

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)1ST PETITIONER/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.....4TH RESPONDENT
THE ATTORNEY GENERAL.....5TH RESPONDENT

AND

MR ANAND GROVER.....AMICUS CURIAE

SUBMISSIONS FOR THE PETITION DATED 15th JUNE 2015

My Lordship,

The Petitioners make these Submissions in support of their Petition dated 15TH JUNE 2015 which is now before this Honourable Court.

Brief Statement of facts:

On 23 February 2015 the National Government through H.E. Uhuru Muigai Kenyatta, C.G.H, The President of the Republic of Kenya, issued an urgent directive to all County Commissioners, the 1st, 3rd and 4th Respondent to collect up-to-date data and prepare a report on all school going children living with HIV & AIDS, information on their guardians, information on the number of expectant mothers who are HIV positive and the number of breastfeeding mothers who are HIV positive. The information requested was to be gathered in a format that would directly link the names of the aforementioned persons and their HIV status.

The 1st, 3rd and 4th Respondents proceeded to implement the directive through their officers and agents, in all the 47 counties without any consultations with persons living with and affected by HIV and without putting any legal, policy and structural safe guards relating to the right to privacy and confidentiality thereby going contrary to the provisions of the Constitutions.

This was followed by a number of attempts by the Petitioners to engage with the President on concerns regarding the rights of people living with HIV that were raised by the Directive and its implementation. These attempts are as outlined in paragraphs 16 to 44 of the affidavit of Mr. Allan Achesa Maleche (for the 1st Petitioner), paragraphs 12 to 21 of the affidavit of Mary Owens (for the 2nd Petitioner) and from paragraphs 5 to 17 of the Petition. Additionally, the Chairpersons of the Commission on Implementation of the Constitution (now defunct) and the Commission on Administrative Justice, respectively and separately issued advisory notes to the President and the Chief of Staff informing him that implementation of the directive in the proposed manner would lead to a violation of Article 31 of the Constitution, Sections 18, 21, 22 and 23 of the HIV Prevention and Control Act as well as Section 19 of the Children's Act. (This is as averred in paragraph 9 of the Petition and verified in paragraphs 25 and 26 of the Affidavit of Mr Allan Achesa Maleche (for the 1st Petitioner) and Annexures marked A.A.M 015 & A.A.M 016 thereof) Further, the International Community of Women Living with HIV (ICW-Global) and the Global Network of People Living with HIV (GNP+) wrote a letter to the President concerning the directive issued by him. (As averred in paragraph 10 of the Petition and verified in paragraph 30 of the Affidavit of Mr. Allan Achesa

Maleche (for the 1st Petitioner) and annexure marked A.A.M 018 thereof). Despite these efforts our letters remained unanswered by the relevant government agencies, resulting into the filing of the court case.

Having unsuccessfully attempted to engage with the Office of the President the 1st and 2nd Petitioners participated in stakeholder consultations held by the Chairperson of the now defunct Commission of Implementation of the Constitution (CIC) after which the CIC issued a further advisory proposing five steps to be taken to ensure the protection of the rights of person living with HIV. (This is as averred in paragraph 12 of the Petition and verified by paragraph 33 of the Affidavit of Mr Allan Achesa Maleche (for 1st Petitioner) and Paragraph 13 of the Affidavit of Mary Owens (for 2nd Petitioner)).

The 1st and 2nd Petitioner were invited to a meeting with the Chairperson of the Commission on Administrative Justice, where they were requested to submit suggestions as to how to identify children and adolescents living with HIV and have them access care and treatment without infringing on their right to privacy and confidentiality. (This is deponed in paragraphs 15 and 16 of the Petition and verified by paragraphs 17 to 19 of the Affidavit of Mary Owens and annexure marked M.O. 003 thereof).

The 1st petitioner, during the period of March and April 2015 extensively used social media to bring to the attention of the President and the public, the implications of the presidential directive on the rights of all Kenyans particularly those who are living with HIV. (This is as averred in paragraph 14 of the Petition and verified by Paragraph 41 of the affidavit of Mr. Allan Achesa Maleche and annexure marked A.A.M 023 thereof).

The Petitioners aver that they futilely attempted to engage with the office of the President to address concerns raised by the Directive. This then resulted in the current petition before the court.

The respondents in the affidavit of Dr Nduku Kilonzo confirmed that indeed the directive was issued and implemented. The respondents advance the argument that the directive *ipso facto* did not breach any constitutional rights, and that possible misinterpretation or implementation resulting in a breach of the petitioner's constitutional right cannot render the said directive unconstitutional.

The Petitioners in their rejoinder reiterated that the Presidential Directive is unconstitutional due to its failure to take into account the right to privacy and the provisions of the HIV and AIDS Prevention and Control Act, 2006. The Petitioners further noted that any misinterpretation in implementation of the directive will be a direct result of the failure to ensure that proper guidelines to protect privacy were available before the Directive was issued. The Petitioners pointed out to this

honourable court the fact that the Respondents admit that the Directive can so easily render itself to misinterpretation in implementation as laid out in their replying affidavit (See Paragraph 16 of the affidavit of Dr Nduku Kilonzo (on behalf of the respondents)).

The Petitioners are concerned about the constitutional implications of implementing the directive without proper guidelines. That the directive may have been issued with the noblest of intentions is not in contention.

The Respondents alleged that there are already developed guidelines that provide privacy and confidentiality guidelines in the implementation of services in research and data collection and in varied settings. The Petitioners, in their rejoinder, noted that the guidelines referred to by the Respondents do not meet the requirements of section 20 of the HIV and AIDS Prevention and Control Act, 2006 which require the guidelines to be in form of regulations. The Petitioners further pointed out that the guidelines referred to by the respondents in paragraph 23 and marked as NK6 govern the distribution of Anti-retroviral drugs and not privacy as required by section 20 and are thus irrelevant.

The respondents argued at paragraph 25 of Dr Nduku's affidavit that there was no preconceived, systematic method of collecting the data prescribed by the respondents. The Petitioners, in their rejoinder, clarified to this honourable court that indeed there was a preconceived method of data collection which was to provide information in a prescribed matrix which would allow a list of people living with HIV that trickles from the office of the Chief, through the county commissioner to the Office of the President. This is evidenced by annexures marked A.A.M 002, A.A.M 003, and A.A.M 004 – which shows the data collection matrix and the ways how the information was to flow from the office of the chief all the way up through the various administrative offices, to the Office of the President. This increases the chances that the directive would definitely violate and continues to violate the right of the concerned parties. This is also a concession that indeed there is a possibility of violation of the right to privacy arising from the implementation of the directive.

My Lord, we bring to the attention of this honourable court that numerous averments in the affidavits of the Petitioners have not been responded to or denied by the Respondents in their replying affidavit. The only logical explanation for this, my lord, is that the Respondents are admitting the issues raised therein. It is thus our humble submissions that the Respondents be deemed to have admitted the following, for the purposes of assisting the court in framing some of the issues:

- (i) The respondents do not dispute the conduct of non-responsiveness by the 1st, 2nd and 5th Respondents which is a clear disrespect to national values and principles of governance that are binding to the said respondents. The respondents are bound by the principle of public participation.

- (ii) The respondents admit that the Presidential Directive to instruct County Commissioners to collect HIV related information and save this information in a prescribed data matrix may or has already lead to violations averred to in paragraph 62 of Mr Allan Achesa Maleche's Affidavit in Support of the Petition. The Respondents further admit in paragraph 25 of Dr. Nduku Kilonzo's affidavit that there have been cases of violation or rights albeit isolated ones.
- (iii) That the Respondents admits paragraphs 50 to 53 and 57 to 76 of the Mr Allan Achesa Maleche's affidavit in support of the petition.
- (iv) That the Respondents admit paragraphs 22 to 25 of the affidavit of Mary Owens in support of the Petition.
- (v) That the Respondents admit paragraphs 17 to 42 of the affidavit of James Njenga Kamau in support of the petition.

Issues arising for determination

The issues for determination, in our humble view, are framed as follows:

- a) Whether the directive dated 23rd February 2015, issued by the National Government through H.E. Uhuru Muigai Kenyatta, C.G.H, The President of the Republic of Kenya, and the subsequent acts and omissions of the Respondents is a breach of the petitioners' constitutional rights under Articles 10 (1) (a), (b), (c) & (2) (a), (b), 24, 27, 28, 29(f), 31, 43(1) (a), 47(2) and 53(2) of the Constitution of Kenya and that the same is null and void for all intent and purposes.
- b) Whether the 1st – 4th respondents can be compelled to destroy all data in their possession, collected as a result of the directive dated 23 February 2015, linking names of persons living with HIV and their HIV status, within a period of 14 days or codify the names collected as a result of the directive and have the stored in a manner that does not link their names and their HIV status in a public document.
- c) Whether the Court can issue an order compelling the 1st respondent to put in place privacy guidelines, in form of regulations as required by Section 20 of the HIV & AIDS Prevention and Control Act, on the collection and store rage of data relating to HIV incorporating the following:
 - i. Detailed guidelines on the management of HIV&AIDS information by all persons who render HIV testing services; especially VCT centers;
 - ii. Detailed guidelines on the management of HIV&AIDS information in hospitals and other medical institutions;
 - iii. Detailed guidelines on the recording, collection, storage and use of HIV&AIDS information by government agencies for public health and other epidemiological purposes;

- iv. Detailed guidelines on the dissemination and/or sharing of HIV&AIDS information between family members and relatives or within the home setting;
 - v. Detailed guidelines on the collection and use of HIV&AIDS information in the workplace;
 - vi. Detailed guidelines on the management of HIV&AIDS information in schools, colleges and institutions of higher learning; and
 - vii. Detailed guidelines on the management of HIV&AIDS information in prisons and other correctional institutions.
- d) Whether the Court can issue an order directing the 1st – 4th Respondents to issue a circular informing their officers, employees and/or agents that the directive issued on 23 February 2015 is unconstitutional is null and void for all intent and purposes.
- e) Whether the Court can issue an order directing the 1st and 2nd Respondents to conduct public awareness campaigns to educate citizen’s persons living with and affected by HIV about their rights, stigma and discrimination and other matters relating to HIV in line with Sections 4-8 of the HIV & AIDS Prevention and Control Act 2006.

My Lord, we discuss each of the issues for determination as follows:

Issue No. 1

Whether the directive dated 23rd February 2015, issued by the National Government through H.E. Uhuru Muigai Kenyatta, C.G.H, The President of the Republic of Kenya, and the subsequent acts and omissions of the Respondents is a breach of the petitioners’ constitutional rights under Articles 10 (1) (a), (b), (c) & (2) (a), (b), 24, 27, 28, 29(f), 31, 43(1) (a), 47(2) and 53(2) of the Constitution of Kenya and that the same is null and void for all intent and purposes.

(a) The Legality and Constitutionality of the Presidential Directive.

My Lord, we start by addressing the pertinent issue of the legality and constitutionality of the presidential directive dated 23rd February, 2015. This is an issue that is central to this petition and which we will address in its entirety throughout our submissions.

My Lord, first we start by demonstrating why the presidential directive is unconstitutional *generally*. We will then proceed to address how the directive offends the various specific Articles of the Constitution.

We contend that it is not in dispute that the president in issuing the directive may have done so in exercise of his executive powers. Whether he issued the directive while exercising his powers pursuant to Article 132(3) (b) or Article 132(4)(a) of the Constitution is a non-issue in this Petition.

What is in dispute is whether this directive meets the test of *constitutionality*. In issuing the directive, did the president respect the Constitution? Does the directive offend any provision of the constitution? Does the directive violate or lead to a violation of the constitutional rights of any person? If the answer to any of these questions is yes, then the directive is unconstitutional. My Lord, we reiterate our assertion the President in issuing the directive may not have been properly advised as to its implications and hence issued a directive that violated the constitution.

My Lord, we have demonstrated and will re-demonstrate that the directive as issued violates a number of provisions of the Constitution, including Articles 10, 27, 28, 29(d) & (f), 31(a), 43(1)(a-c), 47(2) and 53(2). The directive further offends the main legislative framework on HIV that is, The HIV and AIDS Prevention and Control Act, particularly sections 18, 20 and 21. My Lord that the directive was issued without any due regard to the constitutional rights of persons it targeted, and the guiding legislation, makes it unconstitutional *ab initio*.

My Lord, we have demonstrated through the supporting Affidavits of Mr Allan Achesa Maleche (for 1st Petitioner at Paragraph 62), and the respondents have not denied, that the presidential directive to instruct County Commissioners to collect HIV related information and save this information in a prescribed data matrix may or has already lead to, *inter alia*:

- (i) Forced or compulsory testing which violates The HIV & AIDS Prevention and Control Act;
- (ii) Disclosure of information regarding to status – violating their right to privacy under Article 31 of the Constitution and sections 20, 21, 22 and 23 of HAPCA.
- (iii) Breaches of other rights such as right to equality and freedom from discrimination (Art. 27), right to dignity (Art 28) and right to freedom and security of the person (Art. 29)

This brings us to the question of whether it is within the petitioner’s right to challenge an unconstitutional presidential directive. My Lords, it is indeed a settled matter in our judicial jurisprudence that the actions of a President can be challenged if they are unconstitutional.¹

Odunga J in *Keroche Breweries Limited & 6 Others vs. Attorney General & 10 others* (2016) eKLR (*The Keroche Case*) (at paragraph 106) notes:

¹ See the *Republic vs. Chief Justice of Kenya & 6 others exp Moijo Mataiya Ole Keimua* Misc Appl. No. 1298 of 2004

“It follows that where it is alleged that the executive has violated or is threatening to violate the Constitution, this Court must step in, investigate the allegations and if found to be merited to remedy the violation or threatened violation.”

My Lord, if a presidential directive offends any provision of the Constitution, it is unconstitutional *ab initio*. Then my Lord, it automatically follows that any process or function or duty carried out pursuant to the directive is unlawful and void in line with the principle of *ex nihilo nihil fit* (out of nothing comes nothing).²

Odunga J in *Keroche Breweries Limited & 6 Others vs. Attorney General & 10 others* (2016) eKLR (at paragraph 89) notes:

“Under Article 73(1)(a) of the Constitution it is provided that authority assigned to a State officer is a public trust to be exercised in a manner that is consistent with the purposes and objects of the Constitution, demonstrates respect for the people, brings honour to the nation and dignity to the office, promotes public confidence in the integrity of the office and vests in the state officer the responsibility to serve the people, rather than the power to rule them.”

My Lord, that a presidential directive has been issued which offends the HIV legislation and the Constitution, makes us request this court to consider the place of presidential directives in the current constitutional order in Kenya. My Lord, this court has exhaustively and extensively considered the matter. Justice Odunga in the *Keroche* case states (at 95):

“It must be appreciated that directives under the Constitution in the exercise of executive powers of the President are serious matters that ought to be given only after serious circumspection and after full appreciation of the full effects of the likely consequences of their application. The requirement for writing affords the President time to reflect on and if possible seek legal opinion on the likely effects of the decision thus avoiding situations where the actions are subjected to litigation or to ugly scenes in the implementation of the directive. That cooling period also affords the President time to ensure that the directive is carried out in an orderly manner so as to achieve its purpose in accordance with the national values and principles of governance. In other words in the exercise of the powers conferred on the President under Article 132 of the Constitution, the decision or action must not be based on emotions but must be well thought of and must be precise and exercised in accordance with respect for the rule of the law and must be targeted at the purpose for which they are meant to achieve.”

² *Keroche Breweries Limited & 6 Others vs. Attorney General & 10 others* (2016) eKLR at Paragraph 30.

My Lord, it is thus clear that a president must carefully consider all the surrounding issues before issuing a directive. In our case, we argue that the issuance of this directive without mechanisms in place for implementation posed a risk to the rights of the targeted population. The need to always respect the Constitution is succinctly captured by Madan J (as he then was) in *Githunguri vs. Republic* KLR (1986) 1 quoted with approval by Justice Odunga in the *Keroche Case*.

“We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also destroying the society.”

Therefore, this court must protect rights of people living with HIV who are affected by this directive whose implementation clearly offends their rights to privacy, among others. The President should also be guided that he should issue directives that respect all aspects of the Constitution, and with proper consultation, public participation, and after having carefully considered the likely consequences of such a directive.

My Lord we now embark on a journey to demonstrate in details how the said presidential directive offends specific Articles of the Constitution:

(a) Article 10: National Values and Principles of Governance

My Lord, we cite and discuss Article 10 of the Constitution to underscore the importance of inclusiveness and public participation in the sphere of governance and demonstrate how this presidential directive is offensive.

My Lord, it is a clear position of the Constitution that State Organs, State officers, public officers and all persons are bound by Article 10 national values and principles of governance whenever any of them *applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions*. These values and principles of governance include “patriotism, national unity, sharing and devolution of power, the rule of law, democracy and *participation of the people*; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised . . . “

My Lord, it thus emerges that public participation is of utmost importance. The Petitioners have clearly demonstrated that in issuing the directive the president did not respect the clearly laid down principle of public participation. Even after issuing the directive, efforts at public participation were ignored. The petitioners, together with other stakeholders including independent constitutional commissions, made attempts to engage the president to rectify the situation as evidenced by the

Affidavit of Allan Achesa Maleche (paragraphs 16 to 44) which outlines the numerous futile attempts by the petitioners to engage the office of the president to ensure the directive does not violate rights in its implementation. This was ignored. My Lord, the president issued a unilateral directive without public participation. Agencies that ought to have advised him on the issue neglected, ignored or failed to do so – the respondents have not tabled any evidence to show that they advised the president either before or after the directive.

The President, as a state officer is bound by Article 10 and Article 73(1) of the Constitution. His directives must be issued in accordance with the constitution – and public participation is central. Without it, the directive fails the test of constitutionality.

In underscoring the significance of public participation, we are guided by the dicta in [Kenya Small Scale Farmers Forum & 6 Others vs Republic of Kenya & 2 Others \[2013\] eKLR](#) where the Court held as follows:

“One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs. The preamble to the Constitution recognizes, “the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.” It also acknowledges the people’s ‘sovereign and inalienable right to determine the form of governance of our country...’ Article 1 bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of ‘inclusiveness’ and ‘participation of the people.’”

This was positively relied on in [Coalition for Reform and Democracy and Another vs Republic of Kenya and Others](#) Petition 628, 630 of 2014 & 12 of 2015 (Consolidated) (2015) (eKLR).

My Lord we submit that the significance of public participation in governance cannot be underestimated given the Constitution’s deliberate recognition of the people as the holders of the sovereign power in the Republic of Kenya. In enacting the Constitution the people of Kenya took a stand that is succinctly described by the Court in [Keroche Breweries Limited and Others v The Attorney General and Others](#) [Petition 295 of 2015](#):

“Kenyans therefore decided to protect certain provisions of the Constitution unto themselves and barred Parliament from intermeddling in the same. Kenyans made it clear that sovereignty belonged to them and that they had only ceded some of their powers to their agents or delegates, the Legislature, the Executive and the Judiciary. However they expressly provided that such delegated power must be expressed in

accordance with the will of the people as decreed in the Constitution, the ultimate expression of their will.”

My Lord we submit that the affidavit of Mr. Allan Achesa Maleche has evidenced continuous attempts by the Petitioners, the Commission on the Implementation of the Constitution (now defunct) and the Commission for Administrative Justice to engage with the President on the contents of the Directive. My Lord we submit that such attempts have been unsuccessful and we would like to draw the attention of this Court to consider the meaning of public participation as comprehensively discussed by the Constitutional Court of South Africa in [Doctors for Life International v Speaker of the National Assembly and Others \(CCT12/05\) \[2006\] ZACC 11; 2006 \(12\) BCLR 1399 \(CC\); 2006 \(6\) SA 416 \(CC\)](#) where the Court held that:

“What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as a continuum that ranges from providing information and building awareness, to partnering in decision-making. This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity to participate.”

As discussed above, public participation bears a particular significance in the spectrum of national values because it forms the foundation of our democracy in appreciating the people as the holders of sovereign power.

We submit that not only did the President in issuing the directive fail in his duty to facilitate public participation; he refused and or ignored to engage when members of the public asserted their right to participation. Such conduct was indicative of disregard to the national values and significantly disrespect for the rule of law which determines the legality of executive action.

The rule of law is a principle that must be respected in the making and implementation of policy. Therefore, the State must ensure that its actions are legal both in the process of making policy and in the act of implementing policy. In

[Republic vs. Returning Officer of Kamukunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008](#) the Court held that:

“It is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.”

The Court in [Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union \(KMPDU\) & 2 others \[2013\] eKLR](#), considering the above dicta held that: “. . . where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to investigate the allegations. *To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice.*” (Our emphasis)

Justice Odunga in Eng. Michael Sistu Mwaura Kamau and Others v The Ethics and Anti-Corruption Commission and Others Petition 320 of 2015 was tasked with determining the legality of the President’s actions in issuing a directive that sought to compel the Ethics and Anti-Corruption Commission to relinquish investigations to the National Director of Public Prosecutions. The Court held that: Every person, including the President, is under a constitutional obligation pursuant to Article 3(1) of the Constitution to respect, uphold and defend the Constitution. The Court continued finding that:

“the President, with all due respect, exceeded his mandate. His actions amounted to unlawful interference with the actions of an independent commission, an action which the President is barred from taking. In so doing, the President infringed upon the independence of the Commission contrary to the constitutional edict in Article 131(2) (a) of the Constitution which requires the President to respect, uphold and safeguard the Constitution. In directing the Commission as he did, the President not only abdicated his role as a person and as the President but was clearly in breach of the provisions of the Constitution.”

We submit that the President like every other citizen is bound by the national values of this Country. The issue and implementation of the Directive failed to respect the values of public participation and inclusiveness and the Respondents failed to meet the standard of legality. We further submit that this Court is obliged to intervene and ensure that the rule of law and the values of our democracy are safeguarded.

(b) Article 31-the right to Privacy

Article 31 of the Constitution guarantees the right to privacy more particularly Article 31(c) which provides that:

“Every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed”

The right to privacy is also protected in Article 12 of the Universal Declaration of Human Rights (UDHR); Article 17(1) of the International Convention on Civil and Political Rights (ICCPR); Article 22 Convention on Rights of Persons with Disability; Article 16 of the Convention on the Rights of the Child (CRC); Article 10 of the African Charter on the rights and Welfare of the Child; and Article 8(1) of the European Convention on Human Rights.

My Lord, it should be noted international legal instruments ratified by Kenya form part of Kenyan law by virtue of Article 2(6) which provides that:

“Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

My Lord, we submit that the implementation of the said presidential directive without having privacy guidelines in place, inevitably leads to a violation of the right to privacy of Persons Living with HIV (PLHIV). The violation of the right to privacy of PLHIV exposes them to other forms of human rights violations such as dismissal from employment, denial of access to essential services, among others.³ My Lord, the high prevailing levels of stigma and discrimination associated with HIV related conditions validates the need to protect the right to privacy. The Supporting Affidavit of James Njenga Kamau (3rd Petitioner) sheds light to the stigma issues surrounding HIV in Kenya.

My Lord, the president directed that the data be collected. The collection would involve various entities of the government administrative bureaucracy. Therefore, data will move/moved from the lowest level, that is the office of the chief, through the numerous government personnel to the office of the president, without any guidelines on privacy. Implementation of this directive thus posed a huge risk to the right to privacy of the concerned parties.

My Lord the import of the right to privacy especially within the personal sphere has been discussed in [Bernstein and Others v Bester NO and Others \(CCT23/95\) \[1996\] ZACC 2; 1996 \(4\) BCLR 449; 1996 \(2\) SA 751](#) where the Court held:

³ See the *Privacy and Confidentiality for Persons Living with HIV Accessing Health Services* Report annexed to the Supporting Affidavit of Allan Achesa Maleche and marked as A.A.M 029.

“A very high level of protection is given to the individual’s intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual’s activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation”

The same Court in [NM and Others v Smith and Others \(Freedom of Expression Institute as Amicus Curiae\) 2007 \(5\) SA 250 \(CC\)](#) found that the publication of the HIV status of the applicants in the matter was a violation of their right to privacy. The Court further held that “disclosure of one’s HIV status deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has as well as the potential intolerance and discrimination that result from its disclosure.”

The Court in [Aids Law Project v Attorney General & 3 others \[2015\] eKLR](#) in coming to a decision on the constitutionality of a provision in HIV and AIDS Prevention and Control Act, 2006 (HAPCA) relied on “A global assessment of the role of law in the HIV & AIDS pandemic” by L. Gable, L. Gostin and J. Hodge Jr. Public Health 123 (2009) 260 -264. The authors contended that:

“From the inception of the HIV/AIDS pandemic, privacy has been of paramount concern. Grounded in legal, ethical and human rights principles of autonomy and justice, privacy requires that persons: (1) Have the right not to have their health status disclosed without their consent; (2) Are entitled to make health and other personal decisions without interference; and (3) have a right to control others’ access, use and disclosure of their HIV/AIDS health data”

My Lord, one of the objects of the HAPCA is to guarantee the right to privacy of the individual. HAPCA seeks to do this through privacy guidelines that are to be issued by the Minister of Health in accordance with Section 20. In line with this object Section 22(1) of HAPCA provides that “no person shall disclose any information concerning the result of an HIV test or any related assessment to any other person. . . .” HAPCA allows disclosure only in certain circumstances particularly when written consent has been obtained. We direct this Court to the ruling by the HIV and Equity Tribunal in **YBA (Pseudonym) vs. Brother Nicholas Banda and others Tribunal Case No. 007 of 2012**, where the Tribunal held that a requirement by an employer that an employee submits their medical records amounted to a violation of the right to privacy in terms of Article 31(c).

My Lord HAPCA goes further and defines consent as “consent given without any force, fraud or threat and with full knowledge and understanding of the medical and social consequences of the matter to which the consent relates.”

My Lord, we would like to direct you to the Affidavit of Ms. Millicent Kipsang, which indicates that she disclosed her own status and that of her child on the basis that she would receive school fees, uniforms, and medication for her child. (See paragraphs 15, 16 and 17 of the 4th Petitioner’s – Millicent Kipsang – affidavit in support of the Petition).

My Lord we submit that in understanding consent as required by HAPCA this Court can stand guided by the doctrine of informed consent as discussed within the sphere of medical interventions. Ackermann J in *Castel v De Greef* 1994 (4) SA 408 (C) found that:

“For consent to operate as a defence the following requirements must, inter alia be satisfied:

the consenting party must have had knowledge and been aware of the nature and extent of the harm or risk;

the consenting party ‘must have appreciated and understood the nature and extent of the harm or risk;

the consenting party ‘must have consented to the harm or assumed the risk;

the consent ‘must be comprehensive that is extending to the entire transaction, inclusive of its consequence’.”

My Lord guided by the above dictum and the definition of consent in the HIV & AIDS Prevention and Control Act we submit that there is evidence indicating that the manner in which consent is being sought is contrary to a requirement that consent is given with full knowledge and it is not tainted by fraud, misrepresentation, or coercion. We further submit that the mere act of registration of names does not meet the requirement of HIV & AIDS Prevention and Control Act that written consent is obtained prior to disclosure.

It is thus our submission that when the directive was issued, there was reasonable apprehension that the right of privacy of the affected persons might be breached. When the directive was implemented without any measures to protect the privacy of the affected persons and protect the data obtained, it become a foregone conclusion that their right to privacy had been breached, will be breached and continues to be breached. The situation is worsened by the fact that questionable techniques were employed to obtain consent of the affected persons.

Therefore my Lord we contend that the issue and implementation of the Directive is a violation of the right to privacy as enshrined in Article 31(c).

My Lords, our submissions above are further supported by the *International Guidelines on HIV/AIDS and Human Rights 2006*.⁴ These Guidelines clearly provide that in setting standards for the right to privacy, there is no justification for mandatory HIV testing or registration. Paragraph 120 of the Guidelines provide as follows:

“The individual’s interest in his/her privacy is particularly compelling in the context of HIV, firstly, in view of the invasive character of a mandatory HIV test and, secondly, by reason of the stigma and discrimination attached to the loss of privacy and confidentiality if HIV status is disclosed. The community has an interest in maintaining privacy so that people will feel safe and comfortable in using public health measures, such as HIV prevention and care services. The interest in public health does not justify mandatory HIV testing or registration, except in cases of blood/organ/tissue donations where the human product, rather than the person, is tested before use on another person. All information on HIV sero-status obtained during the testing of donated blood or tissue must also be kept strictly confidential.”

Paragraph 121 continues:

“The duty of States to protect the right to privacy, therefore, includes the obligation to guarantee that adequate safeguards are in place to ensure that no testing occurs without informed consent, that confidentiality is protected, particularly in health and social welfare settings, and that information on HIV status is not disclosed to third parties without the consent of the individual. In this context, States must also ensure that HIV related personal information is protected in the reporting and compilation of epidemiological data and that individuals are protected from arbitrary interference with their privacy in the context of media investigation and reporting.”

(c) Article 27-Equality and freedom from discrimination

My Lord we outline the provisions of Article 27 (1)-(5) of the Constitution, which states:

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

⁴ Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS *International Guidelines on HIV/AIDS and Human Rights 2006 Consolidated Version*

(5) *A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)."*

My Lord we submit that on a reading of this Article it is clear that the State is prohibited from discriminating against any person directly or indirectly on the basis of their health status. Equality and freedom from discrimination is also protected by Article 26 of the International Covenant on Civil and Political Rights, Article 12 of the Convention on the Elimination of all forms of Discrimination against Women, Article 2 of the African Convention on Human and Peoples' Rights, Article 18(3) of the African Convention on Human and Peoples' Rights (ACHPR) and Article 2 of the Protocol to the ACHPR on the Rights of Women in Africa (Maputo Protocol).

Perhaps the most persuasive dicta in this discussion is that of [Hoffmann v South African Airways \(CCT17/00\) \[2000\] ZACC 17; 2001 \(1\) SA 1; 2000 \(11\) BCLR 1235 ; \[2000\] 12 BLLR 1365 \(CC\)](#) where the Constitutional Court of South Africa sought to determine whether failure to employ someone on the basis of their HIV status amounted to discrimination. The Court held:

"At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.

The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.

There can be no doubt that SAA discriminated against the appellant because of his HIV status. Neither the purpose of the discrimination nor the objective medical evidence justifies such discrimination."

My Lord paragraph 12 of the Affidavit of Mr. James Njenga Kamau briefly discusses the findings of the National HIV and AIDS Stigma and Discrimination Index Study in Kenya and significantly the following statistics bear repetition:

- i. Parental fear of their children playing with HIV positive children at school was rated at (48%)
- ii. Some people (52%) were reported not willing to buy goods from persons with signs of HIV
- iii. Most respondents thought HIV was a punishment from God (45.9%) while others blamed it on bad behaviour (61%) and others blamed sex workers and men who have sex with men as responsible for the spread of HIV (54.9% and 44.8% respectively)

The stereotypes discussed by the Constitutional Court in South Africa above are similar in Kenya despite medical evidence and despite continued education and awareness around HIV. This is evidenced in the affidavits RM and AJ both community health workers who have first-hand knowledge of the stigma and discrimination persons living with HIV suffer. There can be little doubt that persons living with HIV constitute a marginalised vulnerable group in the country who because of their status are in need of protection.

Section 22(1) of the HIV and AIDS Prevention and Control Act, 2006 (HAPCA) provides that "no person shall disclose any information concerning the result of an HIV test or any related assessment to any other person. . . ." HAPCA allows only in certain circumstances significantly when written consent has been obtained.

The issue and implementation of the Directive is targeted at school going children living with HIV & AIDS, information on their guardians, information of number of expectant mothers who are HIV positive and number of breastfeeding mothers who are HIV positive. The Directive neither required that written consent was obtained nor was such consent sought in implementation.

The Directive discriminates against people living with HIV because it singles them out without due regard to the discrimination such persons already face and seeks to acquire information regarding their health status. Further the directive fails to meet the required standard of disclosure in Section 22(1) of HAPCA, which results in the targeted groups not being afforded equal treatment of the law.

(d) Article 28-Human Dignity

My Lord, the Court in *Hoffman* surmised the right to human dignity holding that "all human beings, regardless of their position in society, must be accorded with human

dignity". The High Court in [C.O.M. v Standard Group Limited & another \[2013\] eKLR](#) relied on the dicta in *NM and Others v Smith* where it was held that the disclosure of a person's HIV status by another violated the dignity and psychological integrity of that person.

Significantly the Court in *NM and Others v Smith* found that disclosure of one's HIV status "undermines their dignity to the extent that it denies those living with HIV/AIDS the right to determine to whom and when their illness should be disclosed. . ."

The intrinsic worth of all human beings must be respected with the understanding that every person is an end in themselves. Respecting one's dignity requires a respect of their right to reveal about themselves what they chose to and when they chose to.

The issue and implementation of the Directive obliges its recipients to disclose the HIV status of persons without regard to their right to make such decision themselves. It impaired the right to human dignity in as far as it denied people living with HIV the respect to take the decision on revealing their status.

This also violates various international and regional legal frameworks including Article 1 of the Universal Declaration of Human Rights, Article 5 of the African Convention on Human and Peoples' Rights, and Article 3 of the Maputo Protocol.

The importance of respecting human rights in the context of HIV response is underscored in the *International Guidelines on HIV/AIDS and Human Rights 2006* where it is stated (at paragraph 94):

"Several years of experience in addressing the HIV epidemic have confirmed that the promotion and protection of human rights constitute an essential component in preventing transmission of HIV and reducing the impact of HIV and AIDS. The protection and promotion of human rights are necessary both to the protection of the inherent dignity of persons affected by HIV and to the achievement of the public health goals of reducing vulnerability to HIV infection, lessening the adverse impact of HIV and AIDS on those affected and empowering individuals and communities to respond to HIV."

(e) Article 29 (f)-freedom and security of the person

My Lord, we submit that the issue and implementation of the Directive was an infringement on the right of freedom and security of the person more particularly as enshrined in Article 29(f) the right not to be treated in a cruel, inhuman and degrading manner.

Additionally, the Directive is contrary to Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the African Charter on Human and People's Rights (ACPHR) which both provide that no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

In the case of the *Republic v Minister For Home Affairs and Others ex parte Sitamze* [2008] 2 EA 323, Justice Nyamu, citing various authorities stated that:

"The provisions of section 74(1) of the Constitution of Kenya are echoed in Article 7 of the International Covenant on Civil and Political Rights, 1966, (ICCPR) which states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . . "Inhuman treatment" is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."

The above is read with the dicta in [Maje v Botswana Life Insurance Ltd and Another 2001 \(2\) BLR 626 \(HC\)](#) where the Court held that:

"It must be stressed that AIDS is a medical condition like any other, albeit one that was not known in Roman times. There is no special stigma to be attached to it in the minds of right thinking persons. Nor has the respondent alleged such a stigma and properly so. But as in the case of other communicable diseases and especially sexually transmitted diseases, unguarded, out of context, or unjustified references in relation to such maladies are capable of causing hurt or offence to the persons referred to, whether or not they suffer therefrom."

My Lord in [C K \(A Child\) through Ripples International as her guardian & next friend\) & 11 others v Commissioner of Police/inspector General of the National Police Service & 3 others \[2013\] eKLR](#) the Court found that: "The State's duty to protect is heightened in the case of vulnerable groups such as girl-children and the State's failure to protect it need not be intentional to constitute a breach of its obligation." The particular vulnerability of certain populations is a determinant of the treatment they should be afforded.

My Lord we direct you in coming to a determination to consider the particular vulnerability of the groups targeted by the directive, that is, school going children and their guardians, expectant mothers and breastfeeding mothers that are HIV positive. My Lord if we are to regard the findings of the Stigma and Discrimination index referenced to above we can already see that school going children are in danger of discrimination because of their HIV status. Disclosure of their status may expose them to being shunned by classmates and possibly even teachers. My Lord this coupled with the tender age of these children may heighten the likelihood of such disclosure causing hurt, offence and mental injury. My Lord we submit that the

Directive and its implementation in so far as it obliges the disclosure of the HIV status of the targeted groups is an infringement of their right to be free from cruel, inhuman and degrading treatment.

(f) Article 43(1) (a)-the Right to health

My Lord, Article 43(1) (a) provides that: “Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.”

This right is also incorporated through Article 12 of the International Covenant of Economic Social and Cultural Rights (ICESCR); Article 24 on the CRC; Article 16 of the African Charter on Human and People’s Rights (Banjul Charter); and Article 14 of the African Charter on the Rights and Welfare of the Child.

The right to health has been subject to judicial interpretation in Kenya in *P.A.O. and 2 others vs. the Attorney General* (2012) eKLR where Justice Mumbi Ngugi held:

“In my view, the right to health, life and human dignity are inextricably bound. There can be no argument that without health, the right to life is in jeopardy . . . one’s inherent dignity as a human being with the sense of self-worth and ability to take care of oneself is compromised.”

The Constitutional Court in [*Minister of Health and Others v Treatment Action Campaign and Others \(No 2\) \(CCT8/02\) \[2002\] ZACC 15; 2002 \(5\) SA 721; 2002 \(10\) BCLR 1033*](#) in discussing the right of access to health as enshrined in the Constitution of South Africa held that:

“The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable.”

The Committee on Economic, Social and Cultural Rights in General Comment No. 14 declared that the right to health “is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.”

The European Court of Human Rights in *M.S. v Sweden*⁵ highlighted the fundamental importance of the protection of personal data, including medical data, to a person’s enjoyment of his or her right to private and family life.

⁵ Application No. 74/1996/693/885 Judgment of the European Court of Human Rights, 27 August 1997

“Respecting the confidentiality of health data is a vital principle ...it is crucial not only to respect the sense of privacy of the patient but also to preserve his or her confidence in the medical profession and on the health services in general”⁶

My Lord we submit that a significant component of realisation of the right to health is a respect of the right to privacy. It is necessary that confidence of persons when seeking health services is maintained so as to encourage them to seek such services. My Lord the issue and implementation of the Directive in its failure to observe the right to privacy infringes upon the right to health of persons living with HIV.

(g) Article 53(2)-Best interests of the child

Article 53(2) of the Constitution provides that “the child’s best interests are of paramount importance in every matter concerning the child.” This is reiterated in section 4(2) of the Children’s Act, 2001 which states, “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

My Lord, we rely on the dictum [in S v M \[2007\] ZACC 18; 2008 \(3\) SA 232 \(CC\)](#) which was cited positively in [J v National Director of Public Prosecutions and Another \[2014\] ZACC 13; 2014 \(2\) SACR 1 \(CC\); 2014 \(7\) BCLR 764 \(CC\)](#) where the Court held that:

“A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.”

My Lord this Court has also tackled the application of Article 53(2) in [J L N & 2 others v Director of Children’s Services & 4 others \[2014\] eKLR](#) where Justice Majanja found that the Director of Children’s Services acted contrary to the best interests of a set of twins when he removed them from the care of their parents and placed them in a home, despite them having been born prematurely, because they were conceived pursuant to a surrogacy agreement.

My Lord we submit that individualised examination is and should be the landmark of a child centred approach. The Directive seeks to utilise a pre-determined formula to obtain the HIV status of all school going children without taking cognisance of the different societal contexts these children come from. My Lord we submit that it is not in the best interests of these children to have their statuses disclosed without due

⁶ Also see [Z v Finland 25 Eur. H.R. Rep. 371 \(1998\)](#) where the Court held that “It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.”

consideration being given to their individual circumstances, significantly given the varying age of these children some may not even be aware of their status or have an understanding of it.

(h) Article 47(1)⁷ of the Constitution of Kenya (2010)

My Lord, we submit that the issue and implementation of the Directive was contrary to their constitutionally guaranteed right to fair administrative action. In [Kituo Cha Sheria & 8 others v Attorney General \[2013\] eKLR](#) which positively referred to dicta in [Minister of Health and Another v Treatment Action Campaign](#)⁸ the Court held that:

“Article 47 provides that, “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” It is the duty of the court to interrogate the policy and where it is inconsistent with the provisions of the Bill of Rights or the fundamental values in the Constitution to declare that policy inconsistent with the Constitution. As was stated by court in Minister of Health and Others v Treatment Action Campaign and Others (2002) 5 LRC 216, 248; “The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself.”

My Lord, the dicta in [Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others \[2014\] eKLR](#) is also instructive on the application of Article 47(1):

“It is now trite that there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. This Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable.”

My Lord, we submit that it is the duty of this Court to interrogate policy and decisions and ensure that they are consistent with the Bill of Rights. We submit that

⁷ “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

⁸ Above at note **Error! Bookmark not defined.**

the Directive as issued and subsequently implemented is inconsistent with the Bill of Rights. The Directive fails to meet the principles of legality, public participation and further infringes upon the rights to privacy, freedom from cruel, inhumane and degrading punishment, human dignity, and health of persons living with HIV and is contrary to the principle that the best interest of the child should be paramount.

(i) Article 24⁹ of the Constitution of Kenya (2010)-Limitations Clause

My Lord, we understand that the rights enshrined in the Bill of Rights are not illimitable. Save for Article 29(f) which in accordance with Article 25 may not be derogated upon, all the rights discussed above are subject to limitation.

We submit that in accordance with Article 24(3) the onus shifts on the State to justify that limitation. We further submit that the State has not met this burden. This is based on the principles enunciated by this Court in [Seventh Day Adventist Church \(East Africa\) Limited v Minister for Education & 3 others \[2014\]eKLR](#) which held:

"I am guided and as can be seen from our Bill of Rights and specifically in the limitation Clause at Article 24, the constitution expressly contemplates the use of a context-sensitive form of balancing. To my mind therefore, the Court in applying the limitation clause must consider the nature and importance of the right and the extent to which it is limited, and whether such limitation is justified in relation to the purpose, importance and effect of the provision which results in the limitation. With that approach in mind, I will be able to gauge whether the actions of the Respondents and Interested Party infringe on the Petitioner's fundamental rights. If the answer is

⁹ Article 24 of the Constitution states as follows:

"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom –

- (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation
- (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
- (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied."

in the affirmative, then I must consider whether the Respondents' actions can be justified or upheld upon the basis of the general limitation under Article 24."

The above case cited with approval the following dictum in [S v Manamela and Another \(2000\) \(5\) BCLR 491 \(CC\)](#):

"In essence, the Courts must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values protected...Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness."¹⁰

My Lord, we submit that the following ought to be taken into account in justifying a limitation:

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

My Lord, the purpose of the Directive is to "enable the Government to [sic] respond and provide appropriate service and support to the children living with HIV/AIDS". Given the impact of HIV in Kenya, this is an important and critical purpose. However, despite the nobility of actions due consideration must be given to rights enshrined in the Constitution.

My Lord we submit that the manner in which the State sought to implement and indeed implemented the directive violated the rights to privacy, equality, human dignity, health and the best interests of the child. We would like to direct this Court to the dictum in *Hoffman* discussed above; the affidavits of James Kamau, RM and AR; and the judgment in *Van Vuuren v Kruger* where the Supreme Court of South Africa found:

"There are in the case of HIV and AIDS special circumstances justifying the protection of confidentiality. By the very nature of the disease, it is essential that

¹⁰¹⁰ *S v Manamela* at para 32.

persons who are at risk should seek medical advice or treatment. Disclosure of the condition has serious personal and social consequences for the patient. He is often isolated or rejected by others which may lead to increased anxiety, depression and psychological conditions that tend to hasten the onset of so-called full-blown AIDS."

My Lord, it is our submission that this directive does more harm than good in that it leads to violation of fundamental human rights. My Lord, this court should be guided by the fact that the Directive targeted an already vulnerable group – that is - school going children who are HIV positive and their guardians, breastfeeding mothers and other HIV positive women. The Respondents should have been more acutely aware of a need to protect such persons who are already vulnerable. Implementation of the directive violates the rights of this group of persons and puts them at an exposed and disadvantaged position.

We therefore submit that the limitation of rights in petition is not justifiable but we maintain that the onus of proving the justifiability of the limitation rests with the Respondents.

Issue No. 2

Whether the 1st – 4th respondents can be compelled to destroy all data in their possession, collected as a result of the directive dated 23 February 2015, linking names of persons living with HIV and their HIV status, within a period of 14 days or codify the names collected as a result of the directive dated 23 February 2015, be stored in a manner that does not link their names and their HIV status in a public document

My Lord we rely on the dicta in the *Minister of Health and Others vs. Treatment Action Campaign and Others* where the Court held that:

"Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant 'appropriate relief'. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of s 172(1)(a) a court may also 'make any other order that is just and equitable' (s 172(1)(b))...Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...The courts have a particular responsibility in this regards and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal...Nor would it necessarily be out of place for there to be an appropriate order on the relevant organs of state in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the

separation of state power as between the Executive and the Judiciary is to negate a foundation value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of state and it is our duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights"

As well as the dictum in [Nancy Makokha Baraza v Judicial Service Commission & 9 Others \[2012\] eKLR](#) where the Court expressed itself inter alia as follows:

"The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises."

And finally on the principle of law raised in crafting appropriate relief that requires the utilisation of the most expeditious and inexpensive lawful process.¹¹

My Lord we submit that this Court is empowered to go beyond the relief outlined in Article 23 and in the circumstances utilise its discretion to ensure that the rights in the Bill of Rights are protected. My Lord, we submit that in the circumstances this Court, having found that the rights discussed under Issue No. 1 have been violated may find it appropriate to order that the Respondents destroy all the data collected pursuant to the issue and implementation of an unconstitutional directive. My Lord, it is a fact that the respondents are in possession of the data collected as a result of the directive. It is also a fact that the respondents have not presented any evidence or the slightest of explanation on how the data is being stored to protect; and whether the method of storage safeguards and protects the privacy and confidentiality of the individuals concerned. My Lord the respondents have neither denied nor refuted the allegations that they have the names that were collected in their possession. It is thus our humble prayer that this honourable court orders that all such data be destroyed.

My Lord in the alternative we seek that this Court orders that the data collected pursuant to an unconstitutional directive is codified and stored in a manner that does not link their names and their HIV status in a public document.

Issue No. 3

Whether the Court can issue an order compelling the 1st respondent to put in place privacy guidelines, in form of regulations as required by Section 20 of the HIV & AIDS Prevention and Control Act, on the collection and storage of data relating to HIV

¹¹ [A.M.N & 2 others v Attorney General & 5 others \[2015\] eKLR](#)

My Lord we rely on section 20 of HIV & AIDS Prevention and Control Act which states that:

“(1) The Minister for the time being responsible for matters relating to health shall, in regulations, prescribe privacy guidelines, including the use of an identifying code, relating to the recording, collecting, storing and security of information, records or forms used in respect of HIV test and related medical assessments.

(2) No person shall record, collect, transmit or store records, information or forms in respect of HIV tests or related medical assessments of another person otherwise than in accordance with the privacy guidelines prescribed under this section”

My Lord the data to be collected, in terms of the Directive, was to be held in a prescribed matrix that would directly link the target groups with their HIV status, thus putting them at a risk of being stigmatized and discriminated against. The children would be linked to their home area and school. My Lord we submit that such consequences would be avoided if the 1st Respondent has put in place privacy guidelines are required by HAPCA. We further submit that almost 10 years have elapsed since the legislation was enacted giving the 1st Respondent ample time to have complied with Section 20.

My Lord the European Court of Human Rights in [I v Finland 48 Eur. H.R. Rep. 31 \(2009\)](#), considered the implications of the unauthorised disclosure of HIV status and found it to be a breach of the positive obligation under article 8 of the European Convention on Human rights to secure respect for her private life “by means of a system of data protection rules and safeguards”. The Court held that:

“[Respecting the confidentiality of health data] is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. The above considerations are especially valid as regards protection of the confidentiality of information about a person’s HIV infection, given the sensitive issues surrounding this disease. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention.” [Our emphasis]

My Lord, in the matter of [Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others \(Muthurwa Estate\)](#)¹² where the Court held:

“Before I do that, I must lament the widespread forced evictions that are occurring in the country coupled with a lack of adequate warning and compensation which are justified mainly by public demands for infrastructural developments such as road bypasses, power lines, airport

¹² Petitions No. 65 of 2010.

*expansion and other demands, Unfortunately there is an obvious lack of appropriate legislation to provide guidelines on these notorious evictions. . . . It is on this basis that it behoves upon me to direct the Government towards an appropriate legal framework for eviction based on internationally acceptable guidelines. These guidelines would tell those who are minded to carry out evictions what they must do in carrying out the evictions so as to observe the law and to do so in line with the internationally acceptable standards. To that end, I strongly urge Parliament to consider enacting a legislation that would permit the extent to which evictions maybe carried out. The legislation would also entail a comprehensive approach that would address the issue of forced evictions, security of tenure, legalization of informal settlements and slum upgrading. This, in my view, should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in **Articles 9 and 10 of the Constitution.**"*

The Court found that due to the widespread evictions it was necessary to direct the Government towards an appropriate legal framework based on internationally acceptable guidelines. My Lord we submit that this dicta is informative in this case, it is necessary that the Ministry of Health, be compelled to develop privacy guidelines in form of regulations so as to ensure that one of the objectives of HAPCA to guarantee privacy is met.

My Lords, from the foregoing, it is clear that this honourable court can rightly order the Government to develop policy guidelines and regulations where the continued absence of such guidelines or regulations leads to violation of human rights. This court has recently issued a similar order in the case of Daniel Ng'etich & Others vs. The Attorney General & Other Petition No. 329 of 2014 at the High Court in Nairobi where Justice Mumbi Ngugi directed as follows:

"That the 4 respondent [The Cabinet Secretary for Health) does, in consultation with county governments, within Ninety (90) days from the date hereof, develop a policy on the involuntary confinement of persons with TB and other infectious diseases that is compliant with the Constitution and that incorporates principles from the international guidance on the involuntary confinement of individuals with TB and other infectious diseases."

My Lords, we thus submit that these privacy guidelines should be on the collection and store rage of data relating to HIV incorporating the following:

- i. Detailed guidelines on the management of HIV&AIDS information by all persons who render HIV testing services; especially VCT centers;
- ii. Detailed guidelines on the management of HIV&AIDS information in hospitals and other medical institutions;

- iii. Detailed guidelines on the recording, collection, storage and use of HIV&AIDS information by government agencies for public health and other epidemiological purposes;
- iv. Detailed guidelines on the dissemination and/or sharing of HIV&AIDS information between family members and relatives or within the home setting;
- v. Detailed guidelines on the collection and use of HIV&AIDS information in the workplace;
- vi. Detailed guidelines on the management of HIV&AIDS information in schools, colleges and institutions of higher learning; and
- vii. Detailed guidelines on the management of HIV&AIDS information in prisons and other correctional institutions.

My Lord we further submit that the guidelines should be in line with the provisions of the Constitution, the relevant international instruments and the International Guidelines on HIV, AIDS and Human Rights.

Issue No. 4

Whether the Court can issue an order directing the 1st – 4th Respondents to issue a circular informing their officers, employees and/or agents that the directive issued on 23 February 2015 is unconstitutional is null and void for all intent and purposes

My Lord we submit that in the circumstances with due consideration to the potential for the target groups to be exposed to stigma and discrimination on the basis of their health status it is necessary for this Court to intervene in ensuring that a judgment in favour of the Petitioners is widely publicised.

In [Prakash Singh & Ors v Union Of India And Ors](#) the Supreme Court of India delivered a historic judgment instructing central and state governments to comply with a set of seven directives laying down practical mechanisms to kick-start police reform. The Court held that:

“Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of Rule of Law; (iii) pendency of even this petition for last over ten years; (iv) the fact that various Commissions and Committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the stage has come for issue of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the State Governments pass the requisite legislations.”

My Lord we submit that the circumstances in this case possess the gravity and urgency described above and require intervention of this Court. My Lord it bears no repetition that one of the national values is the protection of the marginalised. It similarly bears no repetition that persons living with HIV are vulnerable to stigma and discrimination and are marginalised in our society. My Lord we submit that given the vulnerability of the target groups not only due to their health status but additionally due to their age and pregnancy status this Court must intervene in ensuring they are protected from any continued violation of their rights.

My Lord, it is our humble submission that this honourable court has the power to order the government to issue a circular to its officers directing them to stop doing acts which have been found unconstitutional by the court. My Lords, a great injustice would be occasioned if after the order of unconstitutionality has been given, state officers and/or their agents continue implementing the directive. There exists a possibility that the directive may continue being implemented even after the court makes its decision finding it illegal and unconstitutional. The order as to a circular will ensure that the court does not issue orders in vain and that clear timelines as to implementation of the order are provided for. This will equally ensure that government agencies are still not under the impression that it is legal to implement unconstitutional directives and are equally appraised of the dangers of implementing unconstitutional directives. This court has rightly directed the government in Daniel Ng'etich & Others vs. The Attorney General & Other Petition No. 329 of 2014 at the High Court in Nairobi that:

“the 4th Respondent [Cabinet Secretary for Health] does issue a circular, within Thirty (30) days hereof, directed to all public and private medical facilities and public health officers clarifying that section 27 of the Public Health Act, Chapter 242 of the Laws of Kenya, does not authorise the confinement of persons suffering from infectious diseases in prison facilities for the purposes of treatment.”

Issue No. 5

Whether the Court can issue an order directing the 1st and 2nd Respondents to conduct public awareness campaigns to educate citizen's persons living with and affected by HIV about their rights, stigma and discrimination and other matters relating to HIV in line with Sections 4-8 of the HIV & AIDS Prevention and Control Act 2006

Section 3 which sets out the objects of The HIV & AIDS Prevention and Control Act provides that one of the Act's objects is to: “promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV and AIDS”. This object is elaborated in Part II of the Act, which provides for HIV and AIDS education information. This part places obligations on the State, the Ministry of Education, the Ministry of Health, health care providers and members of

local authority to create public awareness on the causes, modes of transmission, consequences and means of prevention and control of HIV and AIDS.

This Court may be guided by the holding in [Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another](#)¹³

“Importantly, the obligation to protect the rights in the Bill of Rights goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right.⁷⁶ This Court has held that in some circumstances the Constitution imposes a positive obligation on the “[s]tate and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection. “The point is well-captured by Nugent JA in Van Duivenboden:

“While private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, and while there might be no similar constitutional imperatives in other jurisdictions, in this country the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights.”

The High Court in [Friends of Lake Turkana Trust v Attorney General & 2 others \[2014\] eKLR](#) in assessing the State’s obligations to protect the environment in terms of Article 42 relied on dictum in *Guerra v Italy* (1998) 26 EHRR 357 and *Oneryildiz v Turkey* (2005) 41 EHRR 20 and found “that there is a positive obligation on the part of public authorities to supply information about the risks involved in living in close proximity to an environmentally sensitive use, particularly one which poses a risk to their right to life.”

My Lord, we submit that HAPCA has placed an obligation on State organs and health care providers to provide HIV and AIDS information and education. This is a positive obligation that requires the stated organs to act as they are under a constitutional duty to observe the law. We therefore submit that guided by the findings of the stigma and discrimination index the 1st and 2nd Respondents should be directed to fulfil their mandate in terms of Part II of HAPCA.

Issue No. 6

My Lord we submit that given this Petition is in the Public Interest, each party should bear their own costs. We are guided by [Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others \[2014\] eKLR](#) where the Supreme Court held that:

¹³ (CCT 103/12) [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC)

“Just as in the Presidential election case, Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others, Sup. Court Petition No. 5 of 2013, this matter provides for the Court a suitable occasion to consider further the subject of costs, which will continually feature in its regular decision-making. The public interest of constructing essential paths of jurisprudence, thus, has been served; and on this account, we would attach to neither party a diagnosis such as supports an award of costs.”

Any other relief

My Lord, with regard to issues 3 and 4 we request that guidance is taken from the crafting of the order in the *Muthurwa Case and Daniel Ng’etich & Others vs. The Attorney General case*, where the Court crafted orders with timelines whereby the Respondents were required to file affidavits that allowed the Court to monitor compliance with its ruling. We submit, that in this matter such order may well be necessary to ensure compliance within a reasonable period of time and to guarantee that another ruling of this Court does not go unnoticed.

These are our humble submissions.

DATED at Nairobi this day of 2016.

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