

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO 250 OF 2015

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 258 AND 259(1) OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 10 (1) (a), (b), (c) & (2) (a), (b), 20, 21,
24, 27, 28, 29(1), 31 and (b), 43(1) (a) 46 (c), 47(2) AND 53(2) OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY
JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2006**

BETWEEN

**KENYA LEGAL AND ETHICAL ISSUES NETWORK
ON HIV & AIDS (KELIN)**

.....**1STPETITIONER/APPLICANT**

CHILDREN OF GOD RELIEF INSTITUTE

(NYUMBANI).....**2ND**

PETITIONER/APPLICANT

JAMES NJENGA KAMAU.....3RD PETITIONER/APPLICANT

MILLICENT KIPSANG.....4TH

PETITIONER/APPLICANT

AND

CABINET SECRETARY, MINISTRY OF HEALTH.....1ST RESPONDENT

THE NATIONAL AIDS CONTROL COUNCIL2ND RESPONDENT

**CABINET SECRETARY, MINISTRY OF EDUCATION,
SCIENCE AND TECHNOLOGY.....3RD RESPONDENT**
**CABINET SECRETARY, MINISTRY OF INTERIOR AND
CO-ORDINATION OF NATIONAL GOVERNMENT.....4THRESPONDENT**
THE ATTORNEY GENERAL.....5TH RESPONDENT

SUPPORTING AFFIDAVIT

I, **ANAND GROVER**, , a senior advocate of the Supreme Court of India and the director of Lawyers Collective, do hereby make oath and state as follows:

1. **THAT** I am an adult male citizen of India residing at A-54, Nizamuddin East, New Delhi, 110013, India.
2. **THAT** I am registered with the Bar Council of Maharashtra to practice as an advocate. In terms of the Bar Council Rules, I am permitted to practice in all courts throughout India, including the Supreme Court.
3. **THAT** I have been designated as a Senior Advocate by the Bombay High Court.
4. **THAT** I am the co-founder and co-director of Lawyers Collective, a leading public interest law centre in India that focuses on human rights advocacy, public interest litigation, and the provision of free legal services to public interest litigants who would otherwise be unable to access justice. I have held this position since 1981.
5. **THAT** the facts contained herein are to the best of my knowledge true and correct, and are unless otherwise stated or indicated by context, within my knowledge.
6. **THAT** I have been involved in effectively addressing the HIV epidemic around the world since 1981. Since that time, I have handled hundreds of cases related

to HIV, including cases related to the issues raised in this suit. A sampling of the HIV-related cases I have handled is attached hereto as Annex B.

7. **THAT** I have an extensive history of engaging in efforts to use law to ensure an effective response to the HIV epidemic in India and internationally, including providing governments and international organizations with expert advice. This has included serving as a member of the of the drafting group of the International Guidelines on Human Rights & HIV/AIDS promulgated by the Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS; as a member of the National Advisory Board on HIV and AIDS set up by the Prime Minister of India; as a national advisory board member on the International AIDS Vaccine Initiative, as a member of the World Care Council, as a member of the International Council of AIDS Service Organizations; as a member of the UNAIDS Reference Group on HIV and Human Rights and as a member of the Core Group of NGO representatives of the National Human Rights Commission of India. I currently serve as a member of the Global Commission on Drug Policy, the Lancet-University of Oslo Panel on Global Governance of Health and the Equitable Access Initiative.

8. **THAT** I served as the United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health ("**Special Rapporteur on Health**") from August 2008-July 2014. I was appointed to that position, for two three-year terms, by the United Nations Human Rights Council.

9. **THAT** in my capacity as the Special Rapporteur on Health, I was obliged to fulfil certain tasks in accordance with his mandate including, inter alia:-
 - To gather, request, receive and exchange information from all relevant sources, including governments, intergovernmental and non-governmental organizations, on the realization of the right of everyone to the enjoyment of the highest attainable

standard of physical and mental health, as well as policies designed to achieve the health-related Millennium Development Goals;

- To develop a regular dialogue and discuss possible areas of cooperation with all relevant actors, including governments, relevant United Nations bodies, specialized agencies and programmes, in particular the World Health Organization and the Joint United Nations Programme on HIV/AIDS, as well as non-governmental organizations and international financial institutions;
- To report on the status, throughout the world, of the realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and on developments relating to this right, including on laws, policies and good practices most beneficial to its enjoyment and obstacles encountered domestically and internationally to its implementation. The list of reports submitted to the United Nations General Assembly that I completed as Special Rapporteur on Health is attached hereto as Annex A;
- To make recommendations on appropriate measures to promote and protect the realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, with a view to supporting States' efforts to enhance public health.

10. **THAT** my sole purpose in seeking to intervene in this matter is to apprise the Court of the international, regional and comparative perspectives relating to these issues, including international and regional legal standards, policies and recommendations regarding disclosure and confidentiality of an individual's HIV status and the most effective means of increasing HIV treatment among the population.

11. **THAT** if granted leave to intervene, I expect to develop my submissions along the following lines:

- a. international and regional public health, human rights and legal standards relevant national law and to this suit;

- b. comparative legal standards relevant to national law and to this suit; and
 - c. evidence-based recommendations for ensuring access to, and uptake of, HIV prevention, treatment and care services, including for pregnant women and children living with HIV.
12. **THAT** I have previously been admitted as Amicus Curiae in the High Court of Kenya in *Patricia Asero Ochieng and Others v Attorney General* given my particular expertise regarding HIV and access to medicines.
13. **THAT** given my significant expertise on issues relevant to this suit, my intervention, as provided for under article 22(3)(e) of the Constitution, would assist the Court to effectively adjudicate on the issues raised in this suit.
14. **THAT** given the urgent nature of the matter, I will file my written submissions within 14 days of admission as Amicus Curiae.

15. **THAT** what is deponed to herein is true to the best of my knowledge, belief and information.

SWORN by the said)

ANAND GROVER)

at DELHI this day)

Of 2015)

Before me:)

)

)

)

Notary Public)

DEPONENT

DRAWN AND FILED BY:

NUNGO, ODUOR & WAIGWA
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Annex A

(List of Special Rapporteur on Health Reports)_

Special Rapporteur on Health Reports – Anand Grover	
A/69/33699 8 August 2014	This report considered a number of elements that affect the implementation of the right to health framework. It reaffirmed the justiciability of the right to health, explored progressive realization of the right and underlined the importance of enforcement of obligations through domestic judgments. The report further focused on the accountability deficit of transnational corporations and urged a review of the current system of international investment agreements and the investor-state dispute settlement to create a level playing field between transnational corporations and States.
A/HRC/26/31 1 April 2014	This report drew links between unhealthy food and diet-related non-communicable diseases. It addressed the need for structural changes in the food environment. In particular, global trade, increased foreign direct investment in the food sector and the pervasive marketing of unhealthy foods meant to encourage consumption were discussed.
A/68/297 9 August 2013	This report considered the right to health obligations of States and non-State actors towards persons affected by and/or involved in conflict situations, including armed conflicts, internal disturbances, protests, riots, civil strife and unrest, occupied territories and territories with a constant military presence. In this context, the availability, accessibility and acceptability of health facilities, goods and service during and after conflict were examined as the obligations of States and obligations of entities other than the primary State. The report also focused on the importance of participation of vulnerable groups.
A/HRC/23/41 /Add.3 31 July 2013	During the SR's mission to Japan, the Special Rapporteur on Health ascertained the country's endeavors to implement the right to health, and in particular considered the issues relating to the realization of the right to health in the wake of the nuclear accident at the Fukushima Dai-ichi nuclear power plant on 11 March 2011, the events leading up to it, and emergency response, recovery and mitigation.
A/HRC/23/41 15 May 2013	This report considered issues concerning the right to health of migrant workers, focusing on low-skilled and irregular migrant workers. It explored the State's responsibility to provide access to information to migrant workers and regulate

	recruitment agencies; various health concerns relating to compulsory medical testing, detention and deportation; specific dangerous or degrading jobs often filled by migrant workers; mental health of migrant workers; and issues related to the sexual and reproductive health of women migrant workers.
A/HRC/23/41 /Add.1 3 May 2013	During the Special Rapporteur on Health's mission to Azerbaijan, the Special Rapporteur on Health ascertained how the country has endeavored to implement the right to health. In particular, he assessed issues related to: the health system and financing; prevention, treatment and control of tuberculosis; and health care in prisons and detention centers.
A/HRC/23/41 /Add.2 2 May 2013	During the Special Rapporteur on Health's mission to Tajikistan, the Special Rapporteur on Health ascertained how the country had endeavored to implement the right to health and, in particular, considered issues relating to the health system and the financing, prevention and treatment of tuberculosis and mental health.
A/HRC/23/42 1 May 2013	This report identified challenges and good practices with respect to access to medicines in the context of the right-to-health framework. It concluded that full realization of access to medicines required the fulfillment of key elements of availability, accessibility, acceptability and quality. The report analyzed the international legal framework as it applies to access to medicines and key determinants of access to medicines, including local production of medicines, price regulations, medicines lists, procurement, distribution, rational and appropriate use and quality of medicines.
A/67/302 13 August 2012	This report considered issues concerning health financing. It explored the necessity of the adequate, equitable and sustainable financing for health and the State's obligation to provide it. The report addressed three critical areas in health financing: how States ensure adequate funds are available for health and the sources from which they raise these funds; how these funds are pooled; and how funds and resources are allocated within health systems towards ensuring universal access to good quality health facilities, goods and services.
A/HRC/20/15 /Add.2 4 June 2012	During the Special Rapporteur on Health's mission to Vietnam, the Special Rapporteur on Health had concerns regarding health systems and financing, access to medicines and issues surrounding HIV/AIDS, including rehabilitation centers. The SR examined health systems and financing within Vietnam, noting a number of serious challenges pertaining to access to health care and increasing out-of-pocket expenditures. There

	<p>are also a number of concerns regarding the national social health insurance program, including the coverage of the scheme and the quality of the services provided. The Special Rapporteur on Health also considered issues related to the prevention and control of HIV/AIDS in Vietnam, focusing on such areas of concern as: epidemiological surveillance and data collection; stigmatization and discrimination of vulnerable groups; and reduced international donor funding. The detention and mandatory treatment of persons who use drugs and female sex workers in rehabilitation centers were of particular concern to the Special Rapporteur on Health.</p>
<p>A/HRC/20/15 /Add.1 10 April 2012</p>	<p>During the Special Rapporteur on Health’s mission to Ghana, the Special Rapporteur on Health examined the effect of the National Health Insurance Scheme (NHIS), which caused concerns regarding membership and coverage, the exclusion of some important goods and services, and the long-term sustainability of the NHIS. The SR also examined the extreme under-resourcing of the mental health sector in Ghana, including deficiencies in mental health care facilities, shortages in mental health practitioners as well as language and physical accessibility barriers. The SR commended Ghana on its efforts to reduce the spread of malaria, but noted that the underlying determinants of health that contribute to the spread of the disease must be addressed. Finally, the report covered occupational health and safety in Ghana, particularly in the mining sector.</p>
<p>A/HRC/20/15 10 April 2012</p>	<p>This report considered issues of occupational health as part of the right to health, focusing on occupational health in the informal economy and the needs of vulnerable and marginalized groups. The report discussed State obligations, challenges posed by emerging technologies, minimization of hazards in the workplace, and availability and accessibility of occupational health services and accountability.</p>
<p>A/66/254 3 August 2011</p>	<p>This report considered the interaction between criminal laws relating to sexual and reproductive health and the right to health. The report focused on the impact of legal restrictions on abortion, conduct during pregnancy, contraception and family planning and the provision of sexual and reproductive education and information. The report concluded that such restrictions, which were often discriminatory in nature, violated the right to health by restricting access to quality goods, services and information, infringed on human dignity and were ineffective in achieving the desired public health outcome.</p>

<p>A/HRC/18/37 4 July 2011</p>	<p>This report considered the realization of the right to health of older persons. The report called for a paradigm shift according to which society should begin working towards active and dignified aging, which is planned for and supported just like any other stage of an individual's life. Such active and dignified aging would require society to put more focus on the continued participation of older persons in economic, cultural and civic life. The report underlined the fact that health facilities, goods and services must be made available, accessible, affordable, and be of good quality for older persons.</p>
<p>A/HRC/17/25 12 April 2011</p>	<p>This report examined how the right to health framework could add value to development programs. Using the example of HIV/AIDS, the Special Rapporteur on Health considered projects in which a human rights-based approach was used and explored the value added of such approach. The report also highlighted the challenges which remain in incorporating human rights into development work, in particular, the adoption of a "culture of evaluation" to the detriment of human rights-based approaches.</p>
<p>A/HRC/17/25 /Add.3 21 March 2011</p>	<p>After Special Rapporteur on Health's mission to Syria, this report focused on issues related to access to health care, particularly for vulnerable and marginalized groups and persons in detention. The report also explored issues related to women's health, including material health, family planning, and gender-based violence.</p>
<p>A/HRC/17/25 /Add.2 15 March 2011</p>	<p>After Special Rapporteur on Health's mission to Guatemala, this report concluded that the health sector in Guatemala was severely under-resourced and concentrated in urban areas. The report also discussed the inequalities which existed in the enjoyment of the right to health for indigenous communities and women, particularly in the areas of sexual and reproductive health and expressed concern of the government policies which restricted access to medicines.</p>
<p>A/65/255 6 August 2010</p>	<p>This report focused on criminalization of drug-related activities as a method for eradicating drug use and concluded that such method failed because it did not acknowledge the realities of drug use and dependence. The report detailed the failure of criminalization to achieve its stated public health goals by pushing the targeted behavior underground and thus hampering efforts to deliver health services, by limiting access to essential drugs and by perpetuating stigma and violence. The report concluded that criminalization had contributed to countless human rights violations and that States should</p>

	rather adopt a right to health approach to drug control, encourage a system-wide coherence and communication, incorporate the use of indicators and guidelines and consider developing a new legal framework concerning certain illicit drugs.
A/HRC/14/20 /Add.4 3 June 2010	After the Special Rapporteur on Health's mission to Australia, this report considered, in particular, the delivery of health services to Indigenous peoples and persons in detention (both prison and immigration detention). In considering Indigenous educational attainment, access to basic amenities, the health workforce and political participation, the report concluded that challenges around Indigenous health which were related to the poor socio-economic conditions and, until recently, the neglect and under-resources of this sector. The report was also concerned with the disproportionate impact of incarceration of Indigenous populations and the mentally ill and the policy of mandatory detention for irregular maritime arrivals (e.g., asylum seekers).
A/HRC/14/20 /Add.3 20 May 2010	After the Special Rapporteur on Health's mission to Poland, this report considered how Poland endeavored to implement the right to health in the context of sexual and reproductive rights and harm reduction policies. The report commended Poland for its commitment to achieving availability of medicines for all and the wide funding of medical services for the population. However, the report noted that certain sexual and reproductive rights issues, such as access to legal abortions, harm reduction measures with regard to HIV and the availability of opioid substitution treatment for drug dependence remained problematic.
A/64/272 10 August 2009	This report considered the evolution of informed consent and discussed the role of informed consent in realizing the right to health and the particular obligations required of States and health-care providers in guaranteeing informed consent in clinical practice, public health and medical research. The report also analyzed the vulnerability of certain individuals whose rights were compromised due to power imbalances and structural inequalities, resulting in particular responsibilities to States, health-care providers and third parties involved in ensuring non-discrimination in achieving the right to health.
A/HRC/10/22 29 May 2009	This combined report (written along with various other Special Rapporteurs and Special Representatives) focused on the situation of human rights in the Occupied Palestinian Territory, particularly after the 2008 Israeli operation against Hamas in response to rockets fired at populated areas on Israeli

	<p>territory. The report highlighted the damaged health infrastructure in Gaza, the lack of access to safe and potable water, the attacks on medical facilities and workers and the effects of the conflict on vulnerable groups and the population's mental health.</p>
<p>A/HRC/11/12 31 March 2009</p>	<p>This report considered the right to health in regard to access to medicines and intellectual property rights. It explored the way in which the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and TRIPS flexibilities had been incorporated into the national patent laws of developing and least-developed countries. It also analyzed free trade agreements and the effects of TRIPS plus requirements on access to medicine.</p>

Annex B

(Selected List of HIV-related Cases)

- i. *Lucy R. D'Souza v. State of Goa*, AIR 1990 Bom 355
- ii. *MX v. ZY*, AIR 1997 Bom 406
- iii. *P v. Union of India*, Kolkata High Court (2001)
- iv. *LX v. Union of India*, CWP – 7330/2004 (2004).
- v. *Shri Subodh Sarma & Anr. v. State of Assam & Ors.*, Guwahati High Court (2000)
- vi. *Ramdas R. Ubale v. State of Maharashtra*, Criminal Application 371 of 2008 in Appeal No. 706 of 2006.
- vii.** *Mr. X v. Hospital Z*, (1998) 8 SCC 296, AIR 1998 SCW 3662
- viii. *A, C & Ors. v. Union of India & Ors.* Bombay High Court (1999)
- ix. *Mr. X v Hospital Z*, AIR 2003 SC 664, (2003) 1 SCC 500
- x. *MX v. ZY*, AIR 1997 Bom 406
- xi. *Mr. Badan Singh v. Union of India & Anr.*, Delhi High Court (2002)
- xii. *X v. State Bank of India*, Bombay High Court (2002)
- xiii. *G v. New India Assurance Co. Ltd.*, Bombay High Court (2004)
- xiv. *X v. The Chairman, State Level Police Recruitment Board & Ors*, 2006 ALT 82
- xv. *RR v. Superintendent of Police & others* [Unreported (2005) Karnataka Administrative Tribunal].
- xvi. *S v. Director General of Police, CISF and others*, [Unreported (2004) High Court at Bombay in WP No. 202 of 1999]
- xvii. *A v Union of India*, [Unreported In the High Court at Bombay (28 November 2000)], WP No. 1623 of 2000.
- xviii. *CSS v. State Of Gujarat*, [Unreported Special Civil Application No. 11766 of 2000 (Gujarat High Court) (17 February 2001)]

xix. *M. Chinnaiyan v Sri Gokulam Hospital & Queen Mary's Clinical Laboratory*,
(National Consumer Dispute Redressal Commission, 2006)