

NEWSUPDATE

Strategic Litigation Annual Newsletter



Message from the Executive Director

Dear Partner,

2024 was a transformative year for KELIN's Litigation Unit. We tackled a number of cases, and empowered communities to demand and promote social justice for health and hold the government accountable to deliver on the right to health. At KELIN, our mission is driven by a deep dedication to upholding the dignity and rights of every individual. The relentless effort from our team members and the invaluable support of our partners, have been pivotal in championing these rights both within and beyond Kenya's borders.

As we step into 2025, we reflect on our achievements with immense gratitude. Our victories inspire us to press on with the ongoing court cases that are shaping the human rights landscape in Kenya. Each step forward is a testament to the collective resilience of our team and partners as we work tirelessly to ensure that rights are realized in accordance with the law.

As we look ahead, we remain steadfast in our resolve to continue in the defense of communities who are at the core of challenging injustices and driving change. Together, we continue to shape a future where justice, equality, and dignity are not aspirations but realities for all.

Allan Maleche





The Irony of Progressive Realization in a Country Marred with Corruption

When Kenya allocates a substantial portion of its budget to foreign debt repayments, the remaining available resources for essential public service functions such as healthcare become considerably constrained. This financial prioritization raises a critical question: why has the promise of accessible and quality health care for all remained unfulfilled 14 years since the promulgation of the Constitution of Kenya 2010 which enshrines health as a fundamental right? Instead of progressing, why does the state of healthcare appear to be regressing?

Article 43(1)(a) of the Constitution of Kenya guarantees every Kenyan the right to the highest attainable standard of health. This provision underscores the government's obligation to uphold and protect this fundamental right. Additionally, Article 21(2) mandates the State to take legislative, policy and other measures, including setting of standards, to progressively realize the rights guaranteed under Article 43. These provisions form a robust framework, reflecting Kenya's commitment to ensuring equitable access to quality healthcare for all citizens. However, the persistent gaps in healthcare delivery raise critical concerns about their effectiveness in practice.

The International Convention on Economic, Social and Cultural Rights (ICESCR) obligates States to take steps towards the progressive realisation of economic and social rights by leveraging the available resources to

their maximum potential. The Universal Declaration on Human Rights (UDHR) also underscores these rights, requiring States to implement measures to ensure their realization. While the ICESCR acknowledges that developing countries may face challenges in matching the extent of service provision seen in developed nations, it still requires these countries to at the very least finance and immediately secure the minimum core content of economic and social rights of basic healthcare services, essential drugs, and access to facilities.

The principle of progressive realization has often been cited as a justification for delays in fulfilling health rights. In a system where delays in service delivery have dire and often irreversible consequences, the persistence of corruption as a primary barrier to resource availability undermines the credibility of resource-related excuses. This is particularly troubling in a healthcare sector marred by systemic inefficiencies, mismanagement, and crises.

The Kenyan government must recognize that the right to the highest attainable standard of health is immediate and non-negotiable. It is incumbent upon the State to prioritize healthcare financing, ensuring that available resources are directed towards achieving tangible improvements within the sector. This means not just maintaining but actively enhancing healthcare services, infrastructure, and access to services.



KELIN's Role in Promoting Health Rights in the Year 2024

KELIN has been at the forefront of advocating for health rights and accountability, through various avenues including litigation. Through strategic litigation, we have work to address systemic injustices and promote accountability in the health sector. This year, our efforts have focused on key cases designed to safeguard the right to the highest attainable standard of health, as enshrined in the Constitution. By leveraging litigation as a tool for change, we aim to challenge policies, practices, and laws that infringe on health rights, ensuring that marginalized communities, including persons living with HIV, key populations, and others, can access equitable and quality healthcare through;

A. Ensuring Government Accountability in Policy Formulation and Legislation

The Constitution mandates that policy formulation and legislative processes be guided by the principle of **public participation**. This principle ensures that stakeholders have an opportunity to provide meaningful input through structured public forums before policies are enacted into law. By incorporating diverse perspectives including lived experiences, professional expertise, and other

critical insights, policies are better positioned to address the needs of the population comprehensively and equitably. Such inclusive approaches strengthen government accountability and ensure that the resulting laws and policies are reflective of the society they are intended to serve.

To this end, KELIN has/ is pursuing the following litigation cases;

1. Rachel Mwikali & 3 Others vs The CS Ministry of Health; (Kenya Obstetrics Gynaecologist Society & Katiba Institute) High Court Petition 27 of 2022

This petition challenges the constitutionality of the [National Reproductive Health Policy 2022-2032](#) due to procedural and substantive elements. The Policy was passed unconstitutionally on the grounds that it did not undergo adequate public participation. It contains various unconstitutional provisions which will greatly violate the right to reproductive health such as;

- Exclusion of certain populations, particularly young women and girls below the ages of 18 and in certain cases from ages 21-25 from accessing

or receiving critical reproductive health care services or information.

- Imposing unreasonable requirements on parental consent prior to the provision of reproductive health services which constitutes an additional barrier for adolescents and young people.
- Infringement on innovation and academic freedom by limiting the conduct of research on reproductive health by giving unrestricted power to the Director General for Health to vet all research in reproductive health.

On [19th March 2024](#), KELIN appeared before the Court and an order was made for a six-month extension of the hearing to the 18th September 2024. This was after it emerged that the Attorney General had not complied with the directions given by the court on 30th October 2023.

We appeared before the court on [18th September 2024](#) for highlighting the serious flaws in the process by which the Ministry of Health developed and launched this policy. We were supported by two key groups: the Kenya Obstetrics and Gynecological Society and the Katiba Institute who echoed our submissions and emphasized the importance of transparency and public engagement. The Court was adjourned to October 17th, 2024 for hearing of the Respondent's submissions.

On [17th October 2024](#), we appeared before Milimani High Court for a further hearing on the petition. The session was scheduled for oral arguments from the Ministry of Health and the 3rd Interested Party, the Kenya Christian Professional Forum. However, due to a scheduling conflict with another matter already set for hearing, the hearing was rescheduled to January 29th 2025.

For more updates on this case, go to [National Reproductive Health Policy 2022-2032 Case Tracker](#)



2. KELIN v The County Government of Kilifi & Another (Malindi Petition E002 OF 2022)

The Petition challenges the constitutionality of the Kilifi County Maternal, Newborn, and Child Health Act due to procedural and substantive elements. It did not undergo meaningful public participation within the County, as required under the Constitution of Kenya (2010) as well as the County Government Act and Health Act. Moreover, the Act contains provisions that unjustifiably limit the rights and fundamental freedoms of women and girls in Kilifi County.

The violation of rights includes:

- a. Lack of meaningful public participation - the public participation sessions were not available and accessible to all inhabitants of Kilifi County and the few attendants were not given copies of the Acts prior to attention the sessions, and there were no translation/interpretation services provided.
- b. Violation of the right to the highest attainable standard of health- the Act fails to recognize that women and girls can access abortions where the health of the mother is in danger and by dint of other written law.
- c. Violation of rights of children- Section 22(1)(b)(i) of the Act allows for testing a child for HIV without consent of a parent, guardian, or the child to determine whether a health care worker may have contracted HIV while treating

the child. The absence of consent violates the child's right to privacy as guaranteed under Article 31 of the Constitution of Kenya.

On [7th July 2024](#), as part of International Women's Day, KELIN paid a courtesy visit to His Excellency the Governor of Kilifi County as a follow up on the continued collaboration between KELIN and the Kilifi County Government on drafting a rights compliant bill, the Reproductive Maternal Neonatal and Adolescent Health Bill 2023 to repeal the above mentioned Acts. The Governor committed to fast tracking the legislative process and having the Bill deliberated upon and assented into law within the next 4 months, that is, July 2024.

B.Ensuring Government Accountability in Provision of Health Care Services



The Constitution guarantees the right to the highest attainable standard of health under, placing an obligation on the government to ensure equitable access to healthcare for all citizens. Accountability in the provision of healthcare services is critical to achieving this mandate. This requires transparent resource allocation, efficient service delivery, and regular monitoring to identify and address gaps in the health system.

To this end, KELIN has/ is pursuing the following litigation cases;

1. FA & 6 Others v The Cabinet Secretary of Health & KEMSA (Petition E008 of 2023)

The Petition aims to hold the Cabinet Secretary for Health and the Kenya Medical Supplies Authority (KEMSA) accountable for their

failure to ensure continuous and uninterrupted supplies of lifesaving ARVs and essential commodities for HIV management in public health facilities. Access to essential medicines is part of the minimum core of the right to health and the State is obligated to ensure access to it as an immediate obligation. The stockouts not only violate the right to health but also impact other fundamental rights like dignity, life and access to critical health information.

This year, KELIN appeared before the Courts on [30th January 2024](#) wherein the Court admitted AYARHEP as an interested party and Professor Walter Jaoko as a friend to the court to the case. The case was then scheduled to be heard on 31st January 2024. On [31st January 2024](#), the Petitioners took the stand

and described to the court the difficulties in securing access to essential medicines and early infant diagnostic testing for themselves and their children, concluding the Petitioners' case.

The KEMSA CEO was to take the stand on [16th February 2024](#) however, this did not happen as the counsel for KEMSA was indisposed. On [11th March 2024](#), the KEMSA CEO, Dr Andrew Mulwa took the stand during a further hearing and testified on the role of KEMSA in the procurement and management of medicines and commodities in the management of HIV in Kenya. KELIN and partners undertook the cross-examination of Dr. Mulwa and this concluded the Respondents' case.

The parties were directed to file their submissions and we were set to return to court on [24th April 2024](#) to orally highlight the written submissions. This did not happen as the Court was not sitting on this date. There were a series of adjournments following this on [26th June 2024](#) and [29th July 2024](#) since the judge was indisposed.

Finally, we had our day in court on [26th September 2024](#) where the legal team highlighted the final arguments in the case alongside other partners such as AYARHEP, the Network of TB Champions and the Katiba Institute. The Respondents did not attend the court session and the court will rely on their written submissions. We are eagerly awaiting the court's judgment on 30th January 2025.

C. Ensuring Prevention of Discrimination based on Health Status



The Constitution prohibits all forms of discrimination, including on the basis of health status. This protection is critical for fostering an inclusive society where individuals are not stigmatized or marginalized due to conditions such as HIV, disabilities, or chronic illnesses. Using strategic litigation as a means to secure redress as well as to push for lasting social change, KELIN has been at the forefront of

pursuing various cases to safeguard rights for all. Some of our notable interventions include securing the release of a domestic worker living with HIV who was unlawfully charged with an attempt to deliberately transmit HIV in **R vs P.K.K MCSO E398 of 2023**. This case was brought against P.K.K, a domestic worker living with HIV, charged with attempting to transmit HIV to her employer and family

by allegedly spitting on their food under Section 26 of the Sexual Offences Act which criminalizes deliberate HIV transmission. This was despite the fact that PKK denied an wrong doing, and was definitely not committing a sexual offence. The case encountered deliberate delays on the part of the police and the prosecution with scheduled hearings adjourned on May 8 and August 14 2024 due to the absence of the complainant. KELIN pursued the release of key evidence including claimed CCTV footage during court proceedings on September 9 and October 7 2024. Ultimately, the court dismissed the case on [October 7 2024](#) under Section 87A of the Criminal Procedure Code which allows for the withdrawal of prosecution in subordinate courts. This was due to a lack of evidence to support the charge. This case demonstrates the way in which overbroad and vague laws that criminalize deliberate transmission of HIV can be used to harass people living with HIV.

Underscoring the importance of the protection and promotion of sexual and reproductive health and rights to the realisation of KELIN continues to advocate for the realisation of safe abortion services within the law. In [Network for Adolescents and Youth of Africa vs Kenya Medical and Practitioners Board and others \(Petition 428 of 2018\)](#), a petition challenging the ban by the then Kenya Medical Practitioners and Dentist Board (KMPDB) ban on Marie Stopes Kenya to provide abortion services and the decision of the Kenya Films and Classification Board to order cessation of broadcasting of information on sexual and reproductive health information. KELIN was admitted as the 6th Interested Party in the case on [17th October 2019](#). On [14th February 2024](#), KELIN filed its written arguments demonstrating how bans on information on sexual and reproductive health services such as abortion increase stigma and lead to unsafe abortions. In advancing our litigation on safe abortion, KELIN continues to work with the legal support network to defend women who have been unjustly arrested for seeking safe services within the law.

KELIN scored a significant victory in [Republic vs Joshua Gichuki Mwangi \(Petition No. E018](#)

[of 2023\)](#) in a Petition filed by the The Director of Public Prosecutions in the Supreme Court of Kenya in an appeal seeking to challenge the decision of the Court of Appeal declaring that mandatory minimum sentences are unconstitutional since they limit judicial discretion. KELIN alongside ISLA, FIDA-Kenya and Women Link Worldwide filed an amicus brief on 25th August 2023 and provided information to the court on

On [13th March 2024](#), ISLA, KELIN, FIDA-Kenya and Women's Link Worldwide appeared as joint amici curiae in the hearing of this case. On [12th July 2024](#), the Supreme Court of Kenya delivered its [judgement](#) in this case where it allowed the petition of appeal to the extent of setting aside the judgement by the Court of Appeal in Nyeri in which it declared [mandatory] minimum sentences for sexual offences unconstitutional. By upholding the constitutionality of the mandatory minimum sentencing for sexual offences, the court has recognized the history of sentencing by punishing perpetrators and a survivor-centered approach to justice.

1. Usikimye CBO, Wangu Kanja Foundation (K) Registered Trustees & 3 Others VS Mr. John Chebochok, Tegat Tea Factory Limited and 13 Others, Kericho (Petition E006 of 2024)



This is a petition challenging the constitutionality of the clearance and appointment of Mr. Chebochok as the director of Tegat/ Toror Tea Factory, Ainamoi Zone. His appointment violates national values and principles of governance

provided under Article 10 as well as the integrity and moral suitability requirements for public officials outlined in Article 73 of the Constitution of Kenya, 2010. This follows Mr. Chebochok being accused of sexual misconduct in a 2023 BBC documentary, titled, [The True Cost of our Tea: Sexual Abuse on Kenyan Tea Farms](#). KELIN is an interested party in the case.

A conservatory order was granted on 5th July 2024 in a [ruling](#), staying and/or suspending the confirmation and appointment of Mr. Chebochok as the Director of Tegat Factory pending the hearing and determination and final disposal of the Petition.

On [26th September 2024](#), during the pre-trial conference, the Court gave instructions on how the survivors' statements will be collected, and importantly how their identities will be kept confidential to ensure their safety during hearing.

The hearing of this case was undertaken from [22nd -24th October 2024](#), in a 3-day hearing in open court with testimonies from 6 victims of sexual abuse perpetrated by the 1st Respondent and the producer of the BBC Documentary. The Hearing of the Respondent's case will proceed on the 18th and 19th November 2024.

D. Cases on Women and Land Property Rights



Land and property rights are central to women's empowerment and economic stability. In Kenya, the Constitution guarantees the right to own property and promotes equitable access to land without discrimination. Despite these legal provisions, women often face significant challenges, including cultural practices, patriarchal norms, and legal illiteracy, which hinder their ability to claim and enjoy these rights.

To this end, KELIN has/ is pursuing the following litigation cases;

1. Joyce Euncan and others v Tullow Oil PLC ELC Petition No E001 of 2024

Residents and community members of Turkana County filed a petition in the Environment and Land Court in Lodwar, seeking to hold the State and Tullow Oil PLC, a multinational corporation specialized in oil and natural gas exploration and licensed by National Environment and Management Authority (NEMA) in Kenya to conduct exploratory and oil drilling in Lokichar Basin in Turkana County accountable for the harmful social and environmental degradation and degeneration caused by oil drilling and exploration that has resulted in violation of the constitutional rights to clean and healthy environment, clean and safe water in adequate quantities, right to the highest attainable standard of health, right to life, right to development and security of person.

On [22 October 2024](#), the Environment and Land Court in Lodwar admitted KELIN and ISLA as joint *amici curiae* to provide information to the court on how women are disproportionately affected by social and environmental impacts of extractive industries; and the nature and extent of state obligation to eliminate indirect discrimination against women in the extractive industries.

1. Kituo cha Sheria & another v The Attorney General & Others Iten ELC Petition No E007 of 2022

This case challenges the failure of the Kenyan government to fulfil its legal obligation to take measures to adapt to the effects of climate change and mitigate the impacts of climate change in relation to Rift Valley Basin. The petitioners' in this case claim that owing to the failure of the government to provide a sufficient response to climate change and mitigate its impact thereof, they have suffered acute climate vulnerability which has affected various aspects of their lives including health, source of livelihoods, and their natural habitation. One of the questions the court is being called upon in the case to determine is whether or not the State has fulfilled its obligation adequately in mitigating against climate change. This case is important because the court is being called upon to determine how and the extent women are impacted by climate change. The Court admitted KELIN and ISLA as joint amici on [31st October 2023](#). This year we attended a court visit alongside the judge at Baringo on 2 October 2024 for case management. The matter was heard between 9th and 11th December 2024, when the parties gave evidence on the extent of climate change in the Baringo region. The court has given directions on filing of submissions, and we return to court on 11th March 2025 to confirm a date for judgment.

As we closed the year, between 3rd and 6th December, Nyokabi Njogu and Martha Ogutu from KELIN's Strategic Litigation Unit and Health & Governance teams attended the 1st Litigation Symposium held by the The Global Health Advocacy Incubator (GHAI) an initiative of the Campaign for Tobacco-Free Kids (CTFK), in collaboration with the Pan-African Legal Network on Food and Nutrition in Marrakech, Morocco. The symposium brought together public health lawyers from 16 countries across the world including the Philippines, Kenya, Nigeria, Tanzania, Uganda, Mexico, Colombia, Brazil, Jamaica and the United States of America to discuss advocacy and legal issues on food policies. The main objective of the symposium was to build and

strengthen the capacity to develop, hone, and expand the use of strategic litigation as a tool to advance public health and injury prevention policy initiatives at local, regional and global levels.

The participants shared experiences tackling cases on new phenomena such as greenwashing and 'nutri-washing'; the two most frequent categories leveraged by the ultra-processed products industry. Greenwashing practices include environmental pledges impossible to fulfil such as claiming 100% packaging recyclability, promoting water protection while they explode hydric resources simultaneously or lobbying against binding environmental measures among other false claims. Nutri-washing entails the generation of a halo around their unhealthy products and brands, presenting themselves as a legitimate voice on public health issues, among others. These actions have the potential to easily deceive consumers and other audiences, which could be taken before courts to make relevant actors accountable.

KELIN has representation in the Council of the Pan African Legal Network on Food and Nutrition (PALNEF) and is also implementing a program supported by GHAI on 'Promoting Conducive Regulatory and Policy Frameworks for Healthy Diets through Advocacy and Collaborative Coordination in Kenya'. The goal of the project is to build on our successes, address the emerging challenges and to amplify our advocacy efforts for the development of evidence-based food policies to promote a conducive regulatory and policy framework for healthy diets through advocacy and collaborative coordination in Kenya.

In the coming year, we look forward to advancing our work on healthy diets through strategic litigation.

Accountability call

The fight for the immediate realization of health rights in Kenya is gaining momentum. We call upon the general public to be proactive in holding the government accountable for protecting and realizing the highest attainable standard of health.



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