

*our copy*

**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**

**RECEIVED**  
12 MAY 2016  
JUDICIAL REVIEW DIVISION

**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, 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) .....1<sup>ST</sup> PETITIONER/APPLICANT  
CHILDREN OF GOD RELIEF INSTITUTE  
(NYUMBANI).....2<sup>ND</sup> PETITIONER/APPLICANT  
JAMES NJENGA KAMAU.....3<sup>RD</sup> PETITIONER/APPLICANT  
MILLICENT KIPSANG.....4<sup>TH</sup> PETITIONER/APPLICANT**

**AND**

**CABINET SECRETARY, MINISTRY OF HEALTH.....1<sup>ST</sup> RESPONDENT  
THE NATIONAL AIDS CONTROL COUNCIL .....2<sup>ND</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF EDUCATION,  
SCIENCE AND TECHNOLOGY.....3<sup>RD</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF INTERIOR AND  
CO-ORDINATION OF NATIONAL GOVERNMENT.....4<sup>TH</sup> RESPONDENT  
THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

12 MAY 2016

*Susan*

**WRITTEN SUBMISSIONS****INTRODUCTION**

1. On 23 February, 2015 His Excellency Hon. Uhuru Muigai Kenyatta issued an instruction ("Presidential instruction") to all County Commissioners to work with County Directors of Education and Medical Services, to "collect up-to-date data and prepare a report" on the following populations: all school-going children who are HIV positive; their guardians; expectant mothers who are HIV positive; and breastfeeding mothers who are HIV positive.
2. The reason for the instruction to the County Commissioners was to enable the Government respond and provide appropriate service and support to the children living with HIV & AIDS."
3. According to the petitioners, the Presidential instruction requires that the name of the individual living with HIV be directly linked with her HIV status. This significantly increases the risk that the individual's HIV-related status would be disclosed without her informed consent.
4. It is clear that HIV&AIDS has reached epidemic proportions within Kenya. The prevalence of HIV in adults aged 15-49 years was estimated to be 7.4 percent in 2007, and approximately 1.4 million adults aged 15-64 are estimated to be living with HIV.<sup>1</sup>Sixteen percent of those people living with HIV are adolescents and youth.<sup>2</sup>

<sup>1</sup>Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2008-2009* (Nairobi, 2010), 210.

<sup>2</sup>Ministry of Health, *Kenya's Fast-track Plan to End HIV and AIDS Among Adolescents and Young People* (September 2015).

5. United Nations Children's Fund's (UNICEF) All In! initiative seeking to address the HIV needs of adolescents and youth and to stem the widening gap in meeting their needs regarding HIV highlights the importance of addressing adolescent and youth vulnerabilities to HIV. This is a critical component of the HIV response and it is laudable that the government has used the All In! initiative to address the HIV needs of adolescent and youth in Kenya.
6. However, maintaining the confidentiality of an individual's HIV-related medical information has been long recognised as a key strategy to ensure an effective response to the HIV epidemic in Kenya, including to ensure that people living with HIV access HIV prevention and treatment services, and adhere to highly active anti-retroviral treatment (HAART). In recognition of the critical importance of maintaining the confidentiality of an individual's HIV status, the law has long protected the confidentiality of a person's medical information, including his or her HIV status.
7. In these submissions, the Amicus Curiae affirms the critical importance of maintaining the privacy of an individual's HIV-related information as necessary under the law and to further public health objectives and the importance of consulting with people living with HIV (PLHIV) prior to implementing policies affecting them. To that end, these submissions will address the following issues:
  - 7.1. Expertise of the *amicus curiae*
  - 7.2. The application of international, regional and comparative law in Kenya
  - 7.3. A discussion of the constitutional issues

## EXPERTISE OF THE AMICUS CURIAE

8. On 17 July 2015, Anand Grover was admitted as *amicus curiae* in these proceedings. Under the order of this Honourable Court, he is permitted to make written submissions.
9. The expertise of the *amicus curiae* were outlined in the application to intervene but are briefly restated here;
10. Mr Grover is a leading human rights lawyer and is a preeminent expert on HIV and the law, having been involved in issues related to international law, the right to health and HIV & AIDS for over three decades. It must be clarified, however, that he is neither a practitioner nor an expert of Kenyan law and his submissions must be read in this context.
11. Most recently, Mr Grover served as the United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health ("Special Rapporteur on Health") from August 2008-July 2014. In that capacity, he addressed a broad range of issues, including the importance of maintaining confidentiality of a patient's medical information and how to most effectively address the HIV epidemic.
12. Further, Mr Grover has an extensive history of engaging in efforts to use law to ensure an effective response to the HIV epidemic in India and internationally, including addressing the relevance of confidentiality and disclosure of an individual's HIV status on effectively addressing the HIV epidemic.
13. Finally, Mr Grover has handled hundreds of HIV-oriented legal cases in India, including cases on issues relevant to this petition.

## APPLICATION OF INTERNATIONAL, REGIONAL AND COMPARATIVE LAW

14. Mr. Grover's understanding of the role of international and regional law within Kenya shows that it is in accord with common law countries in constitutional democracies. The role of international law is outlined in the Constitution under articles 2(5) and 2(6).
  - 14.1. Article 2(5) states: "The general rules of international law shall form part of the law of Kenya."
  - 14.2. Article 2(6) states: "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."
15. Under the Constitution of Kenya 2010, courts have held that international law forms an integral part of Kenyan law and can be used by Kenyan courts.
  - 15.1. The High Court in *Wanjiku & Another v the Attorney General & Others* held that articles 2(5) and 2(6) of the Constitution left no doubt "that international law is applicable in Kenya."<sup>3</sup>
  - 15.2. In *Barasa v the Cabinet Secretary Ministry of Interior and National Coordinator and Others*, the High Court stated: "It is beyond argument that Kenya, being a member of the United Nations and in its co-existence with others in the comity of nations, recognizes international laws, treaties and conventions, particularly those that have been ratified by her."<sup>4</sup>

<sup>3</sup>*Wanjiku & Another v the Attorney General & Others*, Petition No. 190 of 2011, High Court at Nairobi, [2012] eKLR, para 18.

<sup>4</sup>*Barasa v the Cabinet Secretary Ministry of Interior and National Coordinator and Others*, Constitutional Petition No. 488 of 2013, High Court at Nairobi, [2014] eKLR, para 44.

16. Indeed, rights guaranteed under Kenya's international legal obligations are justiciable in Kenyan courts to the extent that they do not directly conflict with the Constitution,. The High Court in *Wanjiku & Another v the Attorney General & Others* stated that: "I would also draw on the authority of Article 19(3) which is part of the Bill of Rights that recognizes other rights other than those protected by the Bill of Rights provided they are not inconsistent with the Constitution. These rights would be founded not only on specific statutes but also international treaties and conventions."<sup>5</sup>
17. In addition, Kenyan courts have long recognized that the interpretation of constitutional provisions should be informed by Kenya's obligations arising under international law. In *Sheria and Others v Attorney General*, the High Court relied on international and regional law in determining the scope of the right to movement under the Constitution.<sup>6</sup>
18. Even where there is no lacuna or ambiguity, courts have looked to international law in interpreting constitutional rights. In *Karua v Radio Africa Ltd*, the High Court stated that the rights and freedoms contained in Chapter 5 of the former Constitution of 1963:  
  
"...have over the years acquired an international dimension which can no longer be ignored by the municipal courts. Courts should therefore recognize that there is international public law dimension to the Chapter 5 rights and freedoms and also that the interpretation should also be guided by the underlying purpose of the right or freedom."<sup>7</sup>

---

<sup>5</sup>*Wanjiku & Another v the Attorney General & Others*, Petition No. 190 of 2011, High Court at Nairobi, [2012] eKLR, para 21.

<sup>6</sup>*Sheria and Others v Attorney General*, Petition No. 19 & 115 of 2013, High Court at Nairobi, [2013] eKLR, para 51.

<sup>7</sup>*Karua v Radio Africa Ltd t/a Kiss F.M. Station & 2 Others*, Civil Suit 288 of 2004, High Court of Kenya at Nairobi, [2006] eKLR at 14

19. Kenyan courts have also acknowledged the relevance of the judicial decisions of other similarly-situated countries when ascertaining the nature and content of constitutional rights.

19.1. In *Law Society of Kenya v The Centre for Human Rights and Democracy and Others*, Kiage JA in responding to the argument that a judgment from the Caribbean was not relevant to Kenya stated:

"I am...firmly persuaded that in this day and age of internationalization and globalization of law, there is little room for judicial insularity. Superior courts of all countries can benefit from cross-pollination and sharing of ideas. This does not undermine their role or status but actually broadens their constitutional vision as they fully join the global community of courts."<sup>8</sup>

19.2. In *Trusted Society of Human Rights Alliance v Matemo and Others*, the Supreme Court noted that a challenge to the inclusion of a specific *amicus curiae* presented "an opportunity to consolidate the principles previously developed on the subject, drawing on earlier decisions, as well as on *comparative jurisprudence*".<sup>9</sup> The jurisprudence is similar in other common law constitutionally governed jurisdictions.

---

<sup>8</sup>*Law Society of Kenya v The Centre for Human Rights and Democracy and Others*, Civil Appeal No. 308 of 2012, Court of Appeal at Nairobi, [2013] eKLR, 27.

<sup>9</sup>*Trusted Society of Human Rights Alliance v Matemo and Others*, Petition No. 12 of 2013, Supreme Court of Kenya at Nairobi, [2014] eKLR, para 19 (emphasis added).

## **The Constitutional Issues**

20. The Presidential instruction significantly increases the risk in that an individual's HIV-related medical information will be disclosed without his/her informed consent violates the following rights:
  - 20.1. The right to privacy guaranteed under article 31(c) of the Constitution.
  - 20.2. The right to be free from cruel, inhuman and degrading treatment guaranteed under article 29(f) of the Constitution.
  - 20.3. The right to health guaranteed under article 43(1)(a) of the Constitution.
  - 20.4. The right to equality and freedom from discrimination guaranteed under articles 27(1) and 27(4) of the Constitution.
21. Further, to the extent the respondents failed to properly consult people living with HIV they failed to meet the obligations outlined under article 10 of the Constitution.

### *Constitutional interpretation*

22. Mr. Grover submits that in interpreting the rights guaranteed under the Bill of Rights, the Constitution has outlined the following four key principles of interpretation to guide the courts.



22.1. First, a court should adopt the interpretation of rights and freedoms that most favours the enforcement of a right or fundamental freedom.<sup>10</sup>

22.2. Second, in interpreting the Bill of Rights, a court should promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.<sup>11</sup>

22.3. Third, in interpreting the Bill of Rights, a court should promote the spirit, purport and objects of the Bill of Rights.<sup>12</sup>

22.4. Finally, that court, among other State organs, are required to "observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights"<sup>13</sup> and further have the duty to address the needs of marginalized populations including children and youth.<sup>14</sup>

23. With these principles in mind, Mr. Grover submits as follows in respect of each relevant constitutional right;

#### ***The right to privacy***

24. Article 31(c) of the Constitution states: "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".

25. A similar right is provided under article 17(1) of the International Covenant on Civil and Political Rights (ICCPR), acceded to by Kenya in 1 May 1972

---

<sup>10</sup> Article 20(3)(b), Constitution of Kenya (2010).

<sup>11</sup> Article 20(4)(a), Constitution of Kenya (2010).

<sup>12</sup> Article 20(4)(b), Constitution of Kenya (2010).

<sup>13</sup> Article 21(1), Constitution of Kenya (2010).

<sup>14</sup> Article 21(3), Constitution of Kenya (2010).

(**annexure 1**); and under article 16(1) of the Convention on the Rights of the Child (CRC), ratified by Kenya on 30 July 1990 (**annexure 2**).

26. The High Court in *Samson Mumo Mutinda T/A Patrol Driving School* noted that:

"[t]he right to privacy protects a person's autonomy. The breach of the right of privacy either involves violation of the law that permits infringement of the right consistent with the limitation provided under Article 24 or failure to obtain consent of the person. Thus the right to privacy may be waived by a person consenting to the search of his person or premises in certain circumstances. Such consent must be voluntarily and freely given."<sup>15</sup>

27. In its General Comment, the Human Rights Committee (HRC), a body of experts which monitors the implementation of the ICCPR and provides guidance on the scope of the obligations under the ICCPR, noted that public authorities should only be permitted to demand information relating to an individual's private life if knowledge of that information is "essential in the interests of society as understood under the [ICCPR]".<sup>16</sup>

28. Further, the HRC provided that even in cases where an infringement of privacy is warranted because it is essential to the interests of society "relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted".<sup>17</sup> Further they noted that "[a] decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case- by -case basis".<sup>18</sup>

29. This is reinforced by international, HIV-specific policy. The International Guidelines on HIV/AIDS and Human Rights (International Guidelines) promulgated by the Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS reinforces the view

<sup>15</sup>*Samson Mumo Mutinda T/A Patrol Driving School*, Petition No. 38 of 2014, High Court at Nairobi, [2014] eKLR, para 23.

<sup>16</sup>Human Rights Committee, General Comment 16, para 7 (1988).

<sup>17</sup>*Id* at para 8.

<sup>18</sup>*Id*.

that unlawful disclosure of an individual's HIV status would violate the right to privacy, emphasizing that states have a duty to protect the right to privacy and should accordingly ensure that safeguards are in place to protect confidentiality.<sup>19</sup>

30. A number of similarly-situated countries have highlighted the importance of ensuring confidentiality of an individual's HIV status, the breach of which has been ruled to be a violation of the right to privacy..

30.1. The Constitutional Court of South Africa in *NM and Others v Smith and Another* addressed whether the disclosure of three women's HIV status by a journalist and her publisher in a book violated the right to privacy, among other constitutionally-guaranteed rights. In finding that such disclosure did violate the right to privacy, the Court held that "it is imperative and necessary that all private and confidential medical information should receive protection against unauthorised disclosure".<sup>20</sup>

30.2. Similarly, the European Court of Human Rights (ECHR) in *I v Finland*, addressed whether the unauthorized disclosure of an HIV-positive Finnish woman's confidential patient record at a public hospital due to it being unlawfully accessed by a third party violated her right to respect for her private life guaranteed under article 8 of the European Convention on Human Rights.<sup>21</sup> The Court held that disclosure of the woman's HIV-positive status constituted a clear violation of Article 8 of the Convention, because "[p]rotection of personal data, in particular medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention.

<sup>19</sup> Office of the UN High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version* (Geneva 2006), para 105.

<sup>20</sup> *NM and Others v Smith and Another*, Case CCT 69/05, Constitutional Court of South Africa, [2007] ZACC 6, para 43.

<sup>21</sup> *I v Finland*, Application No 20511/03, European Court of Human Rights.

Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. 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. 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.<sup>22</sup>

- 30.3. Additionally, the United States Court of Appeals in *Doe v. City of New York* also addressed the disclosure of an individual's HIV status. In *Doe*, the City of New York Commission on Human Rights issued a press release disclosing the terms of a settlement agreement which Doe claimed provided sufficient identifying detail to alert his colleagues of his HIV status. In finding that the City of New York breached Doe's right to privacy, the Court of Appeals stated, "Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over."<sup>23</sup>
- 30.4. The Inter-American Commission on Human Rights in *J.S.C.H. and M.G.S. v. Mexico* also held that it would examine a petition filed by HIV-positive men who were dismissed from their positions in the Mexican Army due to their HIV status. The Commission stated that, if state agents had disclosed the HIV status of the men, such a

---

<sup>22</sup>*Id.* at para. 38.

<sup>23</sup>*Doe v. City of New York*, Court of Appeals, 15 F.3d 264, para 18.

disclosure could constitute a violation of the right to privacy enshrined in Article 11 of the American Convention on Human Rights.<sup>24</sup>

30.5. Finally, in *Case SU-256/96*, the Constitutional Court of Columbia held that a third party's disclosure of the HIV status of an employee to his or her employer violates the fundamental rights to dignity, equality, work, health, and social security.<sup>25</sup>

31. Limitations of the constitutional rights are permissible only where it is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".<sup>26</sup> The factors the court should consider include:

- (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".<sup>27</sup>

32. The HIV & AIDS Prevention and Control Act, 2006, provides clear and specific conditions to protect confidentiality with respect to HIV.<sup>28</sup> Section 22 (1) prohibits the disclosure of HIV-related information without the written informed consent of the person. Further, Article 20 (1) clearly states that the "...recording, collecting, storing and security of information, records of forms used in respect of HIV test and related medical assessments" can only be in accordance with the regulations prescribing privacy guidelines by the Health Ministry. Any administrative order

<sup>24</sup>*J.S.C.H. and M.G.S. v. Mexico*, Inter-American Comm. on Human Rights, Feb. 4, 2009.

<sup>25</sup>*Case SU-256/96*, File T-83734, Constitutional Court of Columbia, 1996.

<sup>26</sup>Article 24(1), Constitution of Kenya (2010).

<sup>27</sup> See Article 24, Constitution of Kenya (2010).

<sup>28</sup>See Article 20, Part V- Confidentiality, Kenya HIV/AIDS Prevention and Control Act 14 of 2006.

that does not comply with this statutory requirement or constitutional limitation on the right to privacy must be held to be unreasonable and unjustifiable.

33. The Health Ministry has not issued any privacy guidelines as regulation pursuant to Article 20 under the 2006 Act. In the absence of statutory protection of identifiable HIV-related information there is a greater risk of disclosure of such information without the consent of children living with HIV or their guardians. This constitutes a breach of the right to privacy.
34. Even if one were to assume valid informed consent is taken that allows collection and recording of HIV-related information, in the absence of statutorily enacted privacy guidelines there is no guarantee of safety of this information from disclosure.
35. In this case, the uncontested fact is that the collecting of information under the Presidential instruction would directly link the individual's name with his or her HIV status. This practice has been rejected by international bodies and countries when conducting HIV-related medical research in recognition of the likelihood that directly linking the individual's name with the person's HIV status will significantly increase the disclosure of her HIV status.
36. It is thus submitted that disclosure of HIV status without consent is a breach of the right to privacy.

#### ***The right to be free from cruel, inhuman and degrading treatment***

37. Article 29(f) of the Constitution states: "Every person has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading manner."
38. Article 7 of the ICCPR prohibits the use of torture and cruel, inhuman or degrading treatment or punishment. Further Article 9(1) of the ICCPR states that "everyone has the right to liberty and security of the person..."

39. In addition, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) acceded to by Kenya on 21 February 1997 (**annexure 3**), also prohibits cruel, inhuman or degrading treatment under article 16(1).
40. Further, the Committee Against Torture, tasked with monitoring country compliance with CAT and providing guidance on the scope of its obligations, has noted that countries must take appropriate measures to prevent cruel, inhuman and degrading treatment.<sup>29</sup>
41. In its General Comment on Article 7, the HRC stated that the purpose of the article was to "protect both the dignity and the physical and mental integrity of the individual" from acts that cause physical and mental suffering."<sup>30</sup>
42. In addition, Article 5 of the African Charter on Human and People's Rights ("African Charter") states that "[a]ll forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." This provision is also included in the Protocol to the African Charter on the Rights of Women in Africa. The African Commission on Human and Peoples Rights, in the case of *Doebbler v. Sudan*, emphasized that "the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses".<sup>31</sup>
43. Moreover, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment recommended that Paraguay ensure that prisoners' medical records be kept confidential in order to ensure it did not violate the prohibition on torture and cruel, inhuman and degrading

---

<sup>29</sup> Committee Against Torture, General Comment 2, para 3 (2008).

<sup>30</sup> Human Rights Committee, General Comment 20, para 2 (1992).

<sup>31</sup> *Doebbler v. Sudan*, African Comm. on Human and People's Rights, 236/00, para 36.

treatment.<sup>32</sup>In that case, Paraguay was allowing prisoners to distribute medicines and to organize patients' medical records. The Subcommittee noted that allowing third parties such as the prisoners access to medical records "[was] detrimental to medical confidentiality" and recommended that **"medical records should be kept strictly confidential and that only medical staff should have access to them"** (emphasis in original).<sup>33</sup> Likewise, the Presidential instruction at issue in this case would allow educational administrators to access the medical records of schoolchildren, pregnant and nursing mothers yet only medical staff should have access to them.

44. The U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also noted that forced or compulsory HIV testing is "a common abuse that may constitute degrading treatment if it is 'done on a discriminatory basis without respecting consent and necessity requirements.'"<sup>34</sup> Here, the compulsory HIV reporting required by the Presidential instruction will cause compulsory testing, and such testing will be conducted on a discriminatory basis because only children who attend school and pregnant and nursing women are to be tested, even though the HIV epidemic affects all members of the Kenyan population. This discriminatory treatment, coupled with the fact that consent may not be obtained, mean the Presidential instruction falls squarely into the definition of degrading treatment set forth by the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.
45. Thus, the Presidential instruction will lead to the disclosure of individuals' medical information without their informed consent, which would constitute degrading treatment and cause mental suffering.

---

<sup>32</sup> Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay, para 174, CAT/OP/PRY/1 (2010).

<sup>33</sup> *Id.*

<sup>34</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Para. E.1, A/HRC/22/53 (2013)



46. This is particularly true with respect to HIV given the high rates of stigma and discrimination that people living with HIV face in Kenya. For example, according to one study, over 15% of people living with HIV in Kenya reported being denied access to health services in the past year because of their HIV status.<sup>35</sup> Such stigma and mistreatment can easily lead to mental suffering. In Botswana, the High Court in *Maje v Botswana Life Insurance and Another* assessed whether the disclosure of the applicant's HIV status in a public newsletter was capable of causing an individual great mental suffering, finding that it could.<sup>36</sup>
47. It is thus submitted that the impugned Presidential instruction constitutes a violation of the right to be free from cruel, inhuman and degrading treatment.

### ***Right to health***

48. The Presidential instruction by placing at risk the disclosure of an individual's HIV status without his or her informed consent violates the right to health.
49. Article 43(1)(a) of the Constitution provides for the right to health stating: Every person has the right...to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
50. Similarly, article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), acceded to by Kenya in 1972 (**annexure 4**), recognises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".
51. The Committee on Economic, Social and Cultural Rights (CESCR), tasked with monitoring compliance with the ICESCR, provides detailed guidance on the scope of article 12 in General Comment No. 14. In addition to interpreting the right and

---

<sup>35</sup> National Empowerment Network of People Living With HIV and AIDS in Kenya, *The People Living with HIV Stigma Index Kenya* (November 2011), 49.

<sup>36</sup> *Maje v Botswana Life Insurance and Another*, 2001 (2) BLR 626, High Court at Lobatse.

the duties it imposes on the state, the CESCR also notes the obstacles created by diseases including HIV & AIDS, and the need to take the impact of these diseases into account when interpreting article 12.

52. The General Comment notes that one aspect of the right to health under article 12 is that all health-related facilities, goods and services are "designed to respect confidentiality...of those concerned".<sup>37</sup> Further it cautions that making health-related information accessible "should not impair the right to have personal health data treated with confidentiality".<sup>38</sup>
53. The UN Special Rapporteur on the Right to Health, in his report on Informed Consent<sup>39</sup>, states that "informed consent, as an integral part of the right to health, must be guaranteed with every protection against stigmatisation and discrimination on any grounds..." Marginalised social groups, as a result of inherent structural inequalities, deserve special considerations as a result of their vulnerabilities stemming from such economic, social and cultural inequalities.<sup>40</sup>
54. Children and women are specially recognised in General Comment No.14 and the Report of the UN Special Rapporteur on the right to health as vulnerable groups in need of special protections.
55. The Report of the UN Special Rapporteur further highlights the plight of people living with HIV&AIDS and the importance of ensuring informed consent, counselling and treatment services and confidentiality. The stigma and discrimination faced by persons affected by HIV if their confidentiality is compromised can deter them from seeking appropriate treatment and services.

---

<sup>37</sup>Committee on Economic, Social and Cultural Rights, General Comment 14, para 12(c) (2000).

<sup>38</sup>*Id.* at para 12(b).

<sup>39</sup>Report of the UN Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, A/64/272, August 2009.

<sup>40</sup>*Id.* at paras 43-46.

The Rapporteur particularly states the compromised confidentiality of women living with HIV & AIDS as an example of a violation of their right to health.<sup>41</sup>

56. Article 16 of the African Charter also provides that every person has the "right to enjoy the best attainable state of physical and mental health," and the African Commission has held that the right to health must be applied without discrimination.<sup>42</sup>
57. Women's right to sexual and reproductive health is an integral part of the right to health as detailed under General Comment 22 to the ICESCR. A core obligation, that States must immediately realise, is the repeal or elimination of any laws, policies or practices which undermines an individuals or group's access to health facilities, goods and services. Guaranteeing women's universal access to acceptable and quality sexual and reproductive health services is another core obligation that States must comply with. In this respect, it is submitted that given the deep HIV stigma and discrimination faced by PLHIV, disclosure of HIV status would not only undermine pregnant and breastfeeding women's access to health services but is also counter-productive to the obligation to ensure universal access. Expectant mothers and breastfeeding mothers are a key vulnerable groups who, according to the CEDAW Committee's General Recommendation No. 24 have the right to quality health care services under article 12(1) of CEDAW includes an obligation that states provide acceptable services, which "are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives".<sup>43</sup>
58. The Presidential instruction attempts to increase Kenya's HIV response with respect to children but fails to provide any safeguards to protect confidentiality

---

<sup>41</sup> *Id.* at Para 75.

<sup>42</sup> See *Purohit and Moore v. Gambia*, African Comm. on Human and People's Rights, 241/01, para 80.

<sup>43</sup> Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation 24, para 22 (1999).

of the children and women, whose HIV-related personal medical information will be collected and stored by the Government. As a result, there is every likelihood that confidentiality of these vulnerable populations affected by HIV will be compromised, resulting in a violation of their right to health.

59. Further, the petitioners have alleged that the respondents failed to consult with people living with HIV (PLHIV) prior to the implementation of the Presidential instruction in violation of article 10 of the Constitution.
60. Participation and meaningful involvement of PLHIV in laws, policies and practices affecting them is critical not only to ensure adherence with the law but also for public health.
61. The right to health under international law includes the obligation to ensure meaningful participation of the community in health-related decision making. Participation of the community is integral to ensuring to individuals their rights to privacy and self-determination.

61.1. The Committee on Economic Social and Cultural Rights in General Comment No. 14 has noted that participation of the population in all health-related decision making at the community, national and international levels is an important aspect of the normative content of the right to health.

61.2. General Comment No. 14 further states that "the improvement and furtherance of participation of the population in the provision of preventive and curative health services, such as the organisation of the health sector, the insurance system and, in particular, participation in political decisions relating to the right to health taken at both the community and national levels" was an important aspect under Article 12.2(d) of the International Covenant on Economic Social and Cultural Rights (ICESCR).

62. International law also requires countries to consult with particular marginalized populations, including women and children, due to their specific vulnerabilities.

62.1. The right to health framework specifically recognises the need to give particular attention to vulnerable and marginalised groups while formulating and implementing public health strategies, including allowing for a participatory and transparent process.

62.2. Article 12(1) of the Convention on the Rights of the Child provides children with the right to be heard. It states that: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

62.3. Countries also have an obligation under article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to consult with women on issues affecting them.

62.4. The Committee on the Elimination of Discrimination Against Women in General Recommendation 23 has noted that article 7 requires countries to "where it is within their control, (...) as a matter of course, to consult and incorporate the advice of groups which are broadly representative of women's views and interests."<sup>44</sup>

63. In *Doctors for Life v Speaker of the National Assembly*,<sup>45</sup> the South African Constitutional Court found that the government failed to properly consult with affected communities prior to passing the Choice on Termination of Pregnancy Amendment Act and the Traditional Health Practitioners Act. With respect to traditional healers, the Court highlighted that "having regard to the history of discrimination against traditional healers, legislation of this nature requires adequate consultation with the traditional healers themselves, lest they feel they are being marginalised again."<sup>46</sup> Similarly, with the Presidential instruction, PLHIV, especially women and children are particularly vulnerable and marginalised communities.

---

<sup>44</sup> Committee on the Elimination of Discrimination Against Women, General Recommendation No. 23 (16th session, 1997), para 26.

<sup>45</sup> 2006 (12) BCLR 1399 (CC) (S. Afr.)

<sup>46</sup> *Id.* at para 174.

64. Thus, given that the Presidential instruction impacts children and women living with HIV, the government was required to consult with the affected communities prior to implementing the Presidential instruction, and to the extent it did not do so it limited the petitioners' rights under article 10.

***Freedom from discrimination and right to equality***

65. Article 27(1) of the Constitution provides: "Every person is equal before the law and has the right to equal protection and equal benefit of the law".

66. Further article 27(4) and 27(5) of the Constitution state:

"(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.

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

67. Similar rights are provided for under international law. The ICCPR provides for the right to equality under article 26 and under article 2(1) the right to be free from discrimination on the basis of gender, health status, with respect to the exercise of the rights guaranteed in the ICCPR, including the right to privacy and the right to be free from cruel, inhuman and degrading treatment. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), acceded to by Kenya on 9 March 1984(**annexure 5**) particularly protects women against discrimination under article 2.

The CRC protects children from discrimination on the basis of their health status under article 2(1). Moreover, Article 2 of the African Charter provides for the right to be free from discrimination, and Article 18(3) specifically protects women from discrimination, providing that states "shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions."

68. Article 1 of CEDAW defines discrimination as:

"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."
69. The Presidential instruction is targeted children and women living with HIV. It specifically requires HIV-related information to be collected on school aged children and pregnant and breastfeeding women living with HIV and thus places them at significantly higher risk of their HIV-related medical information being disclosed without their informed consent.
70. The presidential instruction singles out school going children for appropriate services and support while excluding the whole population of non-school children living with HIV without providing a rationale for such classification.
71. There is no evidence to suggest that HIV incidence in school going children is higher than in non-school going ones.
72. To the extent that the presidential instruction seeks to protect only school going children for appropriate HIV services, it is violative of the right to equality and freedom from discrimination of non-school going children living with HIV.



73. Further, the present instruction also requires all schools to also gather information about HIV positive expectant and breast-feeding mothers. In addition to the fact that schools cannot be a site for HIV data collection for HIV positive expectant and breast-feeding mothers, such data collection seems to be for the sole purpose of extending appropriate health services to prevent mother to child transmission and not to provide care and treatment services for the mothers. To the extent that the presidential instruction seeks to collect HIV-related information for the stated reason of extending appropriate health services to children living with HIV but is completely silent on women living with HIV, it is vague, arbitrary and discriminatory and violative of the right to equality and freedom from discrimination.
74. It is thus submitted that the Presidential instruction impinges on the right to be free from discrimination and the right to equality.

### ***Limitations analysis***

75. Under the Constitution, certain rights can be limited under the law if the "limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".<sup>47</sup> The factors the court should consider include:
- (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

---

<sup>47</sup>Article 24(1), Constitution of Kenya (2010).

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose".<sup>48</sup>

76. The Constitution and ICCPR do not permit any limitations to the right to be free from cruel, inhuman and degrading treatment.<sup>49</sup> Thus, to the extent the Presidential instruction infringes the right to be free from cruel, inhuman and degrading treatment, it must be unconstitutional.

77. It is important to note that the burden for proving that a limitation on a right guaranteed under the Bill of Rights is on the party placing the limitation, in this case the executive.<sup>50</sup>

78. This is similar under the ICESCR. The CESCR requires states to justify its actions in terms of article 4 of the ICESCR:

[A] State party . . . has the burden of justifying such serious measures in relation to each of the elements identified in article 4. Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society.<sup>51</sup>

79. The purpose of the Presidential instruction is to "enable the Government to [*sic*] respond and provide appropriate service and support to the children living with HIV & AIDS". Given the far-reaching impact of HIV in Kenya, this is an important and critical purpose.

80. However, documenting the names and HIV statuses of children and women living with HIV exposes them to significant risk of having their HIV status disclosed without their informed consent.

<sup>48</sup> See Article 24, Constitution of Kenya (2010).

<sup>49</sup> See Article 25(a), Constitution of Kenya (2010); article 4(2), ICCPR.

<sup>50</sup> Article 24(3), Constitution of Kenya (2010).

<sup>51</sup> Committee on Economic, Social and Cultural Rights, General Comment 14, para 28 (2000).

81. Confidentiality of an individual's medical information is a fundamental principle both within the law and as a measure to ensure public health. This is particularly true with respect to the HIV epidemic as people living with HIV in Kenya continue to face high levels of stigma and discrimination. This stigma and discrimination coupled with the fear of exposure of one's HIV-related information can cause a significant psychological and physical impact on a person living with HIV; and can make people living with HIV less likely to seek HIV prevention and treatment services, and less likely to adhere to HIV treatment.
82. The central importance of confidentiality of an individual's HIV information is recognized in the HIV and AIDS Prevention and Control Act (No. 16 of 2006) ("HIV Act"), which prohibits the disclosure of HIV-related medical information without a person's written consent or in the case of a minor with his or her parent's or legal guardian's consent.<sup>52</sup> Further, in the absence of any law or guideline with respect to the manner in which private information sought for legitimate purposes will be protected, the impugned Presidential Instructions are vague, arbitrary and liable to be misused. There continue to be high levels of stigma towards people living with HIV in Kenya. According to the National Stigma Index conducted in 2009 and 2010, almost one-third of the people in the study reported experiencing stigma or discrimination due to their HIV status.<sup>53</sup> The stigma included social and religious exclusion, discrimination in access to work and in education, and being denied health-care services.<sup>54</sup>
83. Such stigma can have significant psychological and physical consequences for people living with HIV. The Appellate Division of the South African Supreme Court (now the Supreme Court of Appeal) in *Van Vuuren v Kruger* in addressing the disclosure of an individual's HIV status without his consent noted:

<sup>52</sup>Article 22, HIV and AIDS Prevention and Control Act (No. 16 of 2006).

<sup>53</sup>National Empowerment Network of People Living With HIV and AIDS in Kenya, *The People Living with HIV Stigma Index Kenya* (November 2011), 48.

<sup>54</sup>*Id.*

"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 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."<sup>55</sup>

84. Confidentiality is particularly important with respect to the HIV epidemic as studies have regularly shown that risking the confidentiality of an individual's HIV status has the opposite effect: making people living with HIV less likely to seek HIV prevention and treatment services, and less likely to adhere to HIV treatment. Indeed, a study in Uganda assessing the adherence of children to ART found that structural factors including stigma were barriers to children's adherence to ART.<sup>56</sup>
85. International agencies have affirmed that the fear of disclosure of one's HIV-related medical information can lead people to avoid HIV treatment and support services. Further, the World Health Organization (WHO) and the Joint United Nations Programme on HIV/AIDS (UNAIDS) have found such fear may "also drive people away from other health care services, such as antenatal care or blood donation."<sup>57</sup>
86. The International Guidelines rejected the idea that restricting human rights and instituting coercive measures such as the measures taken under the Presidential instruction benefitted public health.

<sup>55</sup>*Van Vuuren v Kruger*, Case No 675/91, Supreme Court of South Africa, [1993] ZASCA 145, para 10.

<sup>56</sup>Winnie Bikaako-Kajura, et al, *Disclosure of HIV Status and Adherence to Daily Drug Regimens Among HIV-infected Children in Uganda*, AIDS and Behavior, July 2006, Volume 10, Issue 1 Supplement, 85-93.

<sup>57</sup>World Health Organization and the Joint United Nations Programme on HIV/AIDS, *Opening Up the HIV/AIDS Epidemic: Guidance on Encouraging Beneficial Disclosure, Ethical Partner Counselling & Appropriate Use of HIV Case-Reporting*, UNAIDS/00.42E (November 2000).

They state:

"Although such measures may be effective in the case of diseases which are contagious by casual contact and susceptible to cure, they are ineffective with regard to HIV since HIV is not casually transmitted... these coercive measures drive people away from prevention and care programmes, thereby limiting the effectiveness of public health outreach."<sup>58</sup>

87. The fact that fear of disclosure can make people living with HIV less willing to access HIV prevention and treatment services has been affirmed by judicial decisions in other jurisdictions.

87.1. The Constitutional Court of South Africa in *NM and Others v Smith and Another* highlighted the importance of ensuring confidentiality of an individual's HIV status to improve public health outcomes. The Court stated that:

"[t]he disclosure of an individual's HIV status, particularly within the South African context, 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 affirmation of secure privacy rights within our Constitution may encourage individuals to seek treatment and divulge information encouraging disclosure of HIV which has previously been hindered by fear of ostracism and stigmatisation. The need for recognised autonomy and respect for private medical information may also result in the improvement of public health policies on HIV & AIDS".<sup>59</sup>

---

<sup>58</sup>Office of the UN High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version* (Geneva 2006), para 105.

<sup>59</sup>*NM and Others v Smith and Another*, Case CCT 69/05, Constitutional Court of South Africa, [2007] ZACC 6, para 42.

87.2. The ECHR similarly highlighted the importance of the confidentiality of an individual's HIV information to ensure he or she accesses critical health and HIV services. The Court noted 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."<sup>60</sup>

88. Finally, the respondents' interest in addressing HIV prevalence among children and adolescents is noble. However, the Presidential instruction does not employ the least restrictive means by which to approach this. It is possible to gain the information necessary to address HIV among children and adolescents without requiring the names and personal information of people living with HIV and their parents or caregivers. This principle has been followed in other jurisdictions.
89. For the reasons stated above, the limitation to the applicants' right to privacy; freedom from cruel, inhuman and degrading treatment; freedom from discrimination; right to equality; and right to health is neither reasonable nor justifiable.

---

<sup>60</sup> *J v Finland*, Application No 20511/03, European Court of Human Rights, para 38.

## CONCLUSION

90. For the reasons outlined above, maintaining the privacy of an individual's HIV-related information is necessary both under the law and to further public health objectives.

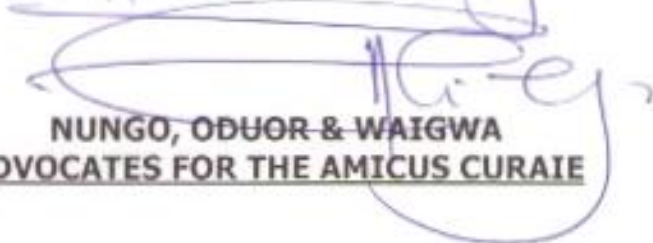
DATED at Nairobi this

11<sup>th</sup>

day of

May

2016

  
**NUNGO, ODUOR & WAIGWA  
ADVOCATES FOR THE AMICUS CURIAE**

### **Drawn & Filed By:**

Nungo, Oduor & Waigwa Advocates

Maisonette No. 1

30 Masaba Road, Off Bunyala Road

Lower Hill,

P.O Box 70678-00400

**Nairobi.**

Email: [Info@Nowadvocates.Co.Ke](mailto:Info@Nowadvocates.Co.Ke)