

SUMMARY OF KISUMU PETITION E008 OF 2023

1. What was the case about?



On September 21, 2023, four women living with HIV, supported by AYARHEP, KELIN, and the Katiba Institute, filed a petition at the High Court of Kenya, demanding accountability from the Ministry of Health and KEMSA for failing to ensure a consistent supply of life-saving antiretrovirals (ARVs) and essential HIV treatment commodities in public health facilities. This crisis has been compounded by the government's heavy reliance on donor funding to fulfill its obligation to provide uninterrupted access to HIV treatment. Kenya has the fifth-largest population of people living with HIV (PLHIV) globally, with the virus remaining a leading cause of adult morbidity and mortality. Since 2020, disputes between the government and USAID, coupled with corruption within KEMSA, have left thousands of PLHIV without critical medication—escalating health risks and undermining national HIV treatment efforts.

2. Who were the parties?



The Petitioners

FA - a woman living with HIV, one of the individuals at the forefront of the case, advocating for access to consistent and uninterrupted ARV supplies.

BK - a woman living with HIV, raising concerns about the impacts of the ARV shortages on her health and survival.

CN - a woman living with HIV, joining the petition to call for accountability and a long-term strategy to ensure the availability of HIV treatment.

Patricia Asero - a woman living with HIV, highlighting the risks posed to children living with HIV due to the ongoing shortages.

Ambassador for Youth and Adolescents Reproductive Health Program (AYARHEP):
An organization advocating for reproductive health and rights of youth and adolescents, including PLHIV.

Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN):
A non-governmental organization committed to promote and protect health related human rights for all including advocating for the legal and human rights of PLHIV,

Katiba Institute: A civil society organization dedicated to promoting knowledge and understanding of Kenya's Constitution and constitutionalism and to defend the Constitution through holding the government accountable.



Respondents

1st Respondent: - Attorney General – is the Principal legal adviser to the government and the person authorized by Article 156(4)(b) of the Constitution of Kenya to represent the National Government in proceedings to which it is a party. Representing the government, accused of failing to ensure access to essential medicines and information on ARV availability.

2nd Respondent: - Cabinet Secretary of the Ministry of Health –who has various responsibilities in the management, prevention and control of HIV in Kenya. The official responsible for ensuring access to healthcare services, addressing the issues of stockouts and delays in the supply of ARVs and HIV commodities.

3rd Respondent: - Kenya Medical Supplies Authority (KEMSA) – a state corporation under the Ministry of Health established under KEMSA Act responsible for procurement and distribution of essential medicines, including ARVs, accused of mismanagement and causing supply shortages.



The Interested Party

The Network of TB Champions in Kenya



The Amici Curiae

Professor Walter Jaoko

3. Petitioners' Arguments



The petitioners argued that the Kenyan government, through the Cabinet Secretary Ministry of Health and KEMSA, had failed to fulfill their constitutional and legal obligations in providing timely access to essential HIV treatment and health services. Specifically, they raised the following violations of constitutional rights:

- **Right to the Highest Attainable Standard of Health(Article 43(1)(a)):** The petitioners contended that the government's failure to ensure a continuous supply of ARVs and HIV treatment commodities violated their right to health as outlined in the Health Act.
- **Right to Life (Article 26):** The petitioners emphasized that the shortage of life-saving ARVs put their lives at significant risk, directly violating their fundamental right to life under the Constitution.
- **Right to Access Information (Article 35):** They argued that the Respondent's failure to proactively provide adequate information on the availability and distribution of ARVs hindered their ability to access essential medicines, breaching their right to information under the Health Act.
- **Right to Equal Protection and Freedom from Discrimination (Article 27):** The petitioners highlighted that the shortages disproportionately affected breast feeding women, and those who could not afford private healthcare, violating their right to equal protection under the law and exposing them to further discrimination.
- **Right to human dignity (Article 28):** the failures of the government to provide essential medicines and life saving essential commodities to vulnerable people have led to the violation of the right to dignity and the right of PLHIV to access treatment.

4. Remedies sought by the petitioners:

- A declaration that the 2nd Respondent - **CS Ministry of Health** is responsible for **ensuring accessible, available, acceptable, and high-quality health services for PLHIV.**
- A declaration that **the failure of the CS Ministry of Health to provide continuous and uninterrupted ARV and HIV commodity supply violates several constitutional articles.**
- A declaration that **the CS Ministry of Health and KEMSA must proactively provide information to the public on ARV availability.**
- An order requiring **the CS Ministry of Health to make public the reforms at KEMSA and its suitability for distributing essential medicines.**
- An order compelling **the CS Ministry of Health and KEMSA to publish information on ARV availability and distribution in public health facilities.**
- An order for the **CS Ministry of Health to collaborate with PLHIV communities and state agencies to develop a long-term strategy for consistent ARV provision.**
- An order for the **CS Ministry of Health to provide general damages to Petitioners affected by the constitutional violations.**
- A requirement for the **Respondents to file affidavits with the Court detailing their progress in complying with these orders.**

5. What was the court's decision?



The court, on February 7th 2025, dismissed this case based on the following grounds:

a) No Violation of Constitutional Rights: The court concluded that the petitioners failed to demonstrate that their constitutional rights were violated by the government, despite acknowledging the disruptions caused by KEMSA's mismanagement and corruption.

b) Right to Health Subject to Progressive Realization: The court ruled that the right to health, specifically for children living with HIV, is not an immediate right but one that is subject to progressive realization, meaning that full implementation of this right is expected to be achieved gradually over time.

c) No Evidence of Immediate Threat to Life: The court did not find sufficient evidence that the shortage of ARVs and HIV treatment commodities posed an immediate threat to the life of the petitioners, despite the serious health risks mentioned by the petitioners.

d) Government Accountability: Although the court acknowledged challenges in the provision of ARVs and other health commodities, it held that the government had not acted in a way that warranted a declaration of constitutional violation. The government was not held accountable for the ARV shortages.

e) Health is a devolved function under the Fourth Schedule of the Constitution with the Cabinet Secretary in charge tasked with the Ministry's general policy and strategic direction while the County Government being the devolved unit is charged with oversight over County Health Facilities and Pharmacies. Hence the Court would be breaching the doctrine of separation of powers by directing the 2nd Respondent on how to undertake their duties.

f) Insufficient Grounds for General Damages: The court found that the petitioners did not provide adequate evidence to support the claim for general damages, rejecting the request for compensation for the harm caused by the shortages and delays in the supply of essential medicines.

6. The Impact of the court's decision



The court's judgment in this case carries several significant implications for people living with HIV and the broader healthcare system:

- | | |
|-----------|---|
| a) | Continued Inaccessibility to Life-saving Treatment: The court's dismissal of the petition means that the systemic shortages of antiretroviral (ARV) medicines and other essential HIV commodities may persist, jeopardizing the health and survival of many people living with HIV in Kenya. |
| b) | Weakening of Accountability Mechanisms: The decision weakens the accountability framework for ensuring a consistent supply of essential medicines. This could undermine future efforts to hold public health authorities accountable for lapses in delivering critical healthcare services. |
| c) | Progressive Realization of Health Rights: The court's view that the right to health for children living with HIV is subject to "progressive realization" dilutes the immediacy of their access to necessary treatment, potentially delaying the realization of their right to life-saving healthcare. |
| d) | Challenges in Public Health Reform: The judgment limits opportunities for reform in institutions like KEMSA, which is seen as responsible for the mismanagement and corruption that led to the health crisis. Without judicial intervention, the public health system may struggle to overcome these challenges. |