

The Kenya's Reproductive Health Bill, 2014

The Constitution of Kenya provides that everyone has the right to the highest attainable standard of health including reproductive health care. The Constitution came into effect on 27th August 2010 after many years of Kenyans rallying to walk away from the old independence Constitution. The Constitution contains an elaborate Bill of Rights.

It also provides that treaties ratified by Kenya shall form part of the Kenyan law. In which sense Kenya has moved a step further by domesticating not only the provisions but also boldly acknowledging its commitments to the regional and international human rights instruments. Kenya is a signatory to various regional and international human rights instruments – the International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination Against Women, the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa among others. Kenya is also among the countries that made commitment at the International Conference on Population and Development in Cairo in 1994 as well as the Fourth World Women's Conference in Beijing in 1995.

In recognition of these provisions, Kenya is in the process of acquiring a law to regulate surrogacy, in vitro fertilisation, termination of pregnancy and various reproductive health issues through the Reproductive Health Care Bill, 2014. The Bill is spearheaded by Hon Judith Sijeny, Senator and former Vice Chairperson of the Federation of Women Lawyers Kenya (FIDA Kenya). FIDA Kenya is a women's rights organisation that has for decades rallied for the rights of women in Kenya including their right to sexual and reproductive health. It's a member of the Reproductive Health and Rights Alliance (RHRA), an umbrella of organisations working on reproductive health and rights issues in Kenya.

The Reproductive Health Care Bill, 2014 defines reproductive health as well as reproductive rights. Reproductive health means a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive rights include the right of all individuals to attain the highest standard of sexual and reproductive health and to make informed decisions regarding their reproductive lives free from discrimination, coercion or violence.

The Bill provides that for a surrogate parenthood agreement to be valid:

- It must be in writing and signed by all parties.
- It must be entered in Kenya.
- Surrogate mother and her husband or partner must be domiciled in Kenya (The bill defines a partner as a stable person of the opposite sex in a relationship).
- A couple must give a written consent.

- Surrogate mother's husband or partner must give written consent but where he withholds his consent unreasonably the agreement will be signed and held valid.
- The couple's gametes must be used. This also applies in case of a single person.

Requirements for surrogate parenthood agreement a couple or single person:

- Should not be able to give birth to a child and their condition has to be permanent and irreversible.
- Must be competent to enter into agreement.
- Should be suitable to accept parenthood of the child.
- Should understand and accept legal consequences as well as their rights and obligations.

A surrogate mother has to meet the above requirements including:

- Be suitable to act a surrogate mother.
- Should not use surrogacy as a source of income.
- Have documented history of at least one pregnancy and viable delivery.
- Has a living child of her own.

In vitro fertilisation should only take place after the surrogate parenthood agreement has been signed. The Bill states that a termination of pregnancy terminates the surrogate parenthood agreement and prohibits payments in respect of surrogacy but provides exception in circumstances such as loss of earnings, insurance and compensation for expenses directly related to pregnancy.

The Bill also tackles termination of pregnancy which can only be carried out by trained health professional upon consultation with pregnant woman. If continued pregnancy would endanger the health of the mother or if mother's life or health is in danger. However, the trained health professional is required to provide non-mandatory and non-directive counselling.

Confidentiality is prioritised and any breach will attract a fine of not more than Kenya shillings 200,000 or a term not more than two years. Other penalties include a term of not more than three years or not exceeding 100,000 Kenya shillings for all other offences. But a refusal to give evidence to the Tribunal constituted in the Bill calls for a fine of 50,000 Kenya shillings or six years imprisonment.

MaryFrances Lukera is a Doctoral Researcher at the School of Law, Politics and Sociology, a member of the Centre for Cultural Reproduction, Technologies and Health and the Human Rights Cluster at the University of Sussex. She is alumnus of the Sexual and Reproductive Health and Rights Programme at the University of the Free State (South Africa). She is a member of the Reproductive Health Committee at the Federation of Women Lawyers Kenya (FIDA Kenya) and the Public Interest, Legal Aid and Human Rights Committee at the Law Society of Kenya.