



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION  
PETITON NO E008 OF 2023

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20(1) & (4) 21, 22, 23, 24, 25, 26(1), 27, 28, 29, 35, 43(1) (a), 47, 53(1) (c), 165, 232(1), 258 AND 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 4(b), (c), (d), (e), (f), (h), (i), (j), (n) AND (m) OF THE EAST AFRICAN COMMUNITY HIV AND AIDS PREVENTION AND MANAGEMENT ACT, 2012

AND

IN THE MATTER OF SECTION 4(c), (d), 8(c), (d) 15 OF THE HEALTH ACT, 2017

AND

IN THE MATTER OF SECTION 19 OF THE HIV PREVENTION AND CONTROL ACT

AND

IN THE MATTER OF SECTION 8, 9, 10 AND 16 OF THE CHILDREN ACT, 2022

BETWEEN

F.A .....1<sup>ST</sup> PETITIONER  
(suing on her own behalf and as mother and next friend of DM (A Minor)  
BK..... 2<sup>ND</sup> PETITIONER  
CN ..... 3<sup>RD</sup> PETITIONER  
PATRICIA OSERO OCHIENG ..... 4<sup>TH</sup> PETITIONER  
AMBASSADOR FOR YOUTH AND ADOLESCENTS  
REPRODUCTIVE HEALTH PROGRAM (ANYARHEP) ..... 5<sup>TH</sup> PETITIONER  
KENYA LEGAL AND ETHICAL ISSUES NETWORK ON  
HIV/AIDS(KELIN) ..... 6<sup>TH</sup> PETITIONER  
KATIBA INSTITUTE ..... 7<sup>TH</sup> PETITIONER

= VERSUS –

THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
CABINET SECRETARY FOR HEALTH ..... 2<sup>ND</sup> RESPONDENT

## 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENT WRITTEN SUBMISSIONS

### Background of The Case

1. My lady, the Petitioners filed the petition dated 21<sup>st</sup> September 2023, the gist of the Petition is that in August 2021 many health facilities around the country did not have adequate supplies of ARVs hence the PLWHIV could access the drugs, hence a violation of the right to health. Further they claimed that the 2<sup>nd</sup> Respondent did not have an implementation plan to procure and distribute ARVs which saw a lack of supply of essential medication used for treatment and management in children.
2. They claimed that the 2<sup>nd</sup> Respondent failed to procure, distribute ARVs and laboratory supplies for testing and management of HIV, meaning that early infant detection and viral load testing stopped. It is their claim that the failure by the government to provide essential medicines and lifesaving essential commodities to the vulnerable, have led to the violation of right to dignity, right to health and right to life.
3. My lady with the devolution of health services the respective county governments are entrusted with all functions related to health care while the national government through the 2<sup>nd</sup> respondent is responsible for health policy and national referral health facilities.

### The following are issues of determination

- a) Whether the right to nutrition and health care for children living with HIV should be an immediate and not progressive.
- b) Whether the Petitioners are entitled to the reliefs sought?
- c) Is there a violation on the right to access information?

### **Whether the right to nutrition and health care for children living with HIV should be an immediate and not progressive.**

4. My lady, in the petition the Petitioners prays that the right to health for children living with HIV/AIDS should be realized immediately and not progressively as stated in **Article 43 of the Constitution of Kenya**. The right to health is recognized in various sections of the Kenyan Constitution. These include the following:

5. **Article 43(1)(a) & (2)** where every person is entitled *to the highest attainable standard of health, which includes the right to health care services, including reproductive health care and Article 53(c) where Every child has the right ... to basic nutrition, shelter and healthcare...*
6. **Further Article 20(5)** of the Constitution provides the principles that should guide a court in the enforcement of rights provided for under Article 43 of the Constitution, where the State claimed that it did not have resources to implement the right were the following; -
  - a) it was the responsibility of the State to show that the resources were not available;
  - b) in allocating resources, the State had to give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
  - c) the court, tribunal or other authority could not interfere with a decision by a state organ concerning the allocation of available resources, solely, on the basis that it would have reached a different conclusion.
7. In **Article 21(1) of the Constitution**, the State and State organs have the duty to observe, respect, protect, promote, and fulfill the rights and fundamental freedoms in the Bill of Rights and article 21(2) of the Constitution, mandates the State to take legislative, policy and other measures, including the setting of standards in order to achieve the progressive realization of the rights guaranteed under article 43 of the Constitution.
8. **Section 19(2) of the HIV and AIDs Prevention Control Act NO. 14 of 2006** requires the Government to maximize its available resources, taking necessary steps to ensure access to essential medicines at affordable prices by persons with HIV or AIDs and those exposed to risks of HIV Infection. My Lady it's the Petitioners 'evidence that they are forced to buy the Septrin Syrups for the children at Kshs 250/-. My Lady by all standards this is a subsidized price compared to other drugs for other illness i.e. Cancer drugs.

9. We rely on the case of **Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment)** where the court held that The expression “progressive realization” was neither a stand-alone nor a technical phrase. It simply referred to the gradual or phased-out attainment of a goal—a human rights goal which by its very nature, could not be achieved on its own, unless first, a certain set of supportive measures were taken by the State. The exact shape of such measures would vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment.
10. We would like Court to take Judicial notice that where these rights require the Kenyan government to spend money or deploy other resources, the government is entitled to balance these demands with other duties regarding the expenditure of the resources at its disposal. Therefore, those rights are not absolute they are better understood as duties upon the Kenyan government to work towards the outlined goals. However, this does not mean that the Kenyan government doesn't have immediate and positive duties. It is making every possible effort, within available resources, to realize the right to health in a concrete way without delay.
11. In **Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)** What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would

not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed.

12. In the Uganda case of *Health Equity and Policy Initiative (HEAPI) v Hon. Dr. Jane Ruth Aceng Ocerro, Minister of Health & Attorney General of Uganda (Miscellaneous Cause 210 of 2018)* [2024] UGHCCD 24 (16 January 2024) the Court stated that

*a. For the court to find that there was infringement of the right to health, the applicant is under a duty to adduce evidence of actual violation and not assumed violation. On the other hand, for the court find that there is threatened violation of the right to health, the applicant is under duty to prove sets of facts which shows, with reasonable probability, that the right to health is more likely than not going to be violated in the foreseeable future unless the cause to the threatened violation is averted.*

13. In the South African cases of *Treatment Action Campaign and others v Minister of Health and others* and subsequent appeal to the Constitutional Court (*Minister of Health and others v Treatment Action Campaign and others*) [13, 40], the court took the time to consider the legal obligation of the state to enforce socio-economic rights and stressed that the state is under a constitutional duty to take all necessary and reasonable actions to comply with the provision of the right to health.

14. My lady, the guarantees of the Constitution are not absolute but may be limited in one way or another. In some instances, the Constitution states in so many words that the state must take reasonable legislative and other measures, within its available resources to achieve the progressive realization of each of these rights. In its language, the Constitution accepts that the state in this case through the 2<sup>nd</sup> respondent cannot solve all of our society woes overnight, but must go on trying to resolve these problems and that is what the government is trying to do. My lady, its apparent that one of the limiting factors to the attainment of the Constitutions guarantees is that of limited or scarce resources.

## Whether the Petitioners' rights were violated

15. The entire Petition is hinged on the fact that the Petitioners rights were violated. My Lady, we have demonstrated that the Right to Health is to be realized progressively and the state has taken reasonable legislative and practical measure, within its available resources, to achieve the progressive realization of right to health.
16. This has been confirmed by the Petitioners where they state that they have never failed to get medicine in the hospital however small the drugs are there in hospital. The 2<sup>nd</sup> Petitioner's Affidavit on (Pg 113) of the Petitioner's bundle of documents confirms that she was given necessary advice and attention including administration of prevention of mother to child transmission, additionally the child was put on drugs and care given thought. My lady she now claims that her samples were collected in expired filter papers and hence uncertain of the results of the child.
17. My Lady, further in the Affidavit of CN the 3<sup>rd</sup> Petitioner confirms that she was diagnosed in 2003, in 2020 before she conceived her twins he was able to check her viral load in line with medical advice, she states that filter papers are in short supply and what is coming has short expiries. My Lady this claim has not been supported in evidence.
18. My lady, its trite law that, who alleges must prove its trite law that whoever alleges must prove. Sections 109 and 112 of the Evidence Act states as follows:
- 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*
- 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.*

19. Further, in *SYT vs TA (2019) eKLR* the Court of Appeal stated *that where a party fails to call evidence in support of his case, that party's pleadings remain mere unsubstantiated statements of fact.*

20. In this case the Petitioners have alleged that the 2<sup>nd</sup> Respondent have used expired filter papers to collect samples and have not adduced any evidence in support of the test nor even proof that samples were collected. The Petitioners cannot claim that their rights have been violated without proving the same to court. It's not enough to allege. My Lady we submit that they fail to prove any allegation. Therefore, the Petition fails.

**Is there a violation on the right to access information?**

21. My Lady, the Petitioners claim that there should be a declaration that failure to proactively provide information to the Public and the Petitioners on the availability of essential ARVS is a violation of Article 35 of the Constitution.

22. My Lady guided by Article 35 of the Constitution and Section (6)4 of Access to the Information Act. The 2<sup>nd</sup> Respondent have made available information and Policy briefs on their website which is open for inspection pursuant to Section 5(3) of Access to Information Act.

23. My Lady by requiring the 2<sup>nd</sup> Respondent to publish within 30 days' information breakdown by County would be requiring them to act out of their ambit this is because Health is a devolved function hence the information needed should be sort from individual counties.

24. After careful perusal of the Petition and affidavit, case laws and relevant laws. It's obvious that the Petitioners' right have not been violated and hence not entitled to ANY relief sought. Perhaps a solution might be to embark upon a massive education campaign to inform the citizens generally about the causes of HIV/AIDS infection and T.B infections. To the people **AREADY** living **WITH HIV/AIDS** and those with

T.B they could be sensitized on how to live life positively to curb the spread of the infections in order to prolong their life expectancy.

25. My Lady, it's our prayer that the Petition herein be dismissed for the following reasons: -

- a) There is not proof of the allegations of the Petitioners
- b) The Petition are not entitled to reliefs as claimed

Dated at Kisumu this                    30<sup>th</sup>                    day                    April                    2024

  
MARYANNE ATIENO OMONDI  
LITIGATION COUNSEL  
**FOR: HON ATTORNEY GENERAL**

**DRAWN AND FILED BY: -**

The Hon Attorney General  
Attorney General Chambers  
Provincial Headquarters – Nyanza  
6<sup>th</sup> Floor, Wing “A”  
P O Box 1902 – 40100  
**KISUMU**

**TO BE SERVED UPON: -**

M/s Nyokabi Njogu Advocates  
C/o KELIN  
Kwindanda Lane, Off Langat Road, Karen C  
P O Box 112-00202 KNH Nairobi  
Mobile NO. 0790111578  
Email: [litigation@kelinkkenya.org](mailto:litigation@kelinkkenya.org)

MAO/rao