted

⁸⁴ Peter K. Waweru v Republic (2006) eKLR.

⁸⁵ Black's Law Dictionary, 10th ed.

⁸⁶ Simon Gitau Gichuru v Package Insurance Brokers (2021) eKLR.

⁸⁷ Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) eKLR.

⁸⁸ Section 3(a), Mental Health Act (2022).

suicide through the lens of the right to freedom from discrimination using the theory of disparate impact discrimination.

3.1 AN ANALYSIS OF ATTEMPTED SUICIDE LAWS THROUGH THE LENS OF THE RIGHT TO FREEDOM FROM DISCRIMINATION

3.1.1 Disparate Impact Discrimination in the Kenyan Context

The legal and factual aspects of a case play a significant role in determining whether an apparently neutral act or policy is disparately discriminatory. Historically, judges have employed judicial perception to maintain justice in a variety of circumstances.⁸⁹ As a result, the judiciary has a unique opportunity to expound on the concept of disparate impact discrimination through adjudication. One of the first judicial decisions on disparate impact discrimination recognised that neutral methods and procedures that try to preserve the status quo created by previous discriminatory practices could not be maintained, notwithstanding the employer's lack of discriminatory intent.⁹⁰ The court applied the theory of disparate impact. The idea has subsequently been adopted in other jurisdictions. In one of the earliest cases in which disparate impact discrimination was discussed in the Kenyan context,⁹¹ The high court defined disparate impact discrimination but failed to further discuss the doctrine and its applicability in the Kenyan context. Other courts followed suit,⁹² however, in cases that are more recent the courts have taken a step further and delved into substantive discussions of the doctrine. This part of the study shall conduct case studies on three cases in which the courts delved into substantive discussions of the theory of disparate impact rather than just defining the theory.

A. The Mohammed Fugicha Case (Hijab Case)

⁸⁹ Wachter S, Mittelstadt B and Russel C, 'Why fairness cannot be automated: Bridging the gap between EU non-discrimination law and AI' 41 *Computer Law & Security Review*, 2021, 44.

⁹⁰ *Griggs v Duke Power Company* (1971), The Supreme Court of the United States.

⁹¹ *James Nyasora Nyarangi & 3 others v Attorney General* (2008) eKLR.

⁹² *Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested parties)* (2020) eKLR.

The Mohamed Fugicha Court of Appeal ruling is the most detailed and informative example of discrimination jurisprudence in Kenya.⁹³ The facts of the case were that on June 22, 2014, concerns arose after the deputy governor of Isiolo County made an informal request to the schools that female Muslim pupils be permitted to wear the Muslim headpiece, a hijab, to school. The Parent Teacher Association and Board of Management of St. Paul's Kiwanjani Day Mixed Secondary School met with the sponsoring church and decided to keep the school's uniform policy. Following this judgement, the County Director of Education issued an order allowing Muslim female students to wear the hijab to school and transferred the school principal. The Methodist church, which was upset by the order, took the case to the high court, where it was determined that the order was illegal and Mr. Fugicha's cross petition was dismissed. The matter was then appealed to the Court of Appeal, claiming that the dismissal of Fugicha's cross petition was flawed. In its conclusion, the court held that in order to ensure justice, it is necessary to evaluate whether a seemingly neutral law, policy, or action becomes discriminatory in its application. As a result, in determining whether the limitation on the donning of the hijab by female Muslim pupils in a public school constituted disparate impact discrimination, the Court relied on the four-step criteria set out by the administrative courts of the United Kingdom.⁹⁴ Firstly, to establish the relevant provision, criterion, or practice that is applicable. Secondly, to address the issue of disparate impact, identify a group and compare the relevant disadvantages. Thirdly, to determine if the provision, criterion, or practice was detrimental to the claimant personally and lastly, to assess whether the policy is objectively supported by a legitimate aim and whether this is an appropriate means to achieve the aim. However, the Supreme Court overruled this decision due to procedural irregularities, as the Court found it improper that the Court of Appeal's decision arose from issues raised in the cross-petition filed by Mr. Fugicha, who was not a party to the proceedings but rather an interested party.⁹⁵ As a result, the Supreme

⁹³ Ngure S, 'Accommodation as an expression of the right to equality: A case note on Fugicha v Methodist Church of Kenya' 6 *Kabarak Journal of Law and Ethics*, 2022.

⁹⁴ Watkins-Singh, R (on the application of) v The Governing Body of Aberdare Girls' High School & another (2008), The United Kingdom Administrative Courts.

⁹⁵ *Methodist Church in Kenya v Mohamed Fugicha & 3 others* (2016) eKRL.

Court determined that both the High Court and the Court of Appeal rulings violated the appellant's right to be heard, and that Mr Fugicha's cross-petition was flawed and inconsistent with the Mutunga guidelines.⁹⁶ In his dissenting opinion, Justice Ojwang of the Supreme Court said that the majority position paid too much attention to procedural details, which was opposed to the 2010 constitutional provisions. He described the Appellate Court's conclusion as “appropriately pragmatic and rational, and well reflects on the desirable judicial stand.”⁹⁷

The decision to dismiss the appeal based on procedural technicalities appears to hamper the delivery of justice in this case. The courts established that the refusal to allow female Muslim students to wear their hijabs constituted disparate impact discrimination. However, the courts failed to secure justice for the Muslim females based on a procedural technicality despite the constitution deeming that justice should be administered without undue regard to procedural technicalities.⁹⁸ Despite this shortcoming, the case provides key insights into disparate impact discrimination in the Kenyan context. It sets out a guideline for the application of the disparate impact theory test in Kenya.

B. Samson Gwer & 5 Others V Kenya Medical Research Institute & 3 Others (Disparate Impact Discrimination)

The facts of the case were that; six doctors, Samson Gwer included, had brought a matter of disparate impact discrimination before the high court against KEMRI. The court held that KEMRI's actions of paying Europeans higher salaries and giving them longer contracts and credit for their works as opposed to their African counterparts constituted disparate discrimination. The court awarded the claimants five million Kenyan Shillings each. However, upon appeal to the Court of Appeal, the court allowed the appeal and overturned the lower court's decision citing the petitioners' failure to produce sufficient proof in their disparate impact discrimination allegations. The doctors appealed further to the Supreme Court of Kenya which

⁹⁶ *Methodist Church in Kenya v Mohamed Fugicha & 3 others* (2019) eKRL.

⁹⁷ *Methodist Church in Kenya v Mohamed Fugicha & 3 others* (2019) eKRL.

⁹⁸ Article 159 (2) (d), Constitution of Kenya (2010).

denied the petition, pointing out the petitioners' failure to produce sufficient proof in their disparate impact discrimination allegations.⁹⁹ Despite this, the case highlighted and answered key questions about Kenya's stance on disparate impact discrimination law. The petitioners requested that the Court rule on what constitutes direct impact discrimination, who has the burden of proof, when the burden shifts, and what constitutes a prima facie instance of disparate impact discrimination.¹⁰⁰ In its decision, the Supreme Court did not clarify on what it believed to be disparate impact discrimination, nor did it specify what form of evidence it thought most relevant in disparate impact discrimination cases. Nonetheless, in its critique of the petitioners' insufficient evidence,¹⁰¹ the court concluded that the petitioners bore the burden of proof before shifting it to the respondent, and the standard of proof in discrimination cases is higher than the balance of probabilities threshold for civil claims.¹⁰²

The case provides key insights into the aspect of burden of proof and the standard of proof in disparate impact discrimination cases. The case ascertains that the burden of proof is borne by the claimant to prove a prima facie case and that the claimant has been affected personally. The burden then shifts to the defendant to prove that the neutral law with discriminate effects is justified. This provides further clarity on disparate impact discrimination in the Kenyan context.

C. Simon Gitau Gichuru V Package Insurance Brokers (Disparate Impact Discrimination)

The facts of the case were that the case had been appealed to the Court of Appeal after the High Court found that Package Insurance Brokers was discriminatory. The matter brought before the court was that Simon Gitau had been fired by his employers on medical grounds. The aggrieved could only move around with the help of a walking frame after fighting illness for a while. The court of appeal found that the respondents had discriminated against him and awarded five million Kenyan Shillings in damages. The case was then appealed to the Supreme Court. This case brought to the Supreme Court the issue of disparate impact discrimination stemming from

⁹⁹ Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) eKLR.

¹⁰⁰ Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) eKLR.

¹⁰¹ Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) eKLR.

¹⁰² Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) eKLR.

the petitioner's summary dismissal by his employer for excessive incompetence.¹⁰³ The essence of the claim, however, revolved around the respondent's conduct prior to the petitioner's dismissal, which the Supreme Court determined to be a 'drastic, harsh, and unreasonable' response.¹⁰⁴

The Supreme Court, like the Court of Appeal in the Mohamed Fugicha case, used the four-part test to determine whether the petitioner was subjected to direct effect discrimination. Although the Court did not give an adequate analysis, leaving the Mohamed Fugicha decision as the only substantial description of the test's substance in Kenyan jurisprudence, the Supreme Court did provide guidelines on issues to consider when examining the respondents' justifications in such claims. It found that the respondent's actions directed at the petitioner, including carrying out investigations solely aimed at him and failing to employ any other remedy other than dismissal, were evidence of the respondent's intention to get rid of the petitioner and thus constituted disparate impact discrimination.¹⁰⁵ The decision further highlighted that the respondent's inability to demonstrate that accommodating the petitioner would have caused 'undue hardship' and was a violation of the non-discrimination principle.¹⁰⁶ This reference to the 'undue hardship' standard, which is based on South African and Canadian law, contributes significantly to Kenya's disparate impact discrimination jurisprudence. This clearly supports reliance on compelling precedents from those jurisdictions.

The analysis of these cases proves that disparate impact discrimination is sufficient grounds for filing a suit for the infringement of the right to freedom from discrimination in Kenya and that the disparate impact theory is an applicable doctrine in the Kenyan courts. The cases further lay out a guideline for how the courts apply the disparate impact theory test to Kenyan matters. The laws criminalising suicide appear to be disparately discriminatory. This study shall apply the disparate impact theory test to the matter of suicide to determine whether the laws on suicide are discriminate against persons that attempt suicide due to the strains of mental conditions.

¹⁰³ Simon Gitau Gichuru v Package Insurance Brokers (2021) eKLR.

¹⁰⁴ Simon Gitau Gichuru v Package Insurance Brokers (2021) eKLR.

¹⁰⁵ Simon Gitau Gichuru v Package Insurance Brokers (2021) eKLR.

¹⁰⁶ Simon Gitau Gichuru v Package Insurance Brokers (2021) eKLR.

3.2 ESTABLISHING DISPARATE IMPACT DISCRIMINATION IN THE LAWS CRIMINALISING SUICIDE

This part of the study will analyse on a systematic basis whether the interaction between individuals suffering from mental health conditions and the laws on attempted suicide results in victimization of the individuals using the test adopted in the Mohammed Fugicha case mentioned earlier. In Fugicha, the court of appeal ruled that, in limited circumstances, even when laws are administered equally to all who are bound by them, they may result in discrimination. The petitioner in the Samson Gwer Case,¹⁰⁷ stated that it was unnecessary for them to demonstrate that the challenged measure was established or implemented with discriminatory purpose. They relied on a human rights ruling that emphasised that proof of 'intent' was not relevant, because direct impact discrimination is primarily concerned with the consequences of a behaviour.¹⁰⁸

3.2.1 Identifying the relevant provision, criterion or practice

Section 226 of the Penal Code is the legislation that criminalises the offence of attempted suicide. The Section stipulates that 'any person who attempts to kill himself is guilty of misdemeanour.'

The section, which has been in existence since colonial times, is still in force despite the colonialists repealing the law in their own country.

3.2.2 Identifying the Relevant Groups and the Disparate Impact

Members of a protected group of people are those who possess protected characteristics as outlined under Article 27(4) of the 2010 Constitution. Health status is one of the characteristics outlined and therefore people suffering from mental health conditions are part of the protected group in Kenya. The court in *VMK v CUEA*¹⁰⁹ held that health status is a

¹⁰⁷ Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) eKLR.

¹⁰⁸ Ontario Human Rights Commission and Theresa O'Malley (Vincent) v. Simpsons - Sears Ltd (1985), The Supreme Court of Canada.

¹⁰⁹ V M K v C U E A [2013] eKLR.

characteristic of a protected group and that discrimination based on health status is a violation of the right to freedom from discrimination as enshrined in the constitution. The claimant was a HIV positive pregnant woman that had been discriminated against based on her health status. The protected group in this matter would be people that attempt suicide because of mental health conditions. As a result, the criminalisation of attempted suicide is highly likely to negatively impact a higher percentage of those suffering from mental health illnesses as opposed to those that are not suffering from it. Cases of suicide bombers and criminals committing suicide to destroy evidence are rare in Kenya and most of the people charged with attempted suicide are people that suffer from one or more forms of mental health conditions, landing in jail for their health status. This is differential treatment because healthy people or people with physical illnesses rarely land in jail facing misdemeanour charges simply because of their health status. Therefore, the disparate impact would be the subjection of mentally sick people to the criminal justice system simply for being sick.

3.2.3 Identifying Whether the Claimant Was Personally Affected

Claims of disparate impact discrimination pertain to the occurrence of harm experienced by certain members of a protected group who share protected characteristics. The petitioner ought to demonstrate how the provision of the law, the criteria, or practice has affected them personally in order to pass the test used in the Mohammed Fugicha case.¹¹⁰ In that instance, the court determined that the petitioner's daughters, together with other school going female Muslim pupils, were the claimants who suffered personal disadvantages. Both petitioners in the *MAO v. Attorney General Case* used their own personal experiences as proof of the harm that affected women in Pumwani Hospital experienced following childbirth.¹¹¹ In another case, the courts changed the test's viewpoint by demonstrating that the victims do not have to be clearly

¹¹⁰ *Methodist Church in Kenya v Mohamed Fugicha & 3 others* (2019) eKRL.

¹¹¹ *M A O & another v Attorney General & 4 others* (2015) eKLR.

identified. The Court accepted the Petitioner's claim who was advocating for all children born out of wedlock with no specifically identified victims as adequate.¹¹²

Health status in Kenya is a fragile characteristic as it plays a role in the perception and estimation of an individual by society. Although this is not fair, it occurs often.¹¹³ Particularly with health conditions that have inaccurate and/or insufficient information spread about them in society and that are highly stigmatised such as HIV/AIDS and mental health conditions. The historic and systematic discrimination of people suffering from mental health illnesses has rendered them a vulnerable group in Kenya. The legal developments on mental health in Kenya, the new mental health policies and the mental health act, are great developments but the state ought to address its legal stand on suicide in order to advance the efforts to reduce the number of reported and unreported suicides in the country.

3.2.4 Proportionality of the Provision Criminalising the Offence of Attempted Suicide

Kenyan courts have ruled that a law is only legitimate when it is proportionate.¹¹⁴ A four-part test establishes proportionality by determining if there is a proper balance between the public interest and the infringement of the right.¹¹⁵

- i. Does the government action establishing the right's limitation serve a valid purpose that is significant enough to warrant limiting a right?
- ii. Are the means chosen to achieve the goal reasonable and appropriate?
- iii. Are the measures necessary, that is, minimally harmful to the limited right, after evaluating alternative methods of achieving the same goal?
- iv. Do the positive effects of the limitation on the right outweigh the negative effects?

¹¹² Cradle – The Children Foundation (suing through the trustee Geoffrey Maganya) v Nation Media Group Limited ex parte (2011) eKLR.

¹¹³ V M K v C U E A [2013] eKLR.

¹¹⁴ Kenya Human Rights Commission v Communications Authority of Kenya & 4 others (2018), eKLR.

¹¹⁵ Kenya Human Rights Commission v Communications Authority of Kenya & 4 others (2018), eKLR.

A legitimate aim is one whose value outweighs the disadvantages it may have.¹¹⁶ The objective must be 'legal and unrelated to discrimination',¹¹⁷ and explicit enough to ensure clarity about what it implies.¹¹⁸ It must also have a clear relationship with the challenged act and respond to a clearly recognised social need.¹¹⁹ Although this is rarely a contentious issue, the legitimacy of an aim is frequently considered when determining the acceptability of the methods used to achieve it. In cases involving the state or its agents, public interest considerations such as national security and public health, as well as public order, morality, and defence interests, are deemed valid.¹²⁰

As discussed in chapter two, the aim of the state is to preserve life and to deter more suicide cases. The state uses means of criminalization of attempted suicide to achieve this goal and the means appear well connected to the aim. However, on the third question of whether the means used minimally harm the limited right, after considering alternative means of accomplishing the same goal, the study arrives at a different conclusion due to the fact that the means lead to a violation of the right to health amongst other rights thereby defeating the purpose of the provision of the law. This is because the root cause of the issue is neglected by exposing the affected person to the criminal justice system instead of emergency health care that puts the life of the persons charged at further risk. Health care professionals are equipped to deal with suicidal persons and the environment in hospitals is much more suitable for prevention of a second attempt as opposed to a prison cell. Therefore, in this circumstance the negative impacts of the provision outweigh its benefits and/or value as the means used to achieve the aim defeats its purpose. The World Health Organization health ministers agreed that the decriminalisation of

¹¹⁶ Bailey A, 'Anti-discrimination law, religious organisations, and justice' 95 *New Blackfriars* 1060, 2014, 729.

¹¹⁷ Christa Tobler, Limits and the potential of the concept of indirect discrimination, September 2008, 32.

¹¹⁸ Deepak Chamanlal Kamani v Principal Immigration Officer & 2 others (2007) eKLR.

¹¹⁹ Deepak Chamanlal Kamani v Principal Immigration Officer & 2 others (2007) eKLR.

¹²⁰ Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested parties) (2020) eKLR.

suicide would be a plausible way to decrease deaths by suicide as it would reduce stigma and encourage people to seek medical help.¹²¹

3.2.5 Summary and Findings of the Chapter

In conclusion, of this chapter, the criminalization of suicide is disparately discriminatory against individuals suffering from mental health conditions based on their health status. The subjection of individuals suffering from mental health conditions to the criminal justice system is disparate impact discrimination because the issue passes the test adopted in Mohammed Fugicha. Section 226 of the Penal Code of Kenya disparately discriminates against survivors of attempted suicide, whose attempts were due to effects of mental health conditions. This is because they are a protected group of persons based on their health status under article 27 (4) of the constitution that guarantees the right to freedom from discrimination by the state¹²² and are guaranteed equal protection and equal benefit of the law under article 27 (1) and (2) of the constitution. The state ought to decriminalise suicide in order to protect the right to freedom from discrimination of mentally ill people based on their health status.

¹²¹ World Mental Health Assembly (2019).

¹²² Article 27 (4), Constitution of Kenya (2010).

CHAPTER FOUR: DISCRIMINATE IMPACT OF THE CRIMINALIZATION OF SUICIDE

The impacts of the laws on suicide are wide and reach almost every aspect of a person's life. People that are charged with attempted suicide and go through the criminal justice system experience various impacts and consequences. The criminal justice system tends to be punitive and rehabilitative. However, persons experiencing mental health conditions require a different environment and approach to achieve rehabilitation. The study in this chapter assesses the direct and indirect consequences of the discriminatory laws on suicide.

4.1 Impact on the Health of Attempted Suicide Survivors

Mental health conditions require diagnostic, preventative, curative and management medical treatment. More often than people charged with attempted suicide lose their access to mental healthcare once, they are apprehended, charged and convicted. The right to health is acknowledged and protected by Kenya's Constitution, particularly the Bill of Rights. Article 43 (10) (a) of Kenya's Constitution ensures that every citizen has access to the highest level of health care, and includes reproductive medical care.¹²³ The World Health Organisation defines health as a state of complete physical, mental, and social well-being, as opposed to simply the absence of sickness or incapacity.¹²⁴

This definition includes mental health, depression, and other mental illnesses, which are the leading causes of suicide.¹²⁵ The Health Act, in stating its objectives¹²⁶ and the responsibilities of the state, states that the state is responsible for protecting, respecting, promoting, and fulfilling the health rights of all Kenyans to the progressive realisation of their right to the best possible health, including the right to emergency medical treatment.¹²⁷ The same Act, in Section 5, states

¹²³ Article 43 (1) (a), Constitution of Kenya (2010).

¹²⁴ Preamble, World Health Organization Constitution.

¹²⁵ Preamble, World Health Organization Constitution.

¹²⁶ Sec 3(b), Health Act (Act No 21 of 2017).

¹²⁷ Sec 4 (a), Health Act (Act No 21 of 2017).

that, “every person has the right to the highest attainable standard of health, which shall include progressive access for the provision of promotive, preventive, curative, palliative, and rehabilitative services.”¹²⁸ The Mental Health Act of Kenya provides in section 3(b) for the rights of persons with mental illness.¹²⁹ It specifies that every person with a mental illness has the right to access medical, social, and legal services in order to promote the protection of the individual's rights under the Constitution.¹³⁰ According to the Act, everyone has the right to receive the highest quality mental health services available.

4.1.1 Comparison of the Criminal Procedure in Kenya and the Procedure of Obtaining Health Care

A person suspected of committing the offence of attempted suicide may be arrested with or without a warrant.¹³¹ Once arrested in accordance with the law, the suspect is detained, awaiting presentation to the court. The police officers then submit a report and evidence to the Office of the Director of Public Prosecution, hereinafter referred to as the ODPP, for review. If the ODPP decides to proceed, the charges are filed, and the suspect is presented before the court. The accused is brought before a magistrate or judge for a mention of the charges. The court informs the accused of the charges against them and their rights. The accused may enter a plea (guilty or not guilty). If the accused pleads not guilty, a date is set for the pre-trial conference, and the prosecution and defence exchange evidence and witness lists. During this stage, the court may consider bail applications. The trial then begins with the prosecution presenting evidence and witnesses. The defence has an opportunity to cross-examine witnesses and present its case. The magistrate or judge evaluates the evidence and makes a determination. If the accused is found guilty, a separate sentencing hearing may be held. The court imposes a sentence, which in this case, may be imprisonment for a term not exceeding two years, a fine, or both. If the accused is

¹²⁸ Sec 5 (1), Health Act (Act No 21 of 2017).

¹²⁹ Section 3(a), Mental Health Act (2022).

¹³⁰ Section 3(c), Mental Health Act (2022).

¹³¹ Criminal Procedure Code (Act No 18 of 2018).

sentenced to imprisonment, they serve their sentence in a correctional facility. The accused or the prosecution may appeal the verdict or sentence to a higher court.

The laws governing access to health in Kenya provide that every individual has a right to access medical care in cases of emergency.¹³² Normally, any person residing in Kenya and in need of medical care would walk into a hospital and receive the care they need. For a person suffering from mental health conditions, one can voluntarily walk into the hospital or be involuntarily held for medical treatment.¹³³ One may be admitted or treated in the outpatient centre and released to go home with medicine or other medical treatment options, such as therapy and counselling, as recommended by his/her doctor. A person suffering from mental health conditions often has the support of family and the mental health act dictates that he/she should have the support of medical staff and the state too.¹³⁴ The laws on suicide therefore limit the affected persons' right to health and the right to healthcare as guaranteed by the constitution of Kenya and other statutory provisions. Instead of receiving the proper healthcare and support that they are entitled to, the persons affected are more often than not subjected to the criminal justice system. They are sentenced to a maximum stay of two years in prison where their access to diagnostic, preventative and curative treatment is limited in the confines of prison. Their health therefore continues to deteriorate in the prison.

Further, subjecting unhealthy people to the criminal justice system simply for being sick is undignified. Article 28 of the Constitution of Kenya guarantees that, "every person has the right to human dignity."¹³⁵ Every individual possesses intrinsic dignity and the right to have it acknowledged and protected. This right can be grounded on Immanuel Kant's theory of human dignity. Kant believed that all humans, regardless of rank or social status, have the same essential worth or dignity. Human dignity is an innate value or position that we did not earn and cannot forfeit. Rather, we must endeavour to make our particular decisions worthy of the moral standing

¹³² Section 7, Health Act (Act No 21 of 2017).

¹³³ Section 14, Mental Health Act (Act No 27 of 2022).

¹³⁴ Section 2D (b), Mental Health Act (Act No 27 of 2022).

¹³⁵ Article 28, Constitution of Kenya (2010).

that raises us above animals and things. The Categorical Imperative, a fundamental tenet of logic and morality, encourages us to see humanity in each individual not as a means to an end, but as an end in itself. We must act as if we were both legislators and subjects in an ideal moral commonwealth in which members' dignity is valued as an end in itself rather than a means to an end. Unlike market, price, and other values that are reliant on our emotional ties, Kant defines dignity as 'an absolute and incomparable worth' that 'admits of no equivalent'. Human dignity is founded on the presumption that 'the moral law', an unconditional mandate of reason, has ultimate dignity and authority that all must accept. This moral standard needs respect for human dignity since, in practice, all human beings, good or bad, are believed to have the capacities and predispositions for rational autonomy. Looking at the experience of attempted suicide survivors in the criminal justice system through the lens of the Kantian understanding of Human Dignity, one can observe that the state risks violating the rights of these individuals by subjecting them to the criminal justice system instead of enabling them to acquire the medical care they need. Treating sick persons as criminals is undignified.

Further, article 12 of the convention on the rights of persons with disabilities reinforces the need to protect the rights of individuals with mental health challenges and treat them with dignity.¹³⁶ The convention obliges member states, Kenya being one, to provide the necessary support for people with disabilities to exercise their legal capacity while ensuring that such support is not abused. The criminalizing of suicide by the penal code under section 226 goes against this commitment by potentially penalizing vulnerable persons with disabilities and treating them in a manner that violates their right to dignity. The Penal Code amendment bill,¹³⁷ in its statement of how the bill affects county governments, stated that, “since persons living with disability are members of different communities within counties, protection and respect of such individuals will impact greatly on equality and freedom from discrimination even at county level. The use of derogatory and demeaning terms is therefore disrespectful and inhumane. Further, both the national and county governments have a duty to uphold and promote the Bill of Rights.” The

¹³⁶ Article 12, Convention on the Rights of Persons with Disabilities, 23 June 1973.

¹³⁷ Penal Code Amendment Bill (2021).

recent developments on using the phrase ‘died by suicide’ instead of ‘committed suicide’ also show that Kenya is moving away from the derogatory and demeaning words that make attempted suicide appear to be a crime.

4.2 Attempted Suicide Survivors Are Punished In a Cruel, Inhuman or Degrading Manner

The concept of cruel, inhumane, or degrading treatment and/or punishment is wider than torture.¹³⁸ It frequently refers to treatment that is less severe than torture or does not fit the definition of torture. It still includes abuse or humiliation. Inhuman treatment or punishment causes less pain than torture since it must be severe enough to produce actual bodily harm or extreme mental agony. It doesn't have to be deliberate. Degrading treatment makes a person feel humiliated, disrespected, or afraid.¹³⁹ It isn't required to be intentional, and it frequently does not cause bodily harm.¹⁴⁰ The exposure of persons, that suffer from mental health illnesses, charged with attempted suicide to the criminal justice system's form of punitive and rehabilitative punishment, may be considered as cruel, inhumane and degrading treatment as it further causes intense mental suffering and further exposes vulnerable persons to situations that may result in actual bodily harm.

4.3. Unlawful Detainment and Invasion of the Survivors' Privacy

People arrested and charged with attempted suicide are detained in cells awaiting presentation to the court and once they are convicted, they are processed to prisons to serve their sentences. However, those that are deemed mentally unstable may be sent to Mathari hospital or any other mental institutions in Kenya temporarily. However, even after their condition improves, they can still be detained while awaiting trial for durations that exceed the penalty for the offence, as

¹³⁸ Weissbrodt D and Heilman C, ‘Defining Torture and Cruel, Inhuman, and Degrading Treatment’ 29 Law & Ineq Journal 343 2011, 373-391.

¹³⁹ Webster E, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights*, Routledge Publishers, England, 2019.

¹⁴⁰ Webster E, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights*, Routledge Publishers, England, 2019.

outlined in Section 36 of the Penal Code. This practice violates individuals' rights to a fair hearing under Article 50 (2) of the constitution and to freedom and security of the person under Article 29 (2) (a) and (b), which guarantee the right not to be deprived of freedom without just cause and not to be detained without trial. Further, the mental facility, Mathari Hospital, in which the survivors are detained, has been deemed insufficient as a mental health facility due to its run down facilities and worn out staff.¹⁴¹ The environment of the national referral hospital, Mathari Hospital, is an impediment to the recuperation of attempted suicide survivors. Their mental health requires an environment that is conducive to their mental and physical well-being. This would promote faster recuperation and hence a shorter detainment period.

Privacy is a fundamental human right, entrenched in various international human rights treaties..¹⁴² The right to privacy is intertwined with the right to dignity. The constitution of Kenya provides for the right to privacy under article 31 (c) where it states that 'every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed.' Further, the Health Act provides that a person has the right to privacy and that "information concerning a user, including information relating to his or her health status, treatment or stay in a health facility is confidential except where such information is disclosed under order of court or informed consent for health research and policy planning purposes." Section 46 of the Data Protection Act explicitly addresses personal data linked to health. Medical health data can only be processed by or on behalf of a health care provider or by someone who is required by law to maintain professional secrecy.¹⁴³ The act further outlines the principles that are key in handling medical data.¹⁴⁴

Criminal matters in Kenya are matters of public interest and therefore are easily accessible to the public through various platforms such as the Kenya Law Report, News Reports and other sources. Attempted suicide is a misdemeanour and therefore court proceedings can be

¹⁴¹ Muhia J, 'A human rights assessment of a large mental hospital in Kenya' 40 Pan African Medical Journal 199, 2021, 10.

¹⁴² Article 12, Universal Declaration of Human Rights, 10 December 1948.

¹⁴³ Section 46, Data Protection Act (Act No 24 of 2019).

¹⁴⁴ Section 25, Data Protection Act (Act No 24 of 2019).

published.¹⁴⁵ However, there are limitations to this for example, the law protects children and hence one cannot publish or report on attempted law proceedings involving children with their full names.¹⁴⁶ It is a different matter for adults. On the Kenya Law Review, one can find a plethora of cases where the accused is charged with attempted suicide or where attempted suicide is one of charges brought against an accused.¹⁴⁷ Sometimes the content of the case might include protected information regarding one's health status, treatment and stay at a health facility without due procedure for exemption. This is an unwarranted invasion of privacy, as it puts out private medical information about individuals in public documents and publications accessible by all. It is unfortunate because of the stigma and discrimination that people suffering from mental health conditions face and the publication of their private information puts them at further risk of victimisation. The court, in *Kelin and 3 others v Cabinet Secretary Ministry of Health and 4 others*,¹⁴⁸ deemed the presidential decree to collect information about HIV positive individuals illegal since its implementation infringed the right to privacy. The government was ordered to codify the names obtained as a result of the directive within forty-five days and to preserve them in a way that does not relate people's identities to their HIV status in public documents. This may apply to those suffering from mental health disorders as a result of the shame and isolation that sometimes accompany these illnesses. This decision is significant because it protects the right to privacy and confidentiality of health information.

The invasion of privacy is further substantiated by the publication of medical information in affected individual's certificates of good conduct as a criminal offence that the individual was charged with and tried for. A certificate of good conduct is a government-issued document that verifies that a specific Kenyan bearer has been searched in Kenya's criminal records and no criminal record has been found. If an applicant has a criminal record, it is listed on the certificate.

¹⁴⁵ Section 7, Defamation Act (Act No 10 of 1970).

¹⁴⁶ Republic of Kenya, Social Transformation through Access to Justice: Child Justice strategy- <https://www.judiciary.go.ke/wp-content/uploads/2023/07/Child-justice-Strategy.pdf> - 2023.

¹⁴⁷ Beatrice Ngwasi Kyusya v Republic (2013) eKLR.

¹⁴⁸ *Kelin and 3 others v Cabinet Secretary Ministry of Health and 4 others* [2016] eKLR.

The validity of a certificate of good conduct is determined by the information presented as of the date of issuance.¹⁴⁹ This certificate is often one of the key requirements for employment. It unnecessarily discloses the mental health status of an individual to an employer. Due to the stigma and myths surrounding mental health and suicide, individuals charged with attempted suicide may receive differential treatment in employment or even be discriminated against and passed over for employment opportunities based on their health status.

These impacts are a further testimony to the differential treatment that attempted suicide survivor's experience. The third part of the disparate impact theory test requires the establishment of the disparate impact suffered. The third chapter of this study established that the disparate impact that the survivors suffer is being charged, convicted and sentenced for attempting to die by suicide. The disparate impact leads to further differential treatment which is unjust to the survivors and violates several of their rights including the right to health, privacy, freedom and security and the right to a fair trial.

4.4 Summary of Findings

The disparate impacts of the laws on suicide are truly wide and far-reaching. They touch on so many rights that an individual should be able to enjoy. The negative impacts affect an individual's life in many ways. Their privacy is invaded, the health is affected and their access to health care is limited. Further, the punishment rendered to survivors of suicide is excessive and the environment of the places where they are detained, cell or Mathari National Referral Hospital, are uncondusive and detrimental to their mental and physical well-being. The survivors' employability chances are also reduced to their criminal records.

CHAPTER FIVE: CONCLUSION

The first and second chapter of the study cover the introduction part of the dissertation. Chapter three of the study explores the criminalization of suicide in Kenya, tracing its historical roots influenced by colonization, religion, and politics. Despite the decriminalization of suicide in

¹⁴⁹ Kenya Police Service, <https://www.kenyapolice.go.ke/pages/faqs.html>.

England in 1961, Kenya still upholds laws inherited from colonial rule. Efforts to repeal Section 226 of the Penal Code, which criminalizes suicide, have been unsuccessful, with a recent bill rejected by parliament. The chapter analyses the rationale of laws on suicide. The rationale for such laws lies in the state's interest in preserving life, both at the societal and individual levels. The legal framework aims to protect individuals from self-harm, particularly those with mental illness, and employs deterrence theory to dissuade suicide attempts. However, the effectiveness and ethical implications of criminalizing suicide remain subjects of debate. This is because it can be argued that the laws criminalizing suicide hamper efforts to prevent, diagnose and treat mental health conditions. The criminalization of suicide perpetuates an environment that fosters blame and stigma towards survivors of attempted suicide. The part of the chapter on the rationale of suicide therefore finds that the rationale of suicide is not justified because the negative effect of the laws are unproportioned to its benefits/value. The Chapter also establishes the link between discrimination and the laws on attempted suicide that it finds is the health status of the survivors of suicide. The chapter further analyses the issue using the disparate impact theory test and concludes that the laws are discriminatory against survivors of attempted suicide for the laws are not justified and affect the individuals as a group personally.

Chapter four delves into the wide-ranging impacts of laws criminalizing suicide in Kenya, particularly on individuals who attempt suicide and navigate through the criminal justice system. It highlights the punitive nature of the criminal justice system and emphasises the need for a rehabilitative approach, especially for those experiencing mental health conditions. The study evaluates both direct and indirect consequences of these laws, focusing on various aspects of human rights.

- a. Right to Health: The Constitution of Kenya guarantees the right to health, including mental health. However, the criminalization of suicide restricts access to proper healthcare for individuals in need, diverting them into the criminal justice system instead. The chapter compares the legal process for those charged with attempted suicide to the procedures for obtaining healthcare. It illustrates how the laws hinder individuals from receiving necessary medical treatment for mental health conditions.

- b. Right to Human Dignity: Drawing from Immanuel Kant's theory, the chapter argues that subjecting individuals with mental health challenges to the criminal justice system violates their dignity. It discusses international conventions and Kenya's commitment to protecting the rights of individuals with disabilities.
- c. Right Not to Be Treated or Punished Inhumanely: The chapter discusses the broader concept of cruel, inhuman, or degrading treatment or punishment, highlighting how the criminalization of suicide may result in such treatment.
- d. Right to freedom and security of the person and right to fair trial: The chapter discusses the violation of rights enshrined under article 29 (2) and article 50 (2) Of the constitution through detainment at a recognized mental institution.
- e. Right to Privacy: The chapter explores the right to privacy concerning medical information, arguing that the publication of court proceedings related to attempted suicide violates individuals' privacy rights. It discusses the implications of disclosing mental health status in certificates of good conduct and its impact on employment opportunities.

The chapter underscores the need for reforms in laws and policies regarding suicide in Kenya to uphold fundamental human rights, ensure access to proper healthcare, and eliminate discrimination against individuals with mental health challenges.

5.1 CONCLUSION

The provisions of the penal code of Kenya under Section 226 are inconsistent with the provisions of the constitution under the Bill of Rights. The criminalization of suicide is an infringement on the right to freedom from discrimination based on health status as protected by Article 27 (4) of the Constitution because it indirectly discriminates against survivors of attempted suicide that suffer from mental health conditions. The survivors personally suffer from the discriminatory effects of the laws that subject them to the criminal justice system. Although the purpose of the laws is to prevent suicide cases, the negative impacts of the laws outweigh the benefit. This is further perpetuated by the fact that criminalization of suicide promotes stigma against mental health conditions and suicide. This is due to the association of suicide and crime in society. The

negative impacts of the discriminations affect several other rights rooted in the constitution of Kenya and therefore negatively affect the quality of life of the survivors of suicide. The state needs to reassess and reformulate the laws on suicide to regulate suicide without being discriminatory because state is bound by the constitution to protect and guarantee the civil right to freedom from discrimination and to respect, protect, and promote this right.

5.2 RECOMMENDATIONS

Although it is undeniable that the criminalization of suicide deters crimes such as suicide bombing and suicidal threats, it is also clear that the unfortunate plight that people struggling with mental health illnesses bear needs to be addressed. The state ought to consider an amendment to the penal code to decriminalise suicide similar to the one brought before parliament in 2021.¹⁵⁰ However, repealing the current provision would leave gaps in the law such unaddressed suicide bomber laws. Therefore, further legislation ought to be developed that covers that gap. The state though pure in intentions passed a seemingly neutral legislation that resulted in discrimination of a protected group. It is the recommendation of this study, that the state develop further policies, concerning suicide and attempted suicide. The state may develop legislation on suicide bombers and the use of suicide to destroy evidence in order to ensure that these types of suicide are covered. The state may also develop legislation to mandatorily detain survivors of attempted suicide, under the state's guardianship, at a mental health facility until the survivors recuperate from their mental health condition and regain their ability to make decisions for themselves. This would ensure that the survivors are at a facility where they can receive proper medical care and protect them from self-harm whilst upholding their right to health. This would also eliminate the subjection of attempted suicide survivors that suffer from mental health conditions to the criminal justice system simply for being ill. This would regulate the same issue yet still promote the early identification of suicide prone people and encourage people to seek medical help for mental health illnesses thus promoting the early identification, prevention, reduction and reports of attempted suicide and a reduction in the alarming rates of suicides and

¹⁵⁰ Penal Code Amendment Bill, (2021)

attempted suicide in Kenya. It would also guarantee enjoyment of the right to freedom from discrimination for attempted suicide survivors that suffer from mental health conditions and thus protect them from the disparate impacts of the laws on suicide.

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