Strathmore University

Law School

DO NOT RESUSCITATE ORDERS AND THEIR ROLE IN AIDING SUICIDE

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Dedication

To those who face the hardest decisions with the greatest courage, may this work honour your strength in navigating the balance between life, dignity, and choice.

Declaration

I, NYABUTO ESTHER GENCHABE, 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: .....:.....

Date: 16 February 2024

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

Signed: .....

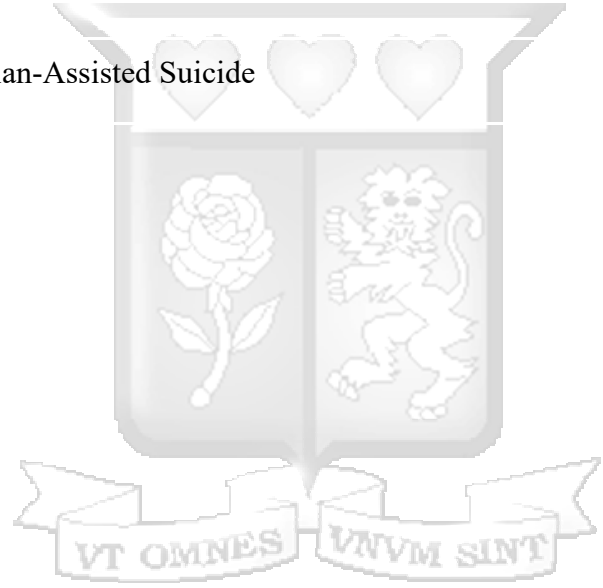
[Cecil Abungu]

Abstract

As humans struggle between personal freedom and societal constraints, the influence of authority casts a shadow. We find ourselves trapped by the very systems we helped create. Even in matters of life and death, the struggle persists as laws seek to govern even the most intimate of choices. The focus of this paper is on end-of-life care, particularly on the contentious issue of Do Not Resuscitate (DNR) orders in Kenya. Grounded in the philosophical principles of Kantian deontology, the research aims to dissect the ethical and legal implications of DNR orders within the framework of aiding suicide as outlined in Section 225 of the Kenyan Penal Code. Adopting a qualitative approach, this research uses a wide array of sources including legal literature, ethical studies, court decisions, and constitutional analyses. Concluding observations suggest that while DNRs are in use in Kenyan health facilities, unclear laws cloud medical professionals' confidence in fulfilling patients' wishes at the end of life. Recommendations include the need for policy reevaluation and the development of explicit guidelines that reconcile personal autonomy with legal standards. Such action could protect medical practitioners from potential legal repercussions, while still respecting the dignity of patients at life's end.

List of Abbreviations

ACP	Advanced Care Planning
AD	Advanced Directive
CPR	Cardiopulmonary Resuscitation
DDE	Doctrine of Double Effect
DNR	Do Not Resuscitate
PAS	Physician-Assisted Suicide



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R v LP (2013), Nunavut Court of Justice.

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Bonar and Hogg v McLeod (1983), Scottish Courts.

1.0 INTRODUCTION

1.1 BACKGROUND

'Man is free: and everywhere he is in chains.'[1] This is especially true to the deliberate taking of life, whether a person decides to take his own life or a life is taken by another. There has been a perceptible tension between individual freedom and the authority of the state ever since the time men organized themselves politically and formed states.[2] Although the law in Kenya has evolved to decriminalize suicide attempts[3], it continues to prohibit all other forms of suicide. Thus, suicide pacts[4] and aiding suicide[5] are strictly forbidden and considered offenses. However, there are certain questions apropos that need to be addressed – Is a person's life his domain: one free from the intrusions of law? What societal benefit does criminalizing such conduct serve? Should the state's desired goal in criminalizing such acts outweigh the right to individual freedom and autonomy? Those who commit suicide and those who aid others in doing so act out of a plethora of reasons. Some are born of malice and others from ailment of the mind. The morally difficult circumstances, on the other hand, are those in which the sole motivation is the benevolent desire to stop the pain of dying patients.

Society has evolved much from the time Jacques Rousseau made this famous quote on freedom and chains. This is evident in medical care where the use of advanced directives is founded on the principle of autonomy and individual freedom. An Advanced Directive (AD) is a directive given by a patient on the level of care they prefer or interventions that should or should not be instituted during their treatment when they are not in a capacity to make decisions for themselves.[6] This directive is given in writing by a patient in discussion with their doctor or in some cases with their lawyers in the process of Advanced care planning (ACP).[7] Examples of such directives include,

[1] Rousseau J, *On The Social Contract: Discourse on the Origin of Inequality*, Penguin Publishing Group, Landon ,2004, 1.
[2] Ashraf A, 'Culpability of attempted suicide: A legal labyrinth amidst ethical quandary' 49 *Journal of the Indian institute* 4, 2007. 503.
[3] The penal code (Amendment) Act, 2021.
[4] Section 209, *Penal Code* (Act No. 12 of 2012).
[5] Section 225, *Penal Code* (Act No. 12 of 2012).
[6] Ministry of Health, *Kenya Palliative Care policy* 2021, 8.
[7] Ministry of Health, *Kenya Palliative Care policy* 2021, 8.

living wills, medical power of attorney, organ and tissue donations as Do Not Resuscitate (DNR) Orders. The focus of this paper shall be on DNR orders.

DNRs are medical orders indicating a person does not consent to receive resuscitative measures in case of cardiopulmonary arrest.[8] They are instructions placed by a doctor in a patient's medical record informing medical staff that cardiopulmonary resuscitation should not be initiated in the event of cardiac arrest.[9] They include simple efforts such as mouth-to-mouth breathing and chest compressions, electric shock to restart the heart, breathing tubes to open the airway, and medication.[10] DNR order therefore calls for the withholding of life-sustaining resuscitative treatment in the event of cardiac or respiratory arrest. Although they are not commonly used in Kenya, they are nevertheless a practice most hospitals undertake. The palliative care policy, although it fails to provide for appropriate guidelines and policies to be followed, acknowledges DNR requests as part of end-of-life care as an advanced directive in Kenya.[11] Research regarding DNR orders in Kenya is minimal. A retrospective study at the Aga Khan University Hospital in Nairobi discovered that 41.2% of terminally ill patients completed DNR orders.[12] This was a sizable proportion of patients, indicating that DNR orders, though not common, are practiced in Kenya. Moreover, a dissertation prepared by a medical practitioner in Kenyatta Hospital made it clear that this is a practice that hospitals undertake in Kenya and provides copies of DNR orders annexed to their paper.[13] Having concluded that they are a reality in Kenya, it is important that we understand whether the provision of these orders and the option to consent to them violate any written laws in Kenya.

Section 225 of the penal code introduces the offense of aiding suicide.[14] The assertion is that any person who either procures, aids, or counsels another to kill themselves thereby inducing them to do so is guilty of a felony and is liable to imprisonment for life. Respect for autonomy grounds a

[8] Ministry of Health, *Kenya Palliative Care policy*,2021, 9.
[9] Mina U, 'Do not resuscitate" Orders: current practice and factors influencing decisions making in Kenyatta National Hospital' Unpublished MBBS Thesis, University of Nairobi, Nairobi, 2015, 1.
[10] 'Do-not-resuscitate order 'MedlinePlus Medical Encyclopaedia, 19 August 2019- < https://medlineplus.gov/ency/patientinstructions/000473.htm-> on 19 August, 2019.
[11] Ministry of Health, *Kenya Palliative Care policy*,2021, 9.
[12] Omondi S, Weru J, Shaikh AJ, Yonga G, 'Factors that influence advance directives completion amongst terminally ill patients at a tertiary hospital in Kenya' *National Library of Medicine* - https://pubmed.ncbi.nlm.nih.gov/28118824/ - on 25th January, 2017.
[13]Mina U, 'Do not resuscitate" Orders: current practice and factors influencing decisions making in Kenyatta National Hospital' Unpublished MBBS Thesis, University of Nairobi, Nairobi, 2015, 1.
[14] Section 225, *Penal Code* (Act No. 12 of 2012).

patient's right to refuse medical treatment even when the resulting consequences will be the death of a patient. This policy seems to guarantee a patient the right to commit suicide. It however fails to account for the other players that might be indirectly party to their decisions.

The criminal guilt to be attached to the abetting of suicide is perhaps as confusing a question as the law can present; and when the aid consists merely in furnishing the means of death if desired, a legal question is presented no less interesting than the ethical problem.[15] Assisted suicide is a common practice in most parts of the world, especially in the medical field. This practice is sometimes referred to as Physician-Assisted Suicide (PAS) or interchangeably euthanasia. There are a few different types/ forms of PAS

a) By action or active Euthanasia – which involves intentionally causing the death of a person by performing an action such as giving a lethal injection.

b) Euthanasia by omission or passive PAS – which is euthanasia by not providing or withdrawing treatment.[16]

It can be from both the acts or omissions of a doctor or acts of an individual who can choose to reject or withdraw treatment by writing a letter to that effect.[17]

1.2 PROBLEM STATEMENT

Do not resuscitate orders as alluded to earlier call for the withholding of life-sustaining resuscitative treatment in the event of cardiac or respiratory arrest. By definition, this involves not providing resuscitative treatments to patients thus withdrawing treatment. Although it is within the patient's right to refuse medical treatment,[18] doctors providing options to withhold or withdraw treatment to patients could be interpreted as aiding suicide since the doctor counsels and by withdrawing the treatment, aids the patient in ending their life. There has been discussion on legal culpability that may result from performing CPR on a person with a DNR order. The effect of this unclarity of the penal code is felt in medical practice as well. Doctors are hesitant to carry out these orders because they are uncertain as to whether or not they are violating any laws. In light of this,

[15]The Crime of Aiding a suicide ', *The Yale Law Journal,* 1921, 408.
[16] Sommerville M, 'Death Talk', *Mc-Gill's Queen University Press*, 2014, 28.
[17] Sommerville M, 'Death Talk', *Mc-Gill's Queen University Press*, 2014, 235-236.
[18] Section 8, *The Health Act* (2017).

my study will investigate whether doctors providing options to withhold or withdraw treatment to patients in the form of Do Not Resuscitate orders should be interpreted as aiding suicide in violation of section 225 of the Penal Code.

1.3 RESEARCH QUESTIONS

1.

a) In light of her socio-cultural background, how should the right to life be interpreted in Kenya?

b) Does the practice of Physician Assisted Suicide contradict the constitutional right to life?

2. Should a distinction be made between acts and omissions in defining aiding suicide?

3. Given the preceding discussions, should DNR orders be interpreted as aiding suicide in violation of section 225 of the penal code?

1.4 RESEARCH OBJECTIVES

1. To analyse the right to life in the context of Kenya to determine whether this right was envisioned as an essential concomitant to the right to die

2. To determine whether a distinction between acts and omissions should be incorporated into the definition of aiding suicide.

3. To ascertain whether Do Not Resuscitate (DNR) orders should be construed as aiding suicide, potentially violating Section 225 of the penal code,

1.5 HYPOTHESIS

Doctors offering the option of withholding or withdrawing treatment in the form of DNR orders should be interpreted as aiding suicide. This is because physician-assisted suicide should be interpreted as both an act (intentionally causing the death of a person by acting such as giving a lethal injection) and an omission (withholding or withdrawing life-sustaining treatment).

1.6 JUSTIFICATION

Medical practitioners often experience uneasiness due to the lack of clarity and proper guidance addressing the legality and ethics surrounding DNR orders. This study will be valuable in improving the comprehension of end-of-life care, specifically the provision of DNR orders and the medical, ethical, and legal implications of completing them. In addition, this research will be useful in understanding the role of autonomy in the right to life. Moreover, this project is relevant as it clarifies the different responsibilities of healthcare professionals, some of which may conflict with certain laws.

This study will provide valuable information for medical practitioners and legal officers who work in various medico-legal departments. It aims to clarify the ethical and legal concerns that may arise regarding the provision and compliance of DNR orders. Currently, the lack of proper guidelines and procedures regarding DNR orders poses challenges in the healthcare field. Therefore, policymakers who are responsible for formulating guidelines on DNR requests can benefit from this study, as it will enable them to develop clear guidelines for the appropriate use of DNR orders: guidelines that would address the legal and ethical implications of DNR orders and ensure they are consistent with existing laws and regulations. This clarity and certainty will provide valuable insights to healthcare providers, patients, and their families on the ethical and legal considerations involved in end-of-life care: including questions about patient autonomy and the role of healthcare providers. The study will also benefit adjudicators in interpreting Section 225 of the Penal Code, and it may be valuable for legislators to consider modifying Section 225 of the Penal Code to exempt medical practitioners from liability for the offense of aiding suicide if so desired.

1.7 THEORETICAL FRAMEWORK: KANTIAN DEONTOLOGY THEORY

Deontological ethics is a moral theory that emphasises the inherent rightness or wrongness of actions rather than their consequences. For Kant, actions are right if they respect what he calls the Categorical Imperative. He believed that this formulation of the categorical imperative has three important implications for moral behaviour.[19] First, we must treat other people as ends in themselves, not merely as means to our ends. Second, we must act out of a sense of duty, not merely out of self-interest, fear, or desire. And third, we must act as if our actions are setting a

[19] Kant I, 'Groundwork of the Metaphysics of Moral', *Cambridge University press*, 1997, 21.

moral example for all rational beings. A practical example could be lying: lying fails to respect the categorical imperative because the act of lying is wrong irrespective of how we might feel about lying or what might happen if we did lie; it is actions that are right and wrong rather than consequences.

As briefly discussed above, deontological ethics argues that the morality of an action is determined, not by its intended results, but by the act itself. This theory will be used to argue that DNR orders are wrong because they are a form of aiding suicide, which is generally considered immoral under deontological principles.

Firstly, deontological ethics argues that we have particular moral duties or obligations that are defined by reason and universal moral principles, therefore our actions should be guided by a sense of duty and not out of fear, desire to do good, or any other reasons outside the sense of duty. A deontologist will argue in this context that the duty to preserve human life, especially for medical practitioners, is an absolute moral norm, and that breaching this duty through withholding treatment in the form of a DNR order is inherently wrong. Furthermore, this action or omission is considered passive PAS which is against the moral duties and obligations ensured in this theory.

Secondly, this theory emphasises the significance of valuing people as ends in themselves, rather than as means to an end. In the context of medical care, this implies that doctors have a moral duty to treat their patients with dignity and to prioritise their well-being over other considerations such as cost savings, a premature decision to alleviate present pain, and medical staff efficiency. A DNR order is therefore wrong and a form of passive aiding suicide as it denies patients potentially life-saving medical treatment which results in their death.

1.8 LITERATURE REVIEW

So far, the literature on DNR orders has mostly focused on the current practices and factors influencing decision-making in Kenyan Hospitals,[20] the challenges caused by lack of clear legislations and guidelines supporting its practices and the recommendations to curb this legal gap.[21] I, therefore, expect that my study will be a unique contribution by providing a new lens that

[20] Mina U, 'Do not resuscitate" Orders: current practice and factors influencing decisions making in Kenyatta National Hospital' Unpublished MBBS Thesis, University of Nairobi, Nairobi, 2015, 1.

[21] Ministry of Health, *Kenya Palliative Care policy*,2021, 9.

lawmakers and scholars may use to critically assess the issues pertinent to DNR requests to make sound and effective guidelines and legislation.

1.8.1 On whether Physician-Assisted Suicide as a major component of the right to die can be a justifiable limitation to the right to life.

The ongoing academic literature discussion on Physician-Assisted Suicide as an essential element of the right to die and whether it should be a necessary concomitant to the right to life, therefore making it a justifiable limitation to the right to life seems to have no consensus among scholars. It is, therefore, no surprise to find Rwoland Dwarkin at the centre of such trivial matters. He argues that those who oppose and concur with euthanasia all form their arguments in the value of human life: specifically referring to the sacredness and the inviolability of human life. The difference in opinion, in his view, is brought about by how we go about the interpretation of "value", "sacredness" and "inviolability". [22]

According to Dworkin and reputable scholars such as Mary-Ann Warren[23] and Dan Brock[24], the right to die should be considered an extension of the right to life because it allows individuals to maintain their dignity and avoid unnecessary suffering in the face of terminal disease or disability. They believe that individuals should be allowed to make decisions regarding their own lives and deaths as long as they are properly informed and not coerced.[25] They concede, however, that the right to die is not unlimited and should be subject to specified limits and safeguards to prevent abuse or coercion.

Those who argue against the right to die often defend the sanctity of life, which they regard as an inherent and essential value that must be safeguarded at all costs. They contend that methods such as PAS or euthanasia are ethically wrong because they involve the intentional termination of a human life which undermines the dignity and sanctity of life. These conservative opponents also express concern about the potential for abuse and coercion in end-of-life decision-making.

[22] G Robert, 'Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom by Ronald Dworkin', *American Political Science Review*, 1994, 444-446.
[23] Warren M, 'The Moral Significance of Birth and Death: A Kantian Essay'*, 5 Indiana University Press Journals 2*, 1995. 50-64
[24] Brock D 'Life and Death: Philosophical Essays in Biomedical Ethics', 1 *Cambridge University Press 1*, 1993.
[25] Brock D, *'Voluntary Active Euthanasia*', The Hastings Center Report, New York, 1992, 10-22.

Bioethicist Leon Kass[26], bioethics researcher Daniel Callahan[27], and lawyer Wesley J. Smith [28] are all prominent figures in this discussion.

It is worth noting that opponents of the right to die, who argue in favour of the sanctity of life, also share concerns about potential abuses and coercion in end-of-life decision-making. However, they differ from proponents of the right to die in their approach to addressing these concerns. Opponents of the right to die take a hard stand against any form of PAS or euthanasia, believing that these practices inherently violate the sanctity of life and that no amount of legislation can adequately address the potential for abuse and coercion. In contrast, proponents of the right to die believe that effective legislation and safeguards can mitigate these concerns and ensure that end-of-life decisions are made voluntarily and with informed consent.

1.8.2 On whether a distinction be made between acts and omissions in defining aiding suicide.

The debate over the relevance of the distinction between acts and omissions in aiding suicide is a complex philosophical issue. Quill and Miller argue that there should be a moral distinction between intentionally causing a patient's death (an act of commission) and withholding or withdrawing treatment required to extend the patient's life (an act of omission).[29] They base their argument on the principle of double effect, which allows for an act with both positive and negative outcomes, as long as the negative consequences are not intended and are outweighed by the positive consequences. They suggest that in Physician-Assisted Suicide, the negative outcome (the patient's death) is intended, whereas in withholding or discontinuing treatment, it is anticipated but not intended.

However, Hopechallenges this distinction, arguing that it is not morally meaningful.[30] He claims that the distinction is based on the idea that the doctor's intention in the two circumstances is

[26] Kass L, *Life, Liberty, and the Defense of Dignity*: The Challenge for Bioethics, Encounter Book Publishing, San Francisco, 2002, 78-90.
[27] Callahan D, 'The Troubled Dream of Life: In Search of a Peaceful Death' Georgetown University Press, Georgetown, 1993. 250-256.
[28] Smith W, *'Forced Exit: Euthanasia, Assisted Suicide, and the New Duty to Die*', Encounter Book Publishing, New York, 2003, 23- 30.
[29] Quill T and Miller F "Acts and Omissions in Euthanasia and Physician-Assisted Suicide". 1 *Journal of Medical Ethics, 1* Oxford,2008, 576-579.
[30] Hope T , 'Acts and omissions revisited' 26 *Journal of Medical Ethics* 4, Oxford, 2000. 576-579.

different, but this is not always the case. Hope suggests that the principle of double effect applies equally to both acts and omissions and cannot be used to justify the moral distinction. He argues that the distinction is often problematic because it is difficult to draw clear lines between acts and omissions in many cases. For example, some omissions may be equivalent to acts because they involve a deliberate choice not to act, while some acts may have omissive aspects because they involve a failure to prevent harm. Rowan further argues that what matters more is the degree of control and responsibility that a person has in a given situation, rather than whether their actions involve an act or an omission.[31]

Anne Slack's argument and rationale on the relevance of the distinction between acts and omissions in understanding aiding suicide differ from the arguments put forth by other scholars, as she incorporates a different approach. She claims that although the moral distinction between acts and omissions is deeply embedded in our attitudes and corresponds to our intuitive responses in many cases (further mentioning that this attitude is evident in moral language and English law), this contention can be criticised by utilitarianism and the human rights approach.[32] Utilitarians believe that each act or omission is morally right or wrong depending on whether it brings about an overall balance of good or bad consequences while the human rights approach asserts that humans have certain rights that should not be violated, and omissions are also wrong if they violate a right that has been omitted.[33] Anne however maintains a similar belief to that of Quill and Miller that actively causing someone's death is morally different from withholding or withdrawing treatment. She suggests that actively ending someone's life is generally worse than simply allowing them to die. She further believes that this distinction has important legal and practical implications for defining aiding suicide, including the permissibility of withholding or withdrawing treatment under certain circumstances. The author maintains that actively causing someone's death should generally be prohibited by law, while withholding or withdrawing treatment may be permissible under certain circumstances, such as when it is futile or the patient has requested it.[34]

[31] Hope T , 'Acts and omissions revisited' 26 *Journal of Medical Ethics* 4, Oxford, 2000. 576-579.
[32] Slack A, 'Killing and Allowing to Die in Medical Practice' 49 *Journal of Medical Ethics 4*, 1984, 82-87.
[33] Slack A, 'Killing and Allowing to Die in Medical Practice' 49 *Journal of Medical Ethics 4*, 1984, 82-87.
[34] Slack A, 'Killing and Allowing to Die in Medical Practice' 49 *Journal of Medical Ethics 4*, 1984, 82-87.

Donagan's position is similar to Anne Slack's in that it is impermissible to commit murder, but there is a morally significant distinction between acts and omissions. This view that killing is more seriously wrong than allowing death is shared by both absolutists and non-absolutists alike.[35]

Contribution.

The study of DNR orders, as well as the interpretation of whether they may constitute aiding suicide, is an interdisciplinary topic involving several fields. Patient advocacy is vital for guaranteeing that patients receive compassionate end-of-life care and have the freedom to choose their treatment. Medical educators also educate prospective doctors and healthcare professionals on end-of-life care and ethical decision-making. Bioethicists study the junction of medical ethics, law, and policy, whereas sociologists study the social and cultural aspects that influence attitudes about death and dying. Finally, psychologists study and treat the psychological aspects that influence end-of-life care decisions and attitudes regarding assisted suicide. As a result, my research will be valuable in furthering discussions relevant to DNR in these disciplines.

1.9 METHODOLOGY

This study consists of two major parts: the first deals with Kenya's approach to the right to life and how it has been interpreted and the second part will assess the need or lack thereof of distinguishing action and omission in determining aiding suicide. To do so, the study will rely heavily on qualitative evidence from mostly secondary sources such as books, journal articles, medical blogs, case law, and reports. It will also use a few primary sources such as the Constitution of Kenya, the Penal Code, the Hansard Report for the penal code as well as the CKRC report on the constitution of Kenya. This study will, in general, utilize a deductive approach with the first two chapters setting up a premise from which the main claim will be derived. The first chapter, for example, will demonstrate the right to life and how it has be interpreted. Moreover, an interdisciplinary analysis will be effective in this study seeing as the question heavily relies not only on legal principles but also on medical and philosophical underpinnings.

In the first part on determining how best to interpret the right to life to reflect Kenya's socio-political beliefs, the study will look into the constitutional history and logic to determine whether

[35] Donagan A, The Theory of Morality, *University of Chicago Press*, Chicago, 1977, 66.

it envisioned physician-assisted suicide as an exception to this right. This shall be through a doctrinal analysis of the right to life underpinned in the Constitution. Therefore, the Constitution of Kenya and the report of the Constitution of Kenya Review Commission shall be useful in claiming that the right to life does not consider PAS, whether passive or active, as an exception to its violation. A historical analysis of the right to life, its application, and interpretation in Kenyan courts will also be of use in determining the scope envisioned. Furthermore, because the principles of human dignity and the sanctity of life are crucial in interpreting this right, a philosophical examination will be beneficial in understanding its intended interpretation and extent. Therefore, the doctrinal, philosophical, and historical analysis will be useful in the first part of my study.

The study will then discuss the relevance or lack thereof of distinguishing between acts and omissions in interpreting suicide. This will mainly entail a philosophical analysis of various ethical theories and an examination of philosophers' concepts. This methodology will aid in establishing that aiding suicide involves willfully assisting someone else to terminate their life, whether this assistance is delivered through an act (such as supplying a lethal amount of drugs) or through an omission (such as failing to intervene to prevent the person from prematurely ending their own life).

1.10 CHAPTER BREAKDOWN

Chapter one will serve as an introductory chapter of this study. Its main focus will be to establish the foundation for the subsequent chapters. The chapter will outline, among others, the research questions and objectives, as well as the theoretical framework that will be used throughout the study. Overall, chapter one will set the stage for the entire study and provide readers with an understanding of the purpose and scope of the research. It will provide a framework for interpreting the results of the subsequent chapters and act as a roadmap for the readers to follow the progression of the study

Chapter two will examine PAS and its elements as well as the Kenyan constitutional interpretation of the right to life. This is in a bid to establish that PAS contravenes such an interpretation of the right to life thus such acts are unconstitutional and are not protected under the Constitutional restrictions and limitations to the right to life.

In chapter three, a critical examination will be conducted to assess the necessity, or lack thereof, of distinguishing between acts and omissions when defining assisting suicide. The fundamental argument of this chapter will be that the distinction between acts and omissions is immaterial in interpreting aiding suicide since both result in the death of another person, which is intrinsically wrong and illegal.

Chapter four will be the culmination of the study, providing a comprehensive evaluation analysis and synergy of the arguments advanced in the preceding chapters, and offering an informed and persuasive argument on the classification of DNR orders as a form of aiding suicide.

Chapter five will conclude the study.

2.0 PHYSICIAN-ASSISTED SUICIDE AND THE RIGHT TO LIFE IN KENYA

2.1 Introduction

In this chapter, the study will examine Physician Assisted Suicide (PAS) and its elements as well as the Kenyan constitutional interpretation of the right to life. This is in a bid to establish that PAS contravenes such an interpretation of the right to life thus such acts are unconstitutional and are not protected under the Constitutional restrictions and limitations to the right to life. To achieve this, the chapter will begin by assessing the meaning of PAS, its elements, and arguments for and against PAS. Thereafter, it will examine how Kenyan courts have interpreted the right to life as well as the principles judges have used to establish its restrictions. Finally, it will juxtapose these two aspects to conclude on the unconstitutionality nature of Physician Assisted Suicide.

2.2 Understanding Physician-Assisted Suicide

The Cambridge dictionary defines the right to die as the belief that a person should be allowed to die naturally rather than being kept alive by medical methods when they are suffering and unlikely to get well.[36] PAS is one of the elements of the right to die. It involves a scenario where a physician prescribes a variety of ways in which a patient can end their own life.[37] In such a case, the physician carries out the role of an "enabler".[38] By being an "enabler", the physician can assist the patient to commit suicide through different ways such as supplying them with information on the most effective ways of committing suicide,[39] providing subscriptions for lethal dosage of pills, or even helping the suicidal patient in the actual act of ending their life.[40]

[36] Cambridge Dictionary, 4 ed.
[37] Euthanasia and Physician-Assisted Suicide, https://courses.lumenlearning.com/wm-lifespandevelopment/chapter/euthanasia-and-physician-assisted-suicide/ on 23 February 2024.
[38] Weir R, Physician-Assisted Suicide, Indiana University Press, United States, 1997, viii.
[39] Chapter 5, AMA Code of Ethics, https://code-medical-ethics.ama-assn.org/ethics-opinions/physician-assisted-suicide on 23 February 2024.
[40] Weir R, Physician-Assisted Suicide, viii.

The origins of PAS trace back to ancient Greece, a period when physicians lacked adequate means to alleviate their patients' suffering. Faced with the challenge of easing the pain of their patients, some resorted to what was termed "mercy killing".[41] In ancient times, physicians would assist severely ill patients in ending their lives upon request, often through the administration of a poisonous solution or a lethal drug.[42]

Drawing from the reasoning behind modern palliative care which aims to alleviate and address end-of-life suffering, terminally ill patients tend to request assisted suicide as a trade-off between the quantity of life for the quality of life.[43] This has significantly posed a dilemma to healthcare practitioners on how to balance the terminally ill patient's views of the quantity of life versus the quality of life while at the same time observing the cultural and historically developed responsibilities to support life and prevent suffering.[44] Notably, PAS has proven to be incompatible with the physician's role as a healer which seeks to aggressively respond to the patient's needs at the end of life rather than enabling their suicide.[45] This ethical dilemma led to the conception of the Hippocratic Oath whereby some physicians distanced themselves from colleagues who would get involved in assisting terminally ill patients to commit suicide as a means to retain public trust and respect.[46] This Hippocratic Oath included, among others, words stating "I will neither give a deadly drug to anybody who asked for it, nor will I make a suggestion to this effect." This poses a plight to physicians on whether to follow this oath or to respect the wishes of the terminally ill patient.

Physician Assisted Suicide encompasses various components and can manifest in two distinct forms: active PAS and passive PAS. In countries such as the Netherlands, PAS is actively conducted when a physician, in fulfilling their statutory due care, supplies a lethal drug to the patient who then administers it on their own.[47] Active PAS can also be related to directly killing a

[41] Weir R, Physician-Assisted Suicide, vii.
[42] Weir R, Physician-Assisted Suicide, vii.
[43] MacLeod R, Wilson D, and Malpas P, 'Assisted or Hastened Death: The Healthcare Practitioner's Dilemma' 4 *Global Journal of Health Science* 6, 2012, 88.
[44] MacLeod R, Wilson D, and Malpas P, 'Assisted or Hastened Death: The Healthcare Practitioner's Dilemma,' 88.
[45] Chapter 5, AMA Code of Ethics, https://code-medical-ethics.ama-assn.org/ethics-opinions/physician-assisted-suicide on 23 February 2024.
[46] Weir R, Physician-Assisted Suicide, vii.
[47] Euthanasia, assisted suicide, and non-resuscitation on request in the Netherlands, https://www.government.nl/topics/euthanasia/euthanasia-assisted-suicide-and-non-resuscitation-on-request on 23 February 2024.

patient, whereby the doctors the one administering the lethal dosage to the patient,[48] making the physician act last.[49] Active PAS entails the doctor taking direct actions that lead to the termination of the patient's life. This is precisely why ancient physicians saw fit to establish the Hippocratic Oath as a deterrent against such practices.

Passive PAS can occur through either the omissions of a doctor or acts of an individual who chooses to reject or withdraw treatment by writing a letter to that effect.[50] In passive PAS, doctors get to withdraw or withhold life-saving treatment on a dying patient which allows them to die.[51] As such, passive PAS involves an omission on the part of the physician by virtue of withholding such life-saving treatment.

This study is specifically focused on examining the passive PAS through DNRs that enable the physician to withdraw or withhold life-saving treatment on patients consequently leading to their death. In assessing this, it is necessary to look into the arguments for and against PAS.

2.2.1 Arguments for Physician-Assisted Suicide as a Component of the Right to Die

In academia, scholars haven't shied away from offering their opinions regarding PAS. Viewing physician-assisted suicide through the wider lens of the right to die, Kass defines this right as the right to become or to be made dead by whatever means.[52] This includes the cooperation of others to achieve this desired goal. The problem with this interpretation, highlighted ironically by proponents of this right, is that they see the right to die and in turn PAS as a question of autonomy and dignity, rather than of life and death. According to them, this concept represents the freedom to live, even in the face of infirmity, and to have control over one's fate.[53] This encompasses not just the right to die, but also the right to select the method, time, and circumstances of one's death—or the prerogative to determine the most compassionate or dignified means to end one's life. In this

[48] Euthanasia, assisted suicide, and non-resuscitation on request in the Netherlands, https://www.government.nl/topics/euthanasia/euthanasia-assisted-suicide-and-non-resuscitation-on-request on 23 February 2024.
[49] Weir R, Physician-Assisted Suicide, 87.
[50] Sommerville M, Death Talk, Mc-Gill's Queen University Press, Montreal ,2014, 235-236.
[51] Weir R, Physician-Assisted Suicide, 78.
[52] Kass L, ' ïs there a right to die', The Hastings Center Report, New York, 1993, 34-43.
[53] Kass L, ' ïs there a right to die', The Hastings Center Report, New York, 1993, 34-43.

perspective, PAS as an element of the right to die includes the right to self-determination and the right to die with dignity.

In support of this assertion, Dworkin, Mary-Ann Warren[54], and Dan Brock[55] believe that the right to die should be considered an extension of the right to life because it allows individuals to maintain their dignity and avoid unnecessary suffering in the face of terminal disease or disability. They believe that individuals should be allowed to make decisions regarding their own lives and deaths as long as they are properly informed and not coerced.[56] They concede, however, that the right to die is not unlimited and should be subject to specified limits and safeguards to prevent abuse or coercion.

2.2.2 Arguments Against Physician-Assisted Suicide

To start our discussion, Obinuchi raises interesting questions in his paper that are worth considering as preliminary to our main discussion on the arguments against PAS as an element of the right to die. For instance, he questions when life, or the protection of life by law, ceases; to put it more clearly, he's concerned whether the state must uphold the right to life even if an individual no longer wishes to live, contrary to their desire.[57] This concern is particularly relevant because most constitutions, including Kenya's, recognize when life begins, typically at conception.[58] Therefore, it would not be absurd that the state, which jealousy protects the beginning of life, should be concerned with end-of-life decisions, particularly, when or 'if' they should intervene. Additionally, he questions whether individuals who choose to end their lives should receive assistance from others in doing so.[59] While acknowledging the argument that life-support machines can be deactivated to avoid needlessly prolonging the dying process, he remains

[54] Warren M, 'The Moral Significance of Birth and Death: A Kantian Essay', 5 *Indiana University Pres*s Journals 2, 1995. 50-64
[55] Brock D 'Life and Death: Philosophical Essays in Biomedical Ethics' ,1 *Cambridge University Press* 1, Cambridge, 1993.
[56] Brock D, 'Voluntary Active Euthanasia', The Hastings Center Report, New York, 1992, 10-22.
[57] Obinuchi C, 'Right to die (Euthanasia) in Nigeria ' Unpublished, LLM Thesis, University of Port Harcourt-Faculty of Law, Choba, 2015, 26.
[58] Article 26(3), *Constitution of Kenya*(2010).
[59] Obinuchi C, 'Right to die (Euthanasia) in Nigeria ' Unpublished, LLM Thesis, University of Port Harcourt-Faculty of Law, Choba, 2015, 26.

sceptical about whether a state that allows the switching off of life-support machines still upholds the right to life.[60]

In addition to this McConnell discusses the societal implications of legalizing assisted suicide, arguing that it could move the focus away from enhancing patients' lives and towards questioning the value of ongoing care.[61] According to him, …the fear is that patients, feeling the burden they impose on loved ones, may see suicide as a moral duty, and the decision to cling to life may be perceived as wasteful, irrational, and selfish."[62] He believes that existing law is godsend since it relieves the aged and infirm of the burden of justifying their continuing existence. Even if laws against assisted suicide are rarely enforced, they demonstrate society's strong commitment to protecting human life.

Moreover, the author asserts that much of the desire to commit suicide stems from insufficiently aggressive measures to alleviate pain. By addressing both pain and depression, patients often regain their natural desire to live. The author quotes Professor Herbert Hendin, a psychiatry professor, who attests that patients requesting euthanasia are often seeking relief from suffering, and, with proper care, many no longer wish to die.[63] The ethical concern raised is that granting patients the "right" to obtain assistance in suicide may result in the unnecessary killing of individuals who could benefit from modern medicine's help.

Having recognized that the drawbacks of permitting PAS outweigh the benefits, the subsequent part of this chapter will explore whether this practice holds constitutional merit with regard to the right to life.

2.3 The Right to Life in Kenya

Thomas Jefferson is famously remembered for his quote on life, claiming that "All men are created equal and have the right to life, liberty, and the pursuit of happiness." However, this notion of the sanctity of life predates Jefferson, appearing to have existed before this declaration. The right to life finds its origin as a religious conviction in the sanctity of human existence. For instance, according to Thomas Aquinas, life is a gift from God to be loved, nurtured, and lived in proper

[60] Hackforth R, 'Plato's Phaedo' *Cambridge University Press*, Cambridge, 1972, 18.
[61] McConnell M, The right to die and the jurisprudence of tradition' *Utah Law Review,* 1997, 705-708.
[62] McConnell M, The right to die and the jurisprudence of tradition' *Utah Law Review,* 1997, 705-708.
[63] McConnell M, The right to die and the jurisprudence of tradition' *Utah Law Review*, 1997, 705-708.

charity.[64] The concept progresses through philosophical inquiries into the intrinsic value of human life and the contemplation of whether certain rights inherently belong to individuals by their humanity, reflecting a natural law perspective. Finally, this evolution led to the establishment of the right to life in international law. Notably, the notion of the sanctity of human life is found to be universal, transcending specific cultural boundaries.[65]

The forthcoming subsections will extensively explore the right to life, seeking to understand whether PAS merits consideration as a constitutional limitation to this right.

2.3.1 The Historical Evolution of the Right to Life in Kenya

Section 71 of Kenya's Independence constitution outlawed the deliberate deprivation of life.[66] However, it made an exception for court-ordered penalties in cases of criminal conviction.[67] This provision further defined other instances in which a person's death caused by reasonable force would not be regarded as illegal conduct. These instances included self-defense, and protecting property among others.[68] Despite the guarantee of the right to life in the constitution, the presence of these exceptions acting as clawback clauses allowed the government to exploit these provisions for its benefit, leading to extrajudicial killings. Therefore, the presence of these exemptions rendered the protection of this right ineffective. The wording of the European Convention on Human Rights, identical provisions on the right to life, had a notable influence on the 1969 constitution.[69] It could be argued that this influence suggests that the 1969 right-to-life provision may not have truly reflected the aspirations of the Kenyan people but rather incorporated Western ideologies into the constitution. This consequently prompted the Kenyan population to take the initiative in formulating a provision that aligns with their distinctive values and beliefs.

Understanding the people's thirst for a constitution that directly represents their interests, the Constitution Kenya Review Act was adopted to facilitate the full evaluation of the Independence Constitution, with the ultimate goal of establishing a constitution that truly expresses the collective

[64] Davies B, 'The Thought of Thomas Aquinas', 3 Clarendon Press 1, Oxford , 1992, 31.
[65] Article 3, United Nations Declaration Human Rights (1948).
[66] Section 71 (1), *Constitution of Kenya* (1969).
[67] Section 71 (1), *Constitution of Kenya* (1969).
[68] Section 71 (2), *Constitution of Kenya* (1969).
[69] Article 2(2), *European Convention on Human Rights* (1950).

desire of the people.[70] The primary objective was to define the Constitution Review Commission's powers and jurisdiction while also addressing significant related issues.[71] In the commission's final report, they included a segment detailing the perspectives of the people of Kenya, where complaints and demands emerged that were relevant to the right to life. For instance, there was a widespread call for the removal of restrictions on individual rights, showing a collective desire for a more unrestrained exercise of fundamental freedoms.[72] The commission's report, therefore accurately represented the community's desire to move away from the repressive regulations that had permitted such activities, highlighting the need for a legislative framework that better protects and respects all people's fundamental right to life. The draft they formulated included the right to life under Article 58, affirming that everyone possesses the right to life and abolishing the death penalty.[73] It is noteworthy that throughout the drafting process, there is a discernible trend where exceptions to the right to life reduce, thus indicating the people's desire for minimal exceptions to promote and uphold this fundamental right.

Subsequently, the National Constitutional Conference convened in 2003 and 2004, producing the Bomas Draft, which drew inspiration from the CKRC draft. The wording of the Bomas draft is what is reflected in the 2010 constitution with the only difference being that where the former omits the provision on the death penalty, this idea still lives on in the 2010 constitution through Article 26(3).[74]

2.3.2 The 2010 constitutional interpretation of the right to life

Article 26 of the Constitution begins by establishing the right to life as a fundamental right for every individual.[75] This acknowledgment is consistent with generally accepted human rights principles, stressing the intrinsic dignity and sanctity of life.

Thereafter, this provision emphasises a general prohibition against intentionally depriving a person of their life.[76] This forbiddance establishes a baseline protection against actions or measures that

[70] Constitution of Kenya Review Act, (1997).
[71] Constitution of Kenya Review Act, (1997).
[72] Constitution of Kenya Review Commission, Final draft, 2005, 115-118.
[73] Constitution of Kenya Review Commission, Final draft, 2005, 115-118.
[74] Article 26(3), *Constitution of Kenya*, (2010).
[75] Article 26(1), *Constitution of Kenya*, (2010).
[76] Article 26(3), *Constitution of Kenya,* (2010).

aim to intentionally cause harm to an individual's life. Finally, this article introduces exceptions to the general interdiction, allowing intentional deprivation of life to the extent authorized by the Constitution or other written law.[77] This provision finds practical application in the following cases.

In the case of ***PAK & another v Attorney General & 3 others***, the court acknowledged that Article 26 allows for the deprivation of life under other written laws.[78] Furthermore, in ***Kemai & 9 Others v Attorney-General & 3 Others,***[79] the court interpreted the right to life as one of the constitutional fundamental rights which is far-reaching while acknowledging that it does not impose an absolute embargo on the restriction or limitation of life. This concept is exemplified in the case of ***Republic v John Kimita Mwaniki***, where the court explicitly emphasised that "… life is not one of those fundamental rights which may not be limited under Section 25 of the Constitution."[80] A similar opinion is alluded to in the case of ***Republic v Dickson Mwangi Munene & another,***[81] wherein the accused was convicted of murder. In this case, the Supreme Court ruled that the right to life is a fundamental legal concept recognized by the Constitution. The court went on to say that Article 26(3) of the Constitution imposes an encumbrance on the right to life, stating that it cannot be an absolute right because it might be taken away or deprived by written legislation or in a manner specified by the Constitution.[82] The underlying concept advocated in these cases is that while the courts validate the fundamental principle of the right to life under constitutional recognition, they concurred that certain conditions allow this right to be constrained as per statutory provisions.

The debate around abortion, as a statutory provision by Article 26(4), is illuminating in this respect. The Constitution specifically licences trained health professionals to determine when an abortion might be legally permissible,[83] signifying the state's trust in the medical fraternity to make critical life-affecting decisions within their ethical parameters. In the case of ***PAK & another v Attorney General & 3 others,***[84] the court reiterated that the right to life begins at conception as enshrined under article 26 (2) of the Constitution. It further underscored that assisted abortion constitutes a

[77] Article 26(3), Constitution of Kenya, (2010).
[78] PAK & another v Attorney General & 3 others (2022) eKLR.
[79] Kemai & 9 Others v Attorney-General & 3 Others (2000) eKLR.
[80] Republic v John Kimita Mwaniki (2011) eKLR.
[81] Republic v Dickson Mwangi Munene & another, (2014) eKLR.
[82] Republic v Dickson Mwangi Munene & another, (2014) eKLR.
[83] Article 26(4), Constitution of Kenya, (2010).
[84] PAK & another v Attorney General & 3 others (2022) eKLR.

felony under section 160 of the Penal Code. However, the case also highlighted a crucial aspect that the criminalization of abortion contradicts the protective clause outlined in Article 26(4) of the Constitution. This provision safeguards the human rights of women, permitting abortion if it is necessary to prevent danger to the life or health of the mother. The court justified its stance by emphasising that any restriction on the right to life, starting from conception, must be both justifiable within the constitutional framework and based on a significant state interest.

Crucially, in the case of ***Robert Alai v Attorney General,***[85] the court upheld that the right to an abortion affirms this justifiable limitation to the right to life. Aligning with decisions such as the United States Supreme Court's ***Roe v Wade***.[86] The Kenyan courts have set down a precedent that weighs state interests against individual rights.

The courts have shown a pattern of assessing the limitation to the right to life - through abortion – based on the principle that such restriction or limitation of the right be founded or balanced against a substantial state interest. Additionally, such a limitation ought to be justifiable and reasonable under the Constitution.

Furthermore, in the case of ***Patricia Asero Ochieng & 2 others v. Attorney General***, individuals living with HIV/AIDS raised concerns about the Anti-Counterfeit Act, claiming that section 2, 32, and 34 of the Anti-Counterfeit Act violated their constitutional rights, including the right to life, dignity, and health. They contended that access to affordable and essential drugs, including antiretroviral therapy, was encompassed within the fundamental right to life. The court, recognizing the severity of HIV as a life-threatening virus and the life-saving potential of antiretroviral therapy, agreed that denial of access to affordable medicines ito the Act's implementation would infringe upon their right to life. Consequently, the court intervened to prevent such infringement and protect the broad interpretation of the right to life, including access to essential medication.[87] This case shows the courts willingly to expand the interpretation of this provision beyond the wording provided in the article.

With regard to Physician Assisted Suicide, the prevailing jurisprudence treats this practice distinctly from the legal limitations above. For instance, in the case of ***R v Stephen Kiprotich***

[85] *Robert Alai v Attorney General* (2017) eKLR.
[86] *Roe v Wade* (1973), The Supreme Court of the United States.
[87] *Patricia Asero Ochieng & 2 others v. Attorney General,* [2012] eKLR

***Letting & 3 others**,* the court established that "A person who commits physician-assisted suicide out of motives of mercy or compassion to alleviate suffering may, nevertheless, be guilty of murder, just as a person who kills in the 'heat of the moment' without prior planning may also be guilty of murder."[88]

Although not directly applicable to healthcare providers, the case of ***Republic v Emmanuel Kiprotich Sigei & another*** is relevant in understanding the place of assisted suicide within the Kenyan jurisdiction. The court's attitude towards mercy killings was further reinforced in this case where the paternalistic role of the deceased parents to protect life was highlighted, and their role in providing poison to their 13-year-old child was denounced as a breach of this duty, regardless of the perceived suffering of the patient despite the defendants' conviction that they were administering a form of euthanasia, Justice Bwonwonga handed down a sentence of 15 years in prison for ***their alleged involvement*** in causing the child's death.[89] The court, in its obiter dictum, asserted that "...the duty of the accused as parents was to care and protect the deceased. Instead, they turned against the deceased and murdered her. Even if the accused thought this type of killing was a form of euthanasia, since the child was crawling and sickly due to flu, it is still an offence to do so."

As such, these legal precedents emphasise the murky moral concerns surrounding PAS and its legal consequences. The law's reverence for the advancements of modern medicine postulates an expectation to preserve life. PAS is confronted with the moral imperative of medical practitioners to first, do no harm, and second, to exhaust all possibilities that modern medicine offers to alleviate suffering without prematurely ending life. The court's reluctance to equate the justifications for abortion with those for PAS is premised on a profound recognition of the distinct contexts and implications of each act.

From the foregoing discussion on the right to life and the justifiable limitations and restrictions to this right under Article 26 (4) of the Constitution, it is evident that PAS was not envisioned as a part of these statutory limitations or restrictions to the right to life. While some point out the contradiction between the justifiable limitation to the right to life through abortion and the

[88] *R v Stephen Kiprotich Letting & 3 others* (2008) eKLR.
[89] *Republic v Emmanuel Kiprotich Sigei & another*(2017) eKLR.

criminalised PAS,[90] it is clear that the former is meant to safeguard the mother's human rights while the latter deprives the patients from enjoying the exemplary works and advancements of modern medicine. Ideally, in as much as the right to life is not absolute, PAS is not protected under the constitutional limitation or restriction to the right to life and contravenes the Kenyan interpretation of the right to life.

2.4 Conclusion

This chapter set out to examine PAS and its elements as well as the Kenyan constitutional interpretation of the right to life. In doing so, it has assessed the understanding of PAS and has delved into the concept of the right to life under the Constitution. This was in a bid to establish that Physician Assisted Suicide contravenes the constitutional interpretation of the right to life and that such acts are not protected under the Constitutional restrictions to the right to life, consequently making them unconstitutional. Despite judicial pronouncements that have primarily focused on cases involving doctors' active participation in PAS, the line between active and passive medical assistance in dying remains ambiguous. While active steps are prohibited as evidenced by case law, the question remains whether passive steps (such as withdrawing or withholding treatment) taken by doctors are still considered as aiding suicide. In the chapter that follows, the study will attempt to provide clarity on whether a distinction should be made between active and passive PAS in attributing legal culpability to the offense of aiding suicide.

[90]Waiganjo S, 'The legal and ethical justification behind the legislation of euthanasia in Kenya', Unpublished, LLM Thesis, Mount Kenya University- Faculty of Law, Nairobi,2015.

3.0 ANALYSING SECTION 225 OF THE PENAL CODE AND DEFINING THE OFFENSE OF AIDING SUICIDE

3.1 Introduction

This chapter will delve into the offence of aiding suicide, exploring how aiding can manifest as either a commission or an omission thus assigning legal culpability to both in the context of aiding suicide. To do so, this chapter will begin by analyzing what section 225 of the Penal Code requires in light of procuring, counselling and aiding, then it will go ahead to discuss the concept of aiding as a commission and an omission with passive PAS as the central case of the study. Thereafter, it will conclude that passive PAS as an omission is aiding suicide thus an offence under section 225 (c) of the Penal Code, in addition to it being unconstitutional as established in Chapter 2.

3.2 Assisted Suicide

Section 225 of the penal code introduces the offence of aiding suicide.[91] The assertion is that any person who either procures,[92] aids,[93] or counsels,[94] another to kill themselves thereby inducing them to do so is guilty of a felony and is liable to imprisonment for life. There has yet to be any judicial decision about this particular offence in Kenya. The only comparable case to this offense is the previously discussed case of. **Republic v Emmanuel Kiprotich Sigei & another** where the parents of a one-and-a-half-year-old child were convicted of murder after procuring and administering poison to this child. Their defence was that their child was suffering, crawling and sickly with the flu. The court rejected this defence and sentenced them to 15 years in prison.

This gap in judicial interpretation engineers the need to understand how these elements such as procuring, counselling and aiding have been interpreted in other crimes. Therefore, this chapter will start by understanding how the courts and legal scholars have interpreted counsellors and procurers as well as aiders within the wider criminal law jurisdiction as well as borrowing definitions and reasoning from other jurisdictions.

[91] Section 225, Penal Code (Act No. 12 of 2012).
[92] Section 225 (a), Penal Code (Act No. 12 of 2012).
[93] Section 225 (c), Penal Code (Act No. 12 of 2012).
[94] Section 225 (b), Penal Code (Act No. 12 of 2012).

3.3 Procuring and Counselling

Section 22 of the penal code provides an understanding of the aspect of counselling others to commit offences.[95] According to this provision, if an individual advises another person to commit a crime, and that person subsequently commits an offence following this advice it doesn't matter whether the specific crime committed is the same as the one advised, or if it's committed differently. What matters is that the offence committed is a probable consequence of following the advice given.

In counselling suicide, the suicidal person's autonomy is reduced to the vulnerable position they are in as compared to the person counselling them to commit suicide.[96] The counsellor is believed to know of such vulnerability and still takes advantage of the suicidal person's vulnerable position by convincing such a person to commit suicide.[97] Such acts are deemed to be morally reprehensible since preying on a suicidal person's vulnerability is abusive and fraudulent to the vulnerable person even though such a person is deemed to have control of their death. The actions of the counsellor reduce the self-determination of the victim by pushing them to commit suicide by the counsellor being a powerful actor.[98]

The Nunavut Court of Justice grappled with this discussion of counselling suicide in a couple of cases and has deemed such acts as illegal and an offence under section 241 (1) (a) of their criminal code.[99] In the case of **R v LP,**[100] LP told her 17-year-old daughter that she should kill herself because she did not want her and she made such statements on numerous occasions over two months making her daughter take such comments to heart. This made her daughter attempt suicide numerous times, two of which were immediately after her mother counselled her to commit suicide. These actions came to light when the daughter disclosed them to a mental health worker thus leading to her mother being charged with the offence of counselling suicide. The court noted that the mother counselled her daughter to commit suicide multiple times yet her teenage daughter

[95] Section 22, Penal Code (Act No. 12 of 2012).
[96] Self-Determination and Counselling to Commit Suicide: Beyond Rodriguez, https://canliiconnects.org/en/commentaries/30674, on 25 February 2024.
[97] Self-Determination and Counselling to Commit Suicide: Beyond Rodriguez, https://canliiconnects.org/en/commentaries/30674, on 25 February 2024.
[98] Self-Determination and Counselling to Commit Suicide: Beyond Rodriguez, https://canliiconnects.org/en/commentaries/30674, on 25 February 2024.
[99] section 241 (1) (a), Criminal Code RSC (1985).
[100] R v LP (2013), Nunavut Court of Justice.

was in a vulnerable position. The mother was finally charged with violating section 241 (1) (a) of the criminal code,[101] in light of counselling to commit suicide.

Similarly, in the case of **R v Arlo,**[102] the accused terrorised the victim with physical violence until all she could do was comply with the accused's demands. After attaining such vulnerability of the victim, the accused gave the victim a knife to use to kill herself. In light of this, the accused was charged with counselling to commit suicide and was found guilty of violating section 241 (1) (a) of the criminal code.

To procure, on the other hand, is to secure the commission of an offence by obtaining a person or resources to commit an offence.[103] This concept is well brought out in the case of **Liningushu & others v Republic,**[104] where the deceased wife organised the killing of her husband. Her defence was that she did not participate in the killing itself. The trial court, however, summarised her role as follows:

> "She was the mastermind of the operation to eliminate her husband. She committed the offence of murder where she procured the killers and agreed to pay for their services. At the scene, she directed the operations although she did not strike the fatal blow. She paid part of the agreed price after the work was done, therefore guilty as charged."

This offence is further elaborated in the case of **R v F exparte AG**, [105] where the court defined procuring as "to enable or to facilitate." Similarly, in the case of **R v Hawke,**[106] the court added that procure means "to produce by endeavour" which simply translates to the successful persuasion of someone to do something and taking the appropriate steps to ensure that the set-out thing produces an anticipated happening.

Drawing from the above explanation and reasoning provided by the courts, procuring and counselling suicide relates to the commission aspect of assisting suicide as expressed in the Penal Code and such can be grouped under active suicide assistance.

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[101] section 241 (1) (a), Criminal Code RSC (1985).
[102] R v Arlo (2012), Nunavut Court of Justice.
[103] Musyoka W, Criminal Law, 1ed, African Books Collective, 2013, 148.
[104] Linigushu & others v Republic (2012) eKLR.
[105] R v F exparte AG (2003), Supreme Court of Queensland.
[106] R v Hawke (2016), Supreme Court of Queensland.

3.4 Aiding and Abetting

There are those who believe that in certain contexts, failure to perform an act, with foreseen adverse effects due to this omission, is 'less immoral' than to perform a different act which has identically foreseen bad consequences.[107] This concept is what is referred to as the acts-omission doctrine (AOD). According to this AOD, there exist certain kinds of harm for which actively causing them is morally worse or 'more difficult to morally justify' than allowing them to happen. Consequently, there are circumstances where it would be morally wrong to actively cause harm, but permissible to allow it to occur. [108] For instance, it is absolutely wrong to actively kill people but it would be permissible to let them die or be killed.

Walton justifies the existence of this doctrine by arguing that when someone takes positive action, they intentionally interfere with the natural course of events. On the other hand, allowing nature to proceed without interference implies some level of approval, but doesn't necessarily imply intention or deliberate agency as strongly.[109] This means that the more actively involved someone is in causing death, the more 'morally responsible' they are perceived to be.[110] Nevertheless, despite this rationale, criminal law and judicial precedent illustrate that both acts and omissions lead to equal criminal liability, without the necessity for differentiation in culpability, particularly in the case of aiding crime.

Aiding and abetting in the context of criminal law, refers to assisting or facilitating the commission of a crime, or promoting its accomplishment.[111] Section 20 (b),[112] and (c),[113] of the penal code stipulates that aiders are individuals **who either perform or omit** to do a certain act with the intent of enabling another person to commit an offence. This definition is mirrored in the case of **R v Sherrington & Kichler**,[114] where the court noted that one is guilty of an offence and may be

[107] Hope T , 'Acts and omissions revisited' 26 journal of medical ethics 4, Oxford, 2000. 227-228.
[108] Persson I, 'The Act-Omission Doctrine and negative rights'. 41 *Journal of Value Inquiry* 15, Landon, 2007, 15-30.
[109] Walton D, '*On DefIning Death: An Analytic Study of the Concept of Death in Philosophy and Medical Ethics*'. 4 *McGill Queen's University Press* 1, Montreal, 1979, 94-96.
[110] Walton D, '*On DefIning Death: An Analytic Study of the Concept of Death in Philosophy and Medical Ethics*'. 4 McGill Queen's University Press 1, Montreal, 1979, 94-96.
[111] Black's Law Dictionary, 11 ed.
[112] Section 20 (b), Penal Code (Act No. 12 of 2012).
[113] Section 20 (c), Penal Code (Act No. 12 of 2012).
[114] R v Sherrington & Kichler (2001), Supreme Court of Queensland.

charged with actually committing such an offence if they do or omit to do an act to aid another person in committing an offence.

Similarly, in the case of **John Ouma Awino v Republic,**[115] aiding and abetting was defined by the court as assisting in the commission of a crime or being an accomplice. The elements of this offence may vary across different jurisdictions but generally entail proof that the person knew their actions or inaction would assist the perpetrator in committing the crime or that they were aware of the substantial likelihood that their actions would facilitate the commission of a crime by the perpetrator. In this case, John Ouma and Samuel Otieno were convicted of murder. While Otieno actively engaged in physically assaulting the deceased, Ouma's responsibility was to deter other customers from intervening by standing at the door. The court determined that although Ouma did not directly cause harm, his actions in obstructing assistance to the victim, which constitutes an act, and his failure to provide aid to the deceased himself where the law imposes a duty of care to do so, constitutes an omission. With the intention of facilitating another person's commission of the offence, these actions/inactions amounted to aiding and abetting the crime. Therefore, from these cases, it is evident that aiding an offence can result from both actions and omissions.

It's crucial to note that courts consider the concept of positive assistance when determining aiders of a crime. Mere presence at the scene of a crime does not automatically make one an accomplice; what matters is whether the individual present plays a role in the crime. This was affirmed in **Jacinta Njoki Ndirangu v R**,[116] where the appellate court overturned a conviction due to a lack of evidence showing the appellant's assistance or encouragement in the commission of the offence.

Nonetheless, not every omission is deemed as aid. Instances exist where the law mandates taking action, and failure to do so could be construed as aiding and abetting the commission of an offence. For instance, in the case of **Bonar and Hogg v McLeod,**[117] a senior police officer who did nothing while one of his junior officers assaulted a detailed person was convicted as an accomplice for aiding the offender. He was said to have a duty to intervene. In the Kenyan jurisdiction, this concept is brought out in the case of **Sophie Atieno Ojenge v Republic**,[118] where the appellant

[115] John Ouma Awino v Republic (2012) eKLR.
[116] Jacinta Njoki Ndirangu v R (2007) eKLR.
[117] Bonar and Hogg v McLeod (1983), Scottish Courts.
[118] Sophie Atieno Ojenge v Republic (2019) eKLR.

was charged with four counts of aiding the commission of examination offenses which related to the applicant allowing Vivian to sit the 2018 KCPE examination papers on behalf of Lydia Adhiambo who was registered as a candidate. The primary question, in this case, is whether the applicant knew that allowing Vivian to sit for the examination was tantamount to assisting the commission of the offence of impersonation, and whether the appellant had a duty to act. The court rationed that:

> "By failing to fully discharge her duties as a Center Manager the Appellant was aware that her conduct was likely to encourage the commission of any examination offenses or malpractices including the offense of impersonation. Her conduct amounted to aiding the commission of an examination offense"

Ideally, an omission on the part of the Center Manager amounted to the aiding of the examination offense.

3.5 Aiding Suicide

As noted earlier, there hasn't been any judicial ruling regarding this specific offense in Kenya. This absence of judicial interpretation necessitates an exploration of how key elements like procuring, counseling, and aiding have been understood in other criminal contexts. The objective is to discern how such interpretations can be relevant to the crime of aiding suicide. Reflecting on the preceding discussion, it's clear that aiding suicide can take the form of both commission and omission.

Firstly, aiding suicide through positive action involves actively assisting or facilitating the act of ending one's life as seen in the cases of procuring. In the context of Physician-Assisted Suicide, this can include actions such as providing lethal drug physical assistance in carrying out the act or actively encouraging and persuading someone to end their life.[119] Conversely, aiding suicide through omission entails failing to intervene or provide assistance where a duty of care is present, thereby allowing the act to proceed. This can occur in scenarios where individuals with a duty of care, such as healthcare professionals, are aware of someone's intent to end their life and have the

[119] Weir R, Physician-Assisted Suicide, 87.

capability and opportunity to assist but fail to take preventive measures or offer support.[120] Omissions in aiding suicide can include withholding life-saving interventions.

The ethical implications of aiding suicide through omission raise questions about the extent of moral responsibility and duty of care. While the omission to intervene may not involve direct participation in the act itself, it can still contribute to its occurrence by enabling the individual to carry out their intentions unhindered. From a moral perspective, the failure to prevent harm when one can do so is perceived as a form of complicity, albeit through inaction.

In legal contexts, the criminal liability associated with aiding suicide through omission, though less straightforward compared to active participation still exists, as seen in the cases discussed above where aiding encompasses both acts and omissions. Therefore, when considering aiding suicide, both aspects must be taken into account. Additionally, legal frameworks impose obligations on specific individuals, like healthcare professionals, to take reasonable steps to prevent suicide and offer necessary support and intervention. Failure to meet these obligations can result in legal culpability for this offense.

3.6 Conclusion

This chapter set out to examine the offense of aiding suicide by establishing how aiding can either be a commission or an omission thus providing a distinction for purposes of attributing legal culpability to the offense of aiding suicide. In doing so, it has assessed what section 225 of the Penal Code requires in light of procuring, counseling, and aiding, then it went ahead to discuss and distinguish the concept of aiding as a commission and an omission with passive PAS as the central case of the study. The conclusion reached is that passive Physician-Assisted Suicide (PAS) by means of omission constitutes aiding suicide, thus constituting an offense under Section 225 (c) of the Penal Code.

[120] Weir R, Physician-Assisted Suicide, 87.

4.0 DNR AS A FORM OF AIDING SUICIDE

4.1. Introduction

This chapter focuses specifically on Do Not Resuscitate (DNR) orders in relation to aiding suicide. It commences by explaining what DNRs are and how they function in medical practice. Then, it will delve into the legal aspects of these orders, particularly examining their alignment or contradiction with the right to life as outlined in the Kenyan Constitution and section 225 of the penal code. Finally, it will conclude that DNR orders not only violate section 225 of the penal code but are also unconstitutional.

4.2. Understanding DNR orders

Do Not Resuscitate orders are medical orders indicating a person does not consent to receive resuscitative measures in case of cardiopulmonary arrest.[121] A DNR order implies that the responsible physician in advance decides that in case of a cardiac arrest neither basic nor advanced Cardiopulmonary Rescue (CPR) should be performed to a patien[122] These orders serve as instructions for medical staff, informing them not to initiate cardiopulmonary resuscitation in case of cardiac arrest.[123] DNR orders encompass various measures, including mouth-to-mouth breathing, chest compressions, electric shock for heart restart, insertion of breathing tubes to open airways, and medication administration.[124] Furthermore, a DNR order may imply that the patient does not want to be resuscitated, even if the physician's judgements is that CPR can be performed and is justified. However, concerns arise when DNR orders are initiated without just medical cause, as influenced by various factors including cultural beliefs, family dynamics, and personal values.[125] Cultural norms and societal expectations can heavily influence end-of-life care decisions, potentially pressuring individuals to conform to preferences regarding resuscitation and

[121] Ministry of Health, *Kenya Palliative Care policy*,2021, 9.
[122] Ministry of Health, *Kenya Palliative Care policy*,2021, 9.
[123] Mina U, 'Do not resuscitate" Orders: current practice and factors influencing decisions making in Kenyatta National Hospital' Unpublished MBBS Thesis, University of Nairobi, Nairobi, 2015, 1.
[124]'Do-not-resuscitate order 'MedlinePlus Medical Encyclopaedia, 19 August 2019- < https://medlineplus.gov/ency/patientinstructions/000473.htm-> on 19 August, 2019.
[125] M Pettersson, Hedström M, and Höglund A, 'The ethics of DNR-decisions in oncology and hematology care: a qualitative study' 1 *BMC Medical Ethics* 21, Landon, 2020, 1-9.

life-sustaining interventions. The lack of specific guidelines and regulations regarding the administration and applicability of DNR orders can leave patients vulnerable and healthcare professionals facing difficult decisions regarding resuscitation when medical necessity for a DNR is absent.

Moreover, research has examined the decision-making process surrounding DNR orders, particularly highlighting challenges faced by nurses regarding when and how these discussions should be initiated, who should be involved in the decision-making process, and who should be informed about the decision.[126].All these challenges stem for lack of effective guidlines

While the use of advanced directives is rooted in principles of autonomy and the right to refuse medical treatment,[127] the paramount concern remains the well-being of the patient, aligned with the principles of beneficence and non-maleficence. The most important thing is to not harm the patient. and it can be to harm the patient if a DNR decision does not consider the expected chance of survival.[128]

From a deontological perspective, DNR orders pose a significant challenge to Kantian ethics, which prioritizes the preservation of life as an intrinsic duty.[129] Kantian norms, rooted in the principle of treating humanity as an end in itself, strongly advocate for the protection and sustenance of life.[130] Therefore, it is my arguments that DNR orders, which potentially hasten the death of a patient, directly contradict these principles.

4.3. The unconstitutionality of DNR orders

DNR orders, as a form of passive PAS, culminate in the discontinuation of life-sustaining treatment, eventually leading to the patient's death. This passive act pits medical ethics against legal mandates, with physicians faced with the quagmire of respecting a patient's autonomy while being bound by the legal duty to uphold the sanctity of life.

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[126] M Pettersson, Hedström M, and Höglund A, 'The ethics of DNR-decisions in oncology and hematology care: a qualitative study' 1 *BMC Medical Ethics* 21, Landon, 2020, 1-9.
[127] M Pettersson, Hedström M, and Höglund A, 'The ethics of DNR-decisions in oncology and hematology care: a qualitative study' 1 *BMC Medical Ethics* 21, Landon, 2020, 1-9.
[128] Section 8, The Health Act (2017).
[129] Kant I, 'Groundwork of the Metaphysics of Moral' *Cambridge University press*, Cambridge 1997, 21.
[130] Kant I, 'Groundwork of the Metaphysics of Moral' *Cambridge University press*, Cambridge 1997, 21.

These orders, by their nature, are antithetical to the constitutional interpretation that underpins the right to life — a right that is cautiously and narrowly limited by specific statutory provisions.[131] From legislative history and judicial interpretation, there is a distinct reluctance to create frameworks that would otherwise actively or passively support the end of life. The judiciary, through judgments like **R v Stephen Kiprotich Letting & 3 others**[132] and **Robert Alai v Attorney General,**[133] has expanded the notion that Physician-Assisted Suicide is criminal, regardless of the motive, whether empathy or compassion. This illegality extends equally to passive forms such as DNR orders, which, while not explicitly included in rulings, fall within the broader purview of authorizing the termination of life – a foundation that contradicts the fundamental protection of life from conception.

Furthermore, ethical standards such as the Hippocratic Oath embedded in the medical profession emphasize the duty to preserve lives, which DNRs violate. The overriding theme in Kenyan law and medical ethics is to preserve life and improve the quality of life through medical advancements, rather than aiding its end through omission, as DNRs would require.

Despite their passive character, DNRs appear to violate the right to life. They elude the carefully defined legal exemptions to life preservation, and as a result, their validity remains uncertain under the current legal framework. The Kenyan constitution establishes narrow and strict criteria for when life may be lawfully deprived, and under current jurisprudence, DNR orders cannot be securely placed within these boundaries. They contradict the notion of the right to life as enshrined in constitutional and case law interpretations, making not only unlawful but unconstitutional.

4.4. DNR Violate Section 225 of the Penal Code

When considering whether DNR orders should be construed as a violation of Section 225 of the Penal Code, it is essential to analyze the legal definitions of "aiding" in the context of this legislation, which prohibits "procuring, aiding, or counseling" another person to commit suicide.[134] In the context of assisted suicide, aid has been defined to encompass both acts of commission and omission based on the analysis of Section 225. In the preceding chapters, both passive and active

[131] Article 26(3), Constitution of Kenya, (2010).
[132] R v Stephen Kiprotich Letting & 3 others (2008) eKLR
[133] Robert Alai v Attorney General (2017) eKLR.
[134] Section 225, Penal Code (Act No. 12 of 2012).

PAS were established as offenses under this provision. This chapter narrows the discussion to only DNR orders.

There are those who argue that in order to equate a DNR order to aiding suicide under Section 225 of the Penal Code, there is a need to demonstrate that the healthcare provider is intentionally refraining from intervention to facilitate the patient's death.[135] In the realm of PAS, the Doctrine of Double Effect (DDE) plays an essential role, in distinguishing between intended and unintended consequences of medical actions or omissions. The DDE refers to two effects of one act or omission: the ***one aimed at*** and ***the one foreseen but in no way desired or intended***. In a hypothetical scenario, Doctor 1 unintentionally causes death as a side effect while attempting to ease pain, but Doctor 2 purposefully delivers a deadly injection to achieve the desired result.[136] Traditionalists claim that intentionally killing the innocent, as was the case of Doctor 2, is always unacceptable. This is an absolute prohibition.[137] On the other hand, letting die or death by omission as is the case in DNR is sometimes 'morally justifiable', but never if intended.

Despite that, there are those who challenge the significance of intention. For instance, Frey suggests that the claim that we are not responsible for foreseen unintended consequences is highly doubtful. The doctor who does not intend or desire his client's death is still morally responsible for the action/inaction he performs.[138]

In my opinion, this observation holds significant relevance because the idea of absolving individuals of responsibility solely due to the absence of intent for a specific outcome contradicts the logic of criminal law. If this were the case, why would the law still assign criminal liability both to those who intentionally commit murder and to those who inadvertently cause death through manslaughter?

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[135] Euthanasia, assisted suicide and non-resuscitation on request in the Netherlands, https://www.government.nl/topics/euthanasia/euthanasia-assisted-suicide-and-non-resuscitation-on-request on 23 February 2024.
[136] Campbell A, '*Moral dilemmas in medicine: a coursebook in ethics for doctors and nurses*', Churchill Livingstone Publishers, New York, 1984, 28.
[137] Walton D, '*On DefIning Death: An analytic Study of the Concept of Death in Philosophy and Medical Ethics*'. McGill Queen's University Press, Montreal, 1979, 94-96.
[138] Frey R, 'Some aspects to the doctrine of double effect' 5 *Canadian Journal of Philosophy* 2, Alberta, 2005, 259-283.

Rowan further argues that what matters more is the degree of control and responsibility that a person has in a given situation, rather than whether their actions involve an act or an omission.[139]

Moreover, Shaffer explores five ways in which assisted suicide is understood in her jurisdiction - Colombia. These include facilitation of suicide, providing the means, causing suicide, active participation, and, importantly for this discussion, passive assistance in suicide. She goes on to explain that passive assistance in suicide involves individuals being charged with assisting suicide even if they do nothing to prevent it. In some cases, merely standing by while someone commits suicide may be considered assistance.[140]

In the context of healthcare, Shaffer notes that the line courts draw between suicide and being permitted to die from natural causes is unduly artificial. She states that "Suicide is the intentional, voluntary, un-accidental act of a sane man which results in his own death." Whether the "act" consists of disconnecting a respirator or shooting oneself, it is suicide nonetheless. Therefore, whoever makes it possible for them to commit such an act is themselves culpable of assistance in this crime.[141]

Following this line of thought and considering the broader discussions in the preceding chapters, it can be concluded that DNR orders do fall under the purview of aid. Consequently, DNR orders can be considered culpable for the offense of aiding suicide.

4.5. Conclusion

In conclusion, this chapter provided insight into the contentious issue of DNRs in the context of aiding suicide. It reveals that DNR orders not only contravene section 225 of the penal code but also stand as unconstitutional acts. By withholding or withdrawing life-saving treatments, DNR orders challenge both medical ethics and legal mandates, presenting a dilemma for physicians.

[139] Keown J, 'Acts and Omissions Revisited', 1 J*ournal of Medical Ethics 1,* Oxford ,2008, 576-579.
[140] Shaffer C, 'Criminal liability for assisting suicide', 86 *Columbia Law Review* 2, 1986, 348-376.
[141] Shaffer C, 'Criminal liability for assisting suicide', 86 *Columbia Law Review* 2, 1986, 348-376.

5.0 CONCLUSION & RECOMMENDATIONS

Throughout this research, the main focus has been on evaluating whether the withholding or withdrawal of treatment, as practiced in Do Not Resuscitate (DNR) orders, infringes upon the constitutional right to life and constitutes aiding suicide as defined in the penal code. The earlier chapters have examined Physician-Assisted Suicide, which encompasses both the passive and active involvement of doctors. The primary concern has been whether the right to life allows for such practices within appropriate limitations, and understanding the scope of assistance, as interpreted by the courts, to determine whether omissions qualify as aiding suicide. As such, this concluding chapter aims to present the key findings, relate them to the initial objectives, and provide recommendations for the way forward.

5.1. Summary of Findings

5.1.1 Chapter One

Chapter One served as an introductory chapter of this study. Its main focus was to establish the foundation for the subsequent chapters. The chapter outlined, among others, the research questions and objectives, as well as the theoretical framework that was used throughout the study. Overall, chapter one set the stage for the entire study and provided readers with an understanding of the purpose and scope of the research. It provided a framework for interpreting the results of the subsequent chapters and acted as a roadmap for the readers to follow the progression of the study

5.1.2 Chapter Two

Chapter Two investigated Physician Assisted Suicide (PAS) in the context of the constitutional interpretation of the right to life. It began by defining PAS and its historical origins, delving into arguments for and against PAS within the framework of the right to die. The study then examined the evolution of the right to life in Kenya, highlighting constitutional provisions and judicial interpretations regarding life and its limitations.

Key findings revealed that PAS, despite being a contentious issue, was not protected under the constitutional interpretation of the right to life. While arguments for PAS emphasized autonomy

and dignity, opposition highlighted concerns about societal implications, the sanctity of life, and the potential for abuse. Legal precedents underscored the judiciary's stance against PAS, emphasising the duty of medical practitioners to preserve life and alleviate suffering without prematurely ending it.

The analysis of the right to life under the Kenyan Constitution demonstrated a clear distinction between justifiable limitations, such as in cases of abortion, and PAS. While abortion safeguarded maternal health and human rights, PAS contradicted the principles of preserving life and leveraging modern medicine's advancements to alleviate suffering.

In conclusion, the chapter asserted that PAS contravened the Kenyan constitutional interpretation of the right to life and was thus unconstitutional.

5.1.3 Chapter Three

In the third chapter, the requirements of Section 225 were examined with special attention to procuring, counselling, and aiding. In particular, it was noted that aiding could be defined as either commission or omission. The chapter emphasised that criminal liability may result from both actions and omissions through case studies and legal interpretations.

Ultimately, the chapter concluded that passive Physician Assisted Suicide constituted aiding suicide under Section 225 (c) of the Penal Code. Chapter four

5.1.4 Chapter four

Chapter Four discussed DNR orders in the context of aiding suicide. It began by describing DNR orders and their role in medical practice, outlining the various measures covered by such orders. The study then looked at the ethical and legal consequences of DNR orders, specifically in terms of the right to life under Kenyan constitutional interpretation. Key findings revealed that DNR orders pose major obstacles to ethical theories, notably Kantian ethics, which prioritizes life preservation.

Thereafter, this chapter concluded on the hypothesis of the study that withholding or withdrawing treatment in the form of DNR orders should be interpreted as aiding suicide is accurate.

5.2. Recommendations

In light of the aforementioned findings, it is evident that the current legal framework places medical practitioners who issue DNR orders in a precarious position of legal culpability under section 225 of the penal code. This raises critical concerns about the professional and legal implications of end-of-life care provided by doctors in Kenya. To address these issues and to align national law more closely with medical ethics and patients' rights, the following recommendations are proposed:

5.2.1 Draft Comprehensive Palliative Care Legislation

The Kenyan government should initiate the drafting of comprehensive palliative care legislation that thoroughly discusses the concept and application of Do Not Resuscitate orders. This legislation should serve to clearly define DNR orders and detail when and how they can be lawfully applied, ensuring that they are understood by healthcare professionals, patients, and their families. It should establish a legal framework for the issuance of DNR orders that safeguards the rights of patients while providing clear guidelines for healthcare providers. The legislation should also highlight the importance of informed consent and ensure that patients are given full and appropriate disclosure to make informed decisions about DNR orders. Furthermore, it should lay out the procedure for documenting and honoring DNR orders within healthcare facilities, including maintaining records of all communications surrounding the issuance of DNRs. Additionally, the legislation should clarify the relationship between ethical considerations and legal requirements to assist healthcare providers in navigating the complexities of end-of-life care.

5.2.2 Amend Section 225 of the Penal Code:

Section 225 should be amended to introduce a statutory exception specifically for medical practitioners executing their professional duties in the provision of end-of-life care. This amendment should differentiate between actions considered to be deliberately aiding suicide and those medical decisions made in the best interest of the patient, including DNR orders. It should provide clarity and protection for healthcare workers who, in the ethical practice of their profession, may be required to make decisions that involve withholding or withdrawing life-sustaining treatment.

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