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**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 51 OF 2020**

**IN THE MATTER OF THE DEFENCE OF THE CONSTITUTION UNDER ARTICLES 3, 10, 19, 20, 22 AND 258 OF THE CONSTITUTION OF KENYA**  
**AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 19, 21, 28, 29, 31, 39, 43, 47, 51 AND 53 OF THE CONSTITUTION OF KENYA, 2010**  
**AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 8(6) OF THE PUBLIC ORDER ACT, CAP 56 OF THE LAWS OF KENYA**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 4 AND 5 OF THE HEALTH ACT NO. 21 OF 2017**  
**AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 4 AND 5 OF THE ACCESS TO INFORMATION ACT, NO. 31 OF 2016**  
**AND**

**IN THE MATTER OF SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**  
**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE PUBLIC HEALTH (COVID 19 RESTRICTION OF MOVEMENT OF PERSONS AND OTHER RELATED MEASURES) RULES, 2020 AND PUBLIC HEALTH ACT (PREVENTION, CONTROL AND SUPPRESSION OF COVID 19) REGULATIONS, 2020**

**BETWEEN**

- C.M (Suing on her on behalf and on behalf of PM (Minor) as parent..... 1<sup>ST</sup> PETITIONER
- M.O.A..... 2<sup>ND</sup> PETITIONER
- M.O..... 3<sup>RD</sup> PETITIONER
- M.W.M..... 4<sup>TH</sup> PETITIONER
- K.F..... 5<sup>TH</sup> PETITIONER
- F.A..... 6<sup>TH</sup> PETITIONER
- K.B..... 7<sup>TH</sup> PETITIONER
- KENYA LEGAL & ETHICAL ISSUES NETWORK ON HIV & AIDS (KELIN)..... 8<sup>TH</sup> PETITIONER
- KATIBA INSTITUTE..... 9<sup>TH</sup> PETITIONER

**AND**

- HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT
- THE CABINET SECRETARY, HEALTH ..... 2<sup>ND</sup> RESPONDENT
- THE CABINET SECRETARY, INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT..... 3<sup>RD</sup> RESPONDENT

102

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19, 20, 22 AND 258 OF THE CONSTITUTION OF KENYA  
AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 19, 21, 28, 29, 39, 43, 47, 48  
AND 53 OF THE CONSTITUTION OF KENYA, 2010  
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ORDER ACT, CAP 56 OF THE LAWS OF KENYA  
AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 4 AND 5 OF THE  
HEALTH ACT NO. 21 OF 2017  
AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 3, 5, 12, 13, 14  
AND 15 OF PERSONS DEPRIVED OF PERSONAL LIBERTY ACT NO. 23 OF 2014  
AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 4 AND 5 OF THE  
ACCESS TO INFORMATION ACT, NO. 31 OF 2016  
AND**

**IN THE MATTER OF SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT  
NO. 4 OF 2015  
AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE PUBLIC HEALTH  
(COVID-19 RESTRICTION OF MOVEMENT OF PERSONS AND OTHER RELATED  
MEASURES) RULES, 2020 AND PUBLIC HEALTH ACT (PREVENTION, CONTROL AND  
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- THE CABINET SECRETARY, INTERIOR  
AND COORDINATION OF NATIONAL GOVERNMENT..... 3<sup>RD</sup> RESPONDENT

103

PETITION

The humble Petition of the 1<sup>st</sup> - 8<sup>th</sup> Petitioners whose address of service is Allan Maleche, Advocate, C/O KELIN, 4<sup>th</sup> Floor, Somak House, Mombasa Road, P.O. Box 112-00202, Nairobi and the 9<sup>th</sup> Petitioner whose address of service is Emily Kinama, Advocate, C/O Katiba Institute, 5 the Crescent, Off Parklands Road, Westlands, P.O. Box 26586-00100, Nairobi is as follows:

A. NAME AND DESCRIPTION OF PARTIES

1. The 1<sup>st</sup> Petitioner is C.M, a female adult and a Kenyan citizen. She arrived in Kenya on 23<sup>rd</sup> March 2020 from Malawi through Jomo Kenyatta International Airport (JKIA) together with her 9-year-old daughter P.M. They were both placed on mandatory quarantine for 14 days at the Hill park hotel. She has filed this suit on her own behalf and on behalf of her minor daughter against the Respondents for human rights violations in their implementation of the mandatory quarantine.
2. The 2<sup>nd</sup> Petitioner is M.O.A, a male adult and Kenyan citizen. He arrived in Kenya from Australia through JKIA on 23<sup>rd</sup> March 2020 and was placed in mandatory quarantine at the Kenyatta University Conference Center. He was kept in quarantine for 30 days. He has filed this suit on his own behalf for human rights violations against the Respondents during the implementation of the mandatory quarantine.
3. The 3<sup>rd</sup> Petitioner is, M.O, a male adult and Kenyan citizen. He arrived in Kenya through JKIA from Pakistan on 25<sup>th</sup> March 2020. He was placed in mandatory quarantine at Grace House Resort for 21 days. He has filed this suit on his own behalf for the human rights violations committed by the Respondents during the implementation of the mandatory quarantine.
4. The 4<sup>th</sup> Petitioner is M.W.M, a female adult and Kenyan citizen. She arrived in Kenya through JKIA from Singapore on 23<sup>rd</sup> March 2020. She was placed in mandatory quarantine at Pride Inn Hotel Azure for 21 days. She has filed this suit on her own behalf for human rights violations by the Respondents during the implementation of the mandatory quarantine.

104

5. The 5<sup>th</sup> Petitioner is K.F, a female adult and Kenyan citizen. She arrived in Kenya through JKIA from the United Kingdom on 24<sup>th</sup> March 2020 and was placed in mandatory quarantine at Mash Park hotel for 14 days. She has filed this suit on her own behalf for human rights violations by the Respondents during the implementation of the mandatory quarantine.
6. The 6<sup>th</sup> Petitioner is F.A, a male adult and Kenyan citizen who arrived in Kenya through JKIA from Malawi on 23<sup>rd</sup> March 2020 and was placed in mandatory quarantine for 14 days at Hill park hotel. He has filed this suit on his own behalf for human rights violations by the Respondents during the implementation of the mandatory quarantine.
7. The 7<sup>th</sup> Petitioner is K.B, a female adult and Kenyan citizen who arrived in Kenya through JKIA on 24<sup>th</sup> March 2020 from the United States of America. She was placed in mandatory quarantine for 14 days at Hill park hotel. She has filed this suit on her own behalf for human rights violations by the Respondents during the implementation of the mandatory quarantine.
8. The 8<sup>th</sup> Petitioner is Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), a non-partisan, non-profit making and non-governmental organization duly registered under the Non-Governmental Organizations' Act, and committed to and working to protect and promote health-related human rights in Kenya. It does this by facilitating access to justice for those who face human rights violations; creating partnerships with key stakeholders; building the capacity of communities to know their rights; and analysing laws and policies to ensure they integrate human rights principles.
9. The 9<sup>th</sup> Petitioner is Katiba Institute, a duly registered constitutional research, policy and litigation institute established to further the implementation of Kenya's 2010 Constitution and generally to seek the development of a culture of constitutionalism in Kenya.
10. The 8<sup>th</sup> and 9<sup>th</sup> Petitioners file this petition on their own behalf and in the public interest, keeping in mind their responsibility under Articles 3, 22 and 258 to defend the Constitution.
11. The 1<sup>st</sup> Respondent is the Attorney General of the Republic of Kenya. His office is established under Article 156(1) of the Constitution. He is sued on behalf of the national government of

105

Kenya and in his capacity as the chief legal advisor to the national government. He is also authorized by Article 156(4)(b) of the Constitution to represent the national government in any legal proceedings. As a state officer, he is under a duty to promote, protect, and uphold the rule of law and the public interest.

12. The 2<sup>nd</sup> Respondent is the Cabinet Secretary appointed under Article 152 of the Constitution in charge of the Ministry of Health. He is also the Chairperson of the National Emergency Response Committee (NERC) appointed via Executive Order No. 2 of 2020. He has issued directives and published regulations in relation to the COVID-19 pandemic in Kenya. In this petition, the actions of the Cabinet Secretary have been challenged for being contrary to the human rights provisions in the Constitution, other laws and the 2020 COVID-19 related Regulations and Directives. The actions of the Cabinet Secretary are also challenged as being contrary to his duty to promote, protect and uphold the Bill of Rights and the Constitution of Kenya, 2010.

13. The 3<sup>rd</sup> Respondent is the Cabinet Secretary appointed under Article 152 of the Constitution in charge of Ministry of Interior and Coordination of National Government. He is also a member of the National Emergency Response Committee. He has a duty to promote, protect and uphold the rule of law. He is sued for failing to uphold the rule of law, specifically the Public Order Act, Cap 56 and the Public Order (State Curfew) Order, 2020. He is also sued for his actions of violating the Constitution by detaining people in self- paid mandatory quarantine for violating the curfew orders and other COVID 19 related Regulations.

**B. OVERVIEW OF THE PETITION**

14. The Petitioners have instituted this suit on an urgent basis in order to protect and enforce their human rights and the rights of others who are deprived of their liberty under mandatory quarantine.

15. The Petitioners' case is *not* about whether quarantine *per se* is legally permissible in the context of the State's response to COVID-19:

- a. The Petitioners do not deny that the coronavirus, and the manifestation of its disease in COVID-19, is a grave threat to the people of Kenya. The State is constitutionally obligated to take measures to protect people from infection.
  - b. The Petitioners however find fault in the manner in which the state implemented the mandatory quarantine as it resulted in serious violations of human rights and was not a justifiable limitation of rights under Article 24 of the Constitution.
16. The Petitioners' case is that placing a person under quarantine limits their rights to liberty, freedom of movement, privacy, and economic livelihood. The Constitution demands that such a limitation must comply with Article 24 and if deemed justified must as per Article 25 not result in degrading treatment or violation of other human rights that were not sought to be limited by the mandatory quarantine; such as right to dignity and health.
17. The Petitioners' claim is that the manner in which the mandatory quarantine has been and is being implemented does not comply with the State's constitutional duties.
18. The Petitioners' claim is that, at a minimum, the State's constitutional duties towards persons placed in mandatory quarantine require the following:
- a. Quarantine may not be used as a form of punishment.
  - b. The restrictions placed on a person's rights under quarantine are provided for and carried out in accordance with the law.
  - c. The restrictions and the way in which quarantine is implemented are based on scientific evidence and not formulated or implemented arbitrarily or unreasonably.
  - d. The enforcement of quarantine (both formally and in its application) must pursue a legitimate public health objective.
  - e. The restrictions on a person's rights and conditions in quarantine must be proportionate, rationally connected and strictly necessary to achieve the objective in a democratic society.
  - f. There are no less restrictive means to achieve the objective.

107

- g. A quarantined person's rights must be minimally impaired. A quarantined person retains all their rights not deemed necessary for restriction to the fulfilment of the purpose of quarantine.
  - h. A person who is quarantined mandatorily is a person who is detained or held in custody in terms of Article 51 of the Constitution and the Persons Deprived of Liberty Act no. 23 of 2014. That person therefore enjoys the right to dignified and humane treatment.
  - i. Having been deprived of their liberty, the State has a duty of care towards a person in quarantine, which includes the duty to provide dignified and rights-affirming conditions of quarantine commensurate with the objectives of preventing the spread of disease and preserving and advancing individual and public health.
  - j. Every quarantined person must be informed of their rights and be given reasons for the decision to place them under quarantine in terms of Articles 35 and 47 of the Constitution.
  - k. Every quarantined person has a right to challenge the basis for their quarantine in terms of Articles 47, 48, 50 of the Constitution.
  - l. The State has a duty to observe, respect, protect and fulfil the right to the highest attainable standard of physical and mental health of persons in quarantine under Article 43(1)(a) of the Constitution, which duty shall include to:
    - i. Provide adequate and timely information on the duration of quarantine.
    - ii. Provide adequate health information on the nature, extent and purpose of restrictions and public health measures.
    - iii. Provide adequate mental and physical health care services in quarantine.
    - iv. Observe patient confidentiality, dignity and the right to informed consent.
  - m. The best interests of a child in quarantine shall be paramount in terms of Article 53 of the Constitution.
19. The Petitioners aver that the State is not complying with these duties and seeks the Court's urgent intervention to protect the rights of persons in quarantine.

108

**C. APPLICABLE CONSTITUTIONAL PROVISIONS**

20. Article 2(1) provides that the “Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government”.
21. Article 2(2) provides that “no person may claim or exercise State authority except as authorised under this Constitution”.
22. Article 2(4) guarantees the right to secure protection of the Constitution against impermissible legislations by Parliament.
23. Article 2(5) provides that general rules of international law shall form part of Kenya’s law, while Article 2(6) incorporates international treaties to which Kenya is a party to be part of Kenyan law.
24. Article 10 sets out the national values and principles of governance and includes the rule of law, social justice, inclusiveness, human rights, non-discrimination and protection of the marginalised, good governance, integrity, transparency and accountability.
25. Article 19 discusses the reach and breadth of the Bill of Rights and provides in the relevant parts:
- “(1) The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies.
- (2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.”
26. Article 20(3) provides that in applying a provision of the Bill of Rights, a court shall (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.



27. Article 21(1) provides that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. It further reads:

“(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

(4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.”

28. Article 24 provides in part that that a right or fundamental freedom cannot 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, of which major factors are set out in the Article.

29. Article 25 lists the rights that cannot be limited as follows:

“(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus.”

30. Article 28 enshrines the protection of the right to dignity.

31. Article 29 guarantees the security of the person and frowns upon arbitrary deprivation of freedom. It states that:

“Every person has the right to freedom and security of the person, which includes the right not to be—

- (a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58; ...
- (f) treated or punished in a cruel, inhuman or degrading manner”

32. Article 31 protects a person’s right to privacy which includes the right not to have information relating to their private affairs unnecessarily required or revealed.

33. Article 35(1) provides for the right of every citizen to access information held by the State and information held by another person which is necessary for the exercise or protection of any right or fundamental freedom. Article 35(3) places a duty on the State to publish and publicise any important information affecting the nation.

34. Article 39(1) protects the right of every person to freedom of movement.

35. Article 43(1)(a) states 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...”

36. Article 47 of the Constitution enshrines the right to fair administrative action. It provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It also states that if a person’s right is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

37. Article 48 protects everyone’s right to access justice.

38. Article 50 provides for the protection of the right to fair hearing and trial as follows:

111

“50. Fair hearing

- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
- (2) Every accused person has the right to a fair trial, which includes the right—
  - (a) to be presumed innocent until the contrary is proved;
  - (b) to be informed of the charge, with sufficient detail to answer it;
  - (c) to have adequate time and facilities to prepare a defence;
  - (d) to a public trial before a court established under this Constitution;
  - (e) to have the trial begin and conclude without unreasonable delay;
  - (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
  - (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
  - (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - (i) to remain silent, and not to testify during the proceedings;
  - ....
  - (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

39. Article 51 enshrines the rights of persons who are detained to the extent that they retain all the rights in the bill of rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.

40. Article 53 provides for the right of the child. Specifically, sub-article (1)(c) enshrines the child’s right to health care and sub-article (2) that a child’s best interest is of paramount importance in every matter concerning the child.

112

**D. APPLICABLE LEGISLATIVE PROVISIONS**

i. Persons Deprived Of Liberty Act No. 23 of 2014

41. This Act was enacted to give effect to Articles 29(f) and 51 and connected purposes. Section 2 of this Act provides for the following critical definitions:

“detained person” means a person deprived of liberty under authority of the law either by a law enforcement official for the purpose of investigation of a crime or so as to be charged with an offence or by a private person where there is reasonable suspicion that a crime has been committed; or a person deprived of liberty by order of or under de facto control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship or for protection;

“person deprived of liberty” means a person who has been arrested, held in lawful custody, detained, or imprisoned in execution of a lawful sentence;

42. Section 3 provides for the rights of persons deprived of liberty and subsection 1 states that such persons are entitled to the protection of all fundamental rights and freedoms subject to such limitations as may be permitted under the Constitution.
43. Section 5 states that every person deprived of liberty must be treated in a humane manner and with respect of their inherent human dignity.
44. Section 12 provides for the right to reasonable conditions with subsection 1 stating that a person deprived of liberty must not be confined to crowded conditions.
45. Section 13 states that a person in liberty has a right to a nutritional diet.
46. Section 14 deals with the right of deprived persons to decent bedding and clothing.
47. Section 15 protects the right to health care of persons deprived of liberty. It reads:

113

"A person detained, held in custody or imprisoned is, on the recommendation of a medical officer of health, entitled to medical examination, treatment and healthcare, including preventive healthcare."

48. Confidentiality to health information of persons deprived of liberty is provided in Section 16.

It states that:

"(1) A person deprived of liberty has a right to confidentiality regarding his or her health status.

(2) Notwithstanding the provisions of subsection (1), a medical officer of health shall disclose to the law enforcement official in charge of an institution, health information of a person deprived of liberty which relates to infectious or communicable diseases in order to—

- (a) facilitate effective health care for the person deprived liberty; and
- (b) facilitate the protection of other persons deprived of liberty and the officers under whose charge such persons are accommodated."

ii. Public Order Act, Cap 56 of the Laws of Kenya

49. Section 8 of the Public Order Act provides for curfew orders and curfew order restrictions and the offence and penalties for breach of the said orders it states as follows:

"(1) The Cabinet Secretary, on the advice of the Inspector-General of the National Police Service may, if he considers it necessary in the interests of public order so to do, by order (hereinafter referred to as a curfew order) direct that, within such area and during such hours as may be specified in the curfew order, every person, or, as the case may be, every member of any class of persons specified in the curfew order, shall, except under and in accordance with the terms and conditions of a written permit granted by an authority or person specified in the curfew order, remain indoors in the premises at which he normally resides, or at such other premises as may be authorised by or under the curfew order.

.....

114

(6) Any person who contravenes any of the provisions of a curfew order or any of the terms or conditions of a permit granted to him under subsection (1) of this section shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment.”

iii. Health Act No. 21 of 2017

50. Section 2 of the Health Act defines health as a *state of complete mental, physical and social well-being and not merely the absence of disease or infirmity.*

51. Section 3 provides for the objects of the Health Act as:

“(b) protect, respect, promote and fulfil the health rights of all persons in Kenya to the progressive realization of their right to the highest attainable standard of health, including reproductive health care and the right to emergency medical treatment;

(c) protect, respect, promote and fulfil the rights of children to basic nutrition and health care services contemplated in Articles 43(1)(c) and 53(1)(c) of the Constitution;

(d) protect, respect, promote and fulfil the rights of vulnerable groups as defined in Article 21 of the Constitution in all matters regarding health.”

52. Section 4 provides for the responsibility for health as follows:

“It is a fundamental duty of the State to observe, respect, protect, promote and fulfill the right to the highest attainable standard of health including reproductive health care and emergency medical treatment by inter alia—

(a) developing policies, laws and other measures necessary to protect, promote, improve and maintain the health and well-being of every person;”

53. Section 5(1) and 5(2) provide for the following standards of health:

“(1) Every person has the right to the highest attainable standard of health which shall include progressive access for provision of promotive, preventive, curative, palliative and rehabilitative services.

115

(2) Every person shall have the right to be treated with dignity, respect and have their privacy respected in accordance with the Constitution and this Act.”

54. Section 9(2) mandates a health care provider to take all reasonable steps to obtain the user’s informed consent to treatment.

55. Section 11 provides for confidentiality when offering health care services. It reads:

“(1) Information concerning a user, including information relating to his or her health status, treatment or stay in a health facility is confidential except where such information is disclosed under order of court or informed consent for health research and policy planning purposes.

(2) Subject to the Constitution and this Act, no person may disclose any information contemplated in subsection (1) unless—

- (a) the user consents to such disclosure in writing in the prescribed form;
- (b) a court order or any applicable law requires such disclosure; or
- (c) non-disclosure of the information represents a serious threat to public health.”

56. Section 112 provides for the Cabinet Secretary’s power to make regulations and states:

“The Cabinet Secretary in consultation with the Regulations. Director General shall make regulations generally for the better carrying out of the provisions of this Act and without limiting the generality of the foregoing, the Cabinet Secretary may make regulations for—

...

- (f) communicable and non-communicable diseases;
- (g) notifiable medical conditions; . . .”

iv. Public Health Act, CAP 242 of the Laws of Kenya

57. Section 71(1)(c)-(d) of the Public Health Act authorizes the Cabinet Secretary to make orders for prevention the introduction of infectious disease in Kenya, including

(c) impose requirements or conditions as regards the medical examination, detention, quarantine, disinfection, vaccination, isolation or medical surveillance or otherwise of persons entering, or the examination, detention or disinfection or otherwise of such persons as aforesaid or of articles or things introduced into Kenya at its inland border or any part thereof;

(d) apply with or without modifications any particular provisions of this Part to persons, animals, articles or things entering or introduced into or departing or removed from Kenya by means of aircraft."

58. Section 27 of the Public Health Act provides for isolation of persons who have been exposed to an infection:

"Where, in the opinion of the medical officer of health, any person has recently been exposed to the infection, and may be in the incubation stage, of any notifiable infectious disease and is not accommodated in such manner as adequately to guard against the spread of the disease, such person may, on a certificate signed by the medical officer of health, be removed, by order of a magistrate and at the cost of the local authority of the district where such person is found, to a place of isolation and there detained until, in the opinion of the medical officer of health, he is free from infection or able to be discharged without danger to the public health, or until the magistrate cancels the order."

59. Section 36 of the Public Health Act authorizes the Cabinet Secretary to make rules when Kenya appears to be threatened by any formidable endemic, epidemic or infectious disease and states that:

"... the Minister may make rules for all or any of the following purposes, namely—

- (a) the speedy interment of the dead;
- (b) house to house visitation;
- (c) the provision of medical aid and accommodation, the promotion of cleansing, ventilation and disinfection and guarding against the spread of disease;
- (d) preventing any person from leaving any infected area without undergoing all or any of the following, namely, medical examination, disinfection, inoculation, vaccination or revaccination and passing a specified period in an observation camp or station;



117

- (e) the formation of hospitals and observation camps or stations, and placing therein persons who are suffering from or have been in contact with persons suffering from infectious disease;
- (f) the destruction or disinfection of buildings, furniture, goods or other articles, which have been used by persons suffering from infectious disease, or which are likely to spread the infection;
- (g) the removal of persons who are suffering from an infectious disease and persons who have been in contact with such persons;
- (h) the removal of corpses;
- (i) the destruction of rats, the means and precautions to be taken on shore or on board vessels for preventing them passing from vessels to the shore or from the shore to vessels, and the better prevention of the danger of spreading infection by rats;
- (j) the regulation of hospitals used for the reception of persons suffering from an infectious disease and of observation camps and stations;
- (k) the removal and disinfection of articles which have been exposed to infection;
- (l) prohibiting any person living in any building or using any building for any other purposes whatsoever, if in the opinion of the medical officer of health any such use is liable to cause the spread of any infectious disease; and any rule made under this paragraph may give the health officer or a medical officer of health power to prescribe the conditions on which such a building may be used;
- (m) any other purpose, whether of the same kind or nature as the foregoing or not, having for its object the prevention, control or suppression of infectious diseases . . .”

60. Section 164 of the Public Health Act is a general penal provision and states that:

“Any person who is guilty of an offence under or of any contravention of or default in complying with any provision of, this Act shall, if no penalty is expressly provided for such offence, contravention or default, be liable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding six months, or to both and, if the offence, contravention or default is of a continuing nature, to a further fine not exceeding one thousand shillings for each day it continues.

118

v. Access to Information Act, No. 31 of 2016

61. Section 2 of this Act provides for the following definitions:

“information” includes all records held by a public entity or a private body, regardless of the form in which the information is stored, its source or the date of production”.

“personal information” means information about an identifiable individual, including, but not limited to—

(a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, age, physical, psychological or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved ...”

62. Section 3 of the Act states that the object of the Act include:

“(b) provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;

(d) promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information. . .”

63. Section 4 of the Act reads:

“(1) Subject to this Act and any other written law, every citizen has the right of access to information held by—

(a) the State; and

(b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

(2) Subject to this Act, every citizen's right to access information is not affected

by—

119

- (a) any reason the person gives for seeking access; or
- (b) the public entity's belief as to what are the person's reasons for seeking access."

64. Section 5 provides for the disclosure of information held by public entities and Section 5(1) states that subject to Section 6, a public entity has the duty to:

"(c) publish all relevant facts while formulating important policies or announcing the decisions which affect the public, and before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles;

(d) provide to any person the reasons for any decision taken by it in relation to that person . . ."

vi. *Fair Administrative Action Act No. 4 of 2015*

65. Section 2 of the Fair Administrative Action Act defines administrative action to mean:

"administrative action" includes—

- (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates".

66. Section 4 (1) and (2) provide that every person has the *right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair* and that every person has the right to be given *written reasons for any administrative reasons* taken against them.

67. Section 4(3) states that where an administrative reason is likely to adversely affect the rights and fundamental freedom of a person, the administrator must provide the person affected by the decision—

- “(a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 6;
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.”

68. Section 5 places a duty on an administrator whose actions are likely to adversely affect the legal rights or interests of a group of persons to—

- “(a) issue a public notice of the proposed administrative action inviting public views in that regard;
- (b) consider all views submitted in relation to the matter before taking the administrative action;
- (c) consider all relevant and material facts; and
- (d) where the administrator proceeds to take the administrative action proposed in the notice—
- (i) give reasons for the decision of administrative action as taken”.

## **E. REGULATIONS**

*i. Public Health (Prevention, Control and Suppression of COVID-19) Regulations, 2020 (Legal Notice No. 49)*

69. Rules 10(1) and (2) defines and lists the offence of escaping isolation or quarantine and Rule 10(3) provides for the penalty for the offence as follows:

- “(3) A person who commits an offence under subparagraph (1) is liable, on conviction, to imprisonment for a term not exceeding two months or a fine not exceeding twenty thousand shillings.”

121

70. Rule 12 (4) provides that “where any person from a declared infected area is placed under observation or surveillance, the period for observation or surveillance shall be fourteen days.”
71. Rule 13 (1) states that “[s]ubject to the conditions to be specified by the Cabinet Secretary by notice in the gazette, the cabinet secretary may, depending on the circumstances in an area, whether designated as an infected area or not, designate a private health facility, an educational facility, hotel or any other establishment as he may deem appropriate as a designated facility for purposes of handling and or treatment of COVID-19 patients.”
- i. *The Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 (Legal Notice No. 50)*
72. Rule 2 defines a ‘law enforcement officer’ to include ‘a police officer, National Government Administration Officer or medical officer of health’.
73. Rules 4 to 8 provide for various definitions of restrictions and offences related to: movement of persons, transport services, hygiene conditions, prohibition of gatherings, and disposal of bodies.
74. Rule 9 provides for penalties for persons who contravene either rules 4 (1), (2), (3) or 5 (1), (2), (3), (4) in that they “may have their vehicle detained in a police station or any other place as the Inspector-General of the National Police Service may designate, pending their arraignment in court and/or for the duration of the restriction period”.
75. Rule 11 stipulates the general offence for violation of the rules in general as:
- “A person who commits an offence under these Rules shall, on conviction, be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a period not exceeding six months or both.”

122

ii. *Public Health (COVID-19 Restriction of Movement of Persons and Related Measures Variation Measures) No. 2 of 2020 (Legal notice No. 58)*

76. Rule 2 provided for the variation of the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 by inserting sub rule 4A which defines the restriction in the transport services relating to ferries and also deleting Rule 5(5) and substituting it with a new Rule 5(5) which creates an offence if someone violates the restriction of transport services in rule 4 A.

#### **F. APPLICABLE INTERNATIONAL LAW**

i. *Right to the highest attainable standard of health*

77. The Universal Declaration of Human Rights affirms in Article 25 (1) that “[e]veryone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services”.

78. The International Covenant on Economic, Social and Cultural Rights is comprehensive on the right to the highest attainable standard of health. Article 12 reads:

“1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

79. Article 24 of the Convention on the Rights of the Child of 1989 enshrines the State’s duty to provide the child with the highest attainable standards of health.

123

80. Article 16 of the African Charter on Human and Peoples' Rights of 1981 (Banjul Charter) also protects the right to health as follows:

“1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”

*ii. Right to liberty and security of the person*

81. Article 9 of the International Covenant on Civil and Political Rights provides for the right to liberty.

82. Article 6 of the Banjul Charter states that “*every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.*”

83. Article 7 (2) of the Banjul Charter prohibits any penalty being inflicted for an offence for which no provision was made at the time it was committed.

84. Article 11 (2) of the Universal Declaration of Human Rights provides that:

“[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

**G. FACTS IN SUPPORT OF THE PETITION**

85. On 30<sup>th</sup> January 2020, the World Health Organization (WHO) declared Covid-19 disease a public health emergency of international concern.

124

86. On 28<sup>th</sup> February 2020, the President established the National Emergency Response Committee on Coronavirus and made the 2<sup>nd</sup> Respondent, Chairperson and the 3<sup>rd</sup> Respondent a member.
87. On 11<sup>th</sup> March 2020, WHO declared Covid-19 a pandemic. Countries around the world intensified steps to stop the spread of the virus within their borders. Kenya was no exception.
88. On 13<sup>th</sup> March 2020, the 2<sup>nd</sup> Respondent announced Kenya's first case of Covid-19, a woman who likely contracted the virus while travelling abroad.
89. On 22<sup>nd</sup> March 2020, the 2<sup>nd</sup> Respondent orally made an announcement aired on Kenyan television stations in which he, on behalf of the National Emergency Response Committee gave the following directives, inter alia:
- “All international flights are suspended effective Wednesday the 25<sup>th</sup> at midnight and the only exception to this are cargo flights whose crew must observe strict guidelines.
- Those coming into the country between now and Wednesday be they Kenyans or foreigners will undergo mandatory quarantine at a government designated facility at their own expense.
- Countries wishing to evacuate their nationals must make arrangements to do so within this period.
- Kenyans who are currently in foreign countries and would not have come back within the said period are advised to observe the guidelines issued in their respective countries.
- Whereas we had allowed Kenyans and foreigners with valid permits to come into the country we have observed there are those who are not observing self-quarantine protocols. Consequently, NERC [National Emergency Response Committee] has decided that all persons who violate the self-quarantine protocols will be forcefully quarantined for a full 14 days, at their cost and thereafter, arrested and charged in accordance with the Public Health Act...”
90. Based on the above directive any person who arrived by air into Kenya from 22<sup>nd</sup> March 2020 was required to enter into self-paid mandatory quarantine.



125

91. Therefore, between 22<sup>nd</sup> March 2020, when the directive was issued and 25<sup>th</sup> March 2020 at midnight, several flights arrived in Kenya, carrying many passengers.
92. On 23<sup>rd</sup> March 2020, a number of flights landed from different countries-some which had reported people with Covid-19 infections while others came from countries with no reported infections. The passengers came in their hundreds and there was great confusion at the arrival terminal on how the quarantine measures were to be imposed.
93. They waited for several hours before being cleared for admission into the country at the immigration counters. At that time there was still no official communication as to the procedure for mandatory quarantine. The same situation continued after the immigration and customs clearance, at the baggage claim area where there was no written communication as to where they would go for mandatory quarantine.
94. For several hours, the passengers were not allowed outside of the arrivals terminal; and information from government officials was not availed on the process of mandatory quarantine or the facilities that were available for them.
95. Several hours later officials came with a list of 3 government facilities {Kenyatta University (KU), Kenya Medical Training College, Nairobi (KMTC) and Kenya School of Government (KSG)} as well as other government-approved facilities available for mandatory quarantine. The number of government-approved facilities that were available on the first two days were limited and the rest were mostly expensive four to five-star rated hotels such as Crowne Plaza, Boma Inn, Ole Sereni and Four Points by Sheraton. Passengers were required to pay for quarantine at all government-approved facilities.
96. The government facilities were either fully booked or set up in a manner that required passengers to share common facilities like bathrooms and toilets. As a result, some passengers feared that these government facilities were not safe for quarantine because they risked exposing those who were not infected, with those who were.

97. Once informed of the quarantine facilities, the passengers, some coming from countries with no reports of people who had tested positive for COVID-19 and others from countries with numerous positive reports, were then crammed into buses with their luggage. The airport personnel or government authorities did not observe physical distancing practices and some did not have face masks. They made it difficult for the passengers to observe such practices, as well.
98. On 25<sup>th</sup> March 2020, the 3<sup>rd</sup> Respondent, the Cabinet Secretary in charge of the Ministry of Interior and Coordination of National Government enacted an order, under Section 8 of the Public Order Act issuing a nation-wide curfew between 7.00PM and 5.00 AM.
99. The 8<sup>th</sup> and 9<sup>th</sup> Petitioners and other civil society members wrote a joint advisory dated 28<sup>th</sup> March 2020, titled “Advisory Note on Ensuring a Rights-Based Response to Curb the Spread of COVID-19: People - not Messaging – Bring Change” addressed to the Minister of Health in which they stated their concerns. This note raised among other concerns, that the implementation of the government’s directive of mandatory quarantine and isolation of people affected by COVID-19 was uncoordinated, unplanned and not guided by any policy or guidelines.
100. It also raised concerns as to:
- (i) what measures were being put in place to protect workers at such facilities from infection; and
  - (ii) why citizens were being forced to incur costs of isolation at these hotels.
101. The same joint advisory also noted that on 27<sup>th</sup> March 2020, a person under mandatory quarantine died in Kiti Quarantine centre in Nakuru County and there was need to investigate the death and determine if the centres are fit for purpose and meet the requirements to ensure individual and public health.

102. On 3<sup>rd</sup> April 2020, the Ministry of Health published on its website the COVID-19 Mandatory Quarantine Site Protocols: Interim Guidelines. This document states at p. 3 that:
- “The possible quarantine settings include hotels, dormitories, other facilities catering to groups, or the home of the contact. Regardless of the setting, an assessment must ensure that the appropriate conditions for safe and effective quarantine are being met including linen processing and laundry. The designated centres are housing persons who have arrived in the country from countries with confirmed COVID-19 cases or persons who may need to be confined because they have been in contact with a confirmed COVID-19 case in the country.”
103. It further provided at p. 7 that:
- “Quarantine for COVID-19 is recommended for individuals who have been directly exposed to the virus or who have travelled to areas where there are large numbers of people infected in order to prevent further transmission.”
104. On 3<sup>rd</sup> April 2020, the Ministry of Health also published the COVID 19 Mandatory Quarantine Protocols, dated 27 March 2020 that was similar to the interim protocols. It included the following information:
- p. 11- All clients shall be quarantined in a well-ventilated single- room. (With open windows and an open door).
- p. 14- As observed in Wuhan, the mean incubation period for COVID-19 was 5.2 days for the majority of the cases. The Ministry of health has therefore planned for testing from Day 5 of quarantine.
105. The latest protocols also provided the following information to those in mandatory quarantine at p. 14:
- “5. Results will be delivered within 24 hours after sample collection.*
- 6. Positive results will be communicated to the suspected case and transferred to the isolation facility for treatment.*
- 7. Negative results will be relayed to their owners.*
- 8. Following the first negative test, the persons will be released into self-quarantine as per the self-quarantine protocols.*

128

9. *All in self-quarantine will be expected to continue daily monitoring of COVID 19 symptoms: Fever, cough, shortness of breath*
10. *Those found to be negative will continue self-quarantine till 14 days after discharge from the mandatory quarantine sites are over.*
11. *All people in quarantine should have a repeat test on day 10 of quarantine.*
12. *Anyone who develops symptoms during the period of quarantine should be tested for COVID-19.*
13. *Close contacts of anyone found to have positive results of COVID 19 will go into self-quarantine."*

106. Despite the above being set down by the Ministry of Health, which provided for testing from the 5<sup>th</sup> day and a repeat test on the 10<sup>th</sup> day of quarantine, most of the quarantine facilities only tested the clients on the 10<sup>th</sup> day of being placed in mandatory quarantine. Some of those tested also never received any written results of their tests. For some there was no exercise of confidentiality when releasing results but rather public announcements of the number of tests done and the number of positive and negative results in that facility.
107. On 3<sup>rd</sup> April, 2020, the 2<sup>nd</sup> Respondent published the Public Health (Prevention, Control and Suppression of COVID-19) Regulations, 2020 (Legal Notice No. 49). These regulations were only published after all the passengers were already in mandatory quarantine. It stated in Rule 12(4) that quarantine is limited to 14 days.
108. On April 4<sup>th</sup> 2020, as most of the passengers were entering the final day of the 14-day mandatory quarantine, the Ministry of Health changed its protocol. The Ministry of Health orally made a public announcement that those people who had been detained at the facilities for 14 days and tested negative would be detained in mandatory quarantine at their own expense for an additional 14 days, if there was a person who tested positive for COVID-19 in the facility. This was despite the fact that the new protocol was not earlier communicated to those in quarantine and they were abiding to what was told to them earlier.

129

109. The new, orally communicated protocol also contradicted the main guidelines, which stated that those who tested negative would be sent home for self-quarantine for 14 days after completion of their mandatory quarantine.
110. On 3<sup>rd</sup> April 2020, the 2<sup>nd</sup> Respondent published Public Health (Prevention, Control and Suppression of COVID-19) Rules, 2020 - the Prevention, Control and Suppression Rules. Rule 4 authorized a "medical officer of health or public health officer" to inspect the premises of anyone who tests positive for COVID-19 and force all the people in that premises to either be removed to a health care facility if they test positive for COVID-19, be detained in a quarantine facility or remain in the premises where the person was at the time of the infection. Section 10 of the Prevention, Control and Suppression Rules also makes aiding or abetting the escape from a quarantine facility a crime.
111. On 6<sup>th</sup> April, 2020, the 2<sup>nd</sup> Respondent, the Cabinet Secretary in charge of Health, published the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 - the Restriction of Movement Measures. Rule 3 of the Restriction of Movement Measures gave the 2<sup>nd</sup> Respondent the authority to designate any area in Kenya an "infected area". The Restriction of Movement Measures provides in Rules 4 and 5, for the restriction of movement of persons and limitation of transport services in an infected area. Rule 6 imposes hygiene requirements, and Rule 7 prohibits public gatherings. Rule 8 establishes requirements for the disposal of bodies of those who died as a result of COVID-19. Each of these Rules states that a violation would constitute a criminal offence.
112. Rules 9 and 11 establishes the punishments for violations of Rules 4 - 8, which included vehicles being held by the police for breach of the restriction on movement of persons and transport services for an indefinite period. And, if convicted of a violation of one of the Rules, a fine of not more than 20,000 Kenya shillings or imprisonment not exceeding 6 months or both.
113. On April 6, 2020, the 2<sup>nd</sup> Respondent published four other orders. These orders established the Nairobi Metropolitan area and the Counties of Mombasa, Kilifi, and Kwale,

130

respectively, as “restricted areas” subject to the rules set forth in the Restriction of Movement Measures.

114. On 17<sup>th</sup> April 2020, the 2<sup>nd</sup> Respondent, the Cabinet Secretary in charge of Health issued the Public Health (Restriction of movement of persons and related measures) Variation Rules, 2020 in which Rules 4A and 5(5) were inserted. These rules restricted the operation of ferry services and imposed criminal penalties for violations of those restrictions
115. However, on 20<sup>th</sup> April 2020, in spite of the measures imposed under the Public Order, Act and the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules listing the offences and penalties for breach of the offences, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed in upholding the law. Instead, the 2<sup>nd</sup> Respondent ordered that anyone in breach of the curfew orders or the Public Health Rules be arrested and detained at their own cost in mandatory quarantine. The 3<sup>rd</sup> Respondent carried out these orders, arresting and detaining individuals in quarantine facilities for regulatory violations.
116. In another public announcement on 20<sup>th</sup> April 2020, the 2<sup>nd</sup> Respondent stated that over 455 people are currently being detained in the mandatory quarantine facilities for allegedly violating the curfew orders.
117. As recently as 3<sup>rd</sup> May 2020, the Ministry of Health issued another press release given by Dr. Rashid Abdi Aman Chief Administrative Secretary in charge of Health, on behalf of the National Emergency Response Committee, stating that as a result of debates on people being held in quarantine, curfew breakers will no longer be held in government quarantine facilities and that the Inspector General of Police was directed by the committee to designate a ‘curfew breakers holding place’

## H. PARTICULARS OF CONSTITUTIONAL VIOLATIONS

- i. *Arrest and detention of persons in mandatory quarantine facilities and 'curfew breakers holding places', at their own costs for breach of curfew orders and COVID-19 related Public Health Regulations, 2020*
118. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents actions on the arrest and detainment of persons in mandatory quarantine facilities, at their own costs, for contravening the curfew orders and for offences committed under the Public Order Act and other offences under the Public Health Act (Prevention Control and Suppression of COVID 19) Regulations, 2020 as well as the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules (Public Health COVID-19, Rules), is contrary to the right to freedom and security of the person under Article 29 of the Constitution, right of arrested persons under Article 49 of the Constitution, as well as the right to a fair trial under Article 50 of the Constitution.
119. The Respondents also contravened Article 10's national value and principle of rule of law, which provides that the law must be certain, that any actions carried out by the State must be authorised by law, and that the State and every person must act in accordance with the law.
120. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents actions blatantly disregard Section 8(6) of the Public Order Act which already provides for the penalty for persons found guilty of offences contrary to curfew orders as "*liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment.*"
121. In addition, by directing that those who commit offences under the COVID-19 related rules under the Public Health, be placed in mandatory quarantine at their own cost, the 2<sup>nd</sup> Respondent is contravening the same rules which he enacted that provide for specific and general penalties for the violation of the rules; and in contravention of the principle that there should be no punishment without a law.
122. Specifically, Rule 10(3) of the Public Health (Prevention, Control and Suppression of COVID-19) Regulations, 2020 provides for the penalty for the offence of escaping isolation and quarantine being liable, on conviction, to imprisonment for a term not exceeding two months or a fine not exceeding twenty thousand shillings. Additionally, Rule 15(1) provides

132

for a general penalty for any contravention of the provisions of the rules to imprisonment for a term not exceeding six months, or to a fine not exceeding twenty thousand shillings, or both. Rule 9 of the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020, provides for the penalty for contravening offences related to the restriction of movement of persons and transport services - that such persons may have their vehicle detained in a police station or any other place determined by the Inspector General of the National Police Service may designate, pending their arraignment in court and/or for the duration of the restriction period. Rule 11 provides for the general violation of these rules, that on conviction, a person will be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a period not exceeding six months or both.

123. The above penalties are also subject to a conviction following a finding that a person is guilty of committing an offence. This can only be done after the arrest and criminal trial has taken place. Therefore, the Respondents' denial of such a person's right to access Court and to be heard before a court of law and be convicted of such an offence is a violation of the rights to and of: access justice under Article 48; arrested persons under Article 49(1); a fair hearing and trial under Article 50(1); be free from degrading treatment under Article 29(f); as well as the right of detained persons under Article 51.
124. Because these individuals are being held for allegedly violating laws that impose imprisonment of not more than 6 months, their detention violates Article 49(2) of the Constitution.
125. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' actions are also contrary to section 8(6) of the Public Order Act and Regulation 10(3) of the Public Health (Prevention, Control and Suppression of COVID-19) Regulations, 2020 and Rules 9 and 11 of the Public Health (Restriction of Movement of Persons and other related measures) Rules, 2020. The placing of people in mandatory quarantine as a form of punishment is also unreasonable and detrimental to the fight against the pandemic and any measures taken to lessen the economic impact of the pandemic on people and their families.
126. The move to convert the quarantine centres into detention facilities and the creation of 'curfew breakers holding places' is unconstitutional as it violates the right of access to justice



and to a fair trial, this additionally violates the rule of law. It further undermines the very essence of mandatory quarantine. Restrictions of this nature must be carried out in accordance with the dictates of the law and must be strictly necessary to achieve the legitimate aim.

127. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' actions do not meet the requirements of limitation of rights as set out in Article 24 of the Constitution.

128. These constitutional violations have resulted from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' failure to act within the bounds of law—some of which, they themselves, made. Yet, whatever the scope of their law-making authority, no law authorises them to use this form of punishment for a penal offence and, therefore, the limitation of any rights as a result is unjustifiable in an open and democratic society.

129. They are also acting *ultra vires* and in violation of the right to fair administrative action under Article 47 of the Constitution.

130. In addition, under Article 25 of the Constitution, the right to fair trial cannot be limited.

*ii. Implementation of the mandatory quarantine protocols*

131. This Petition does not challenge the 2<sup>nd</sup> Respondent's authority to issue quarantine guidelines. The manner in which the mandatory quarantine was and is being implemented, however, violates Articles 21, 27, 28, 29, 31, 35, 39, 47, 43(1)(a) and 53 of the Constitution.

a) Article 21- State's duty

132. The 2<sup>nd</sup> Respondent's failure to plan and prepare for the rolling out of the self-paid mandatory quarantine procedures caused the 1<sup>st</sup>-7<sup>th</sup> Petitioners and other passengers from several countries to be crowded together at the arrival terminal of JKIA. The passengers had to wait for assistance, with no space or facilities to allow them to physically distance in line with government recommendations and best practices. This overcrowding and lack of regard for the safety of the passengers continued when they were transported to their mandatory quarantine facilities, when they were forced into crowded lines and placed in crowded busses.

134

Thereby increasing the risk of exposure and infection, a violation of the right to health and defeating the very purpose of preventing the spread of the virus to the larger public.

133. The state's inaction and failure to prepare is in violation of Article 21(1), which places the duty on the State and every organ to observe, respect, promote and fulfil the rights in the Bill of Rights. The State had an affirmative duty to put measures in place to protect the health and safety of the passengers by ensuring there was physical distancing and arranging a smooth transition from the arrival terminal to the buses, and then to the facilities.
134. In particular, the state had a positive duty to protect the passengers from third parties, in this instance other passengers who could cross-infect them if they had contracted COVID-19, which was a risk factor considering that hundreds of passengers were crowded in a small place and were prevented from leaving the airport for hours as they waited for transport. And, once transport arrived, passengers were packed in buses to be taken to the mandatory quarantine facilities. The government's treatment of the passengers constituted a threat to the right to the highest attainable standard of health provided in Article 43(1)(a) of the Constitution, which includes the right to be free from interference with one's health.
135. Because of the highly contagious nature of the Coronavirus, potentially exposing hundreds of people to it also threatens the health and safety of all Kenyans, not just the passengers who were directly exposed defeating the very essence of the objectives of the Public Health Act.
136. Placing people in mandatory quarantine facilities while, at the same time, failing to promote their right to health by ensuring that measures are put in place to separate the passengers and move them in a systematic manner to the quarantine facilities was both retrogressive, and counterproductive. It was therefore contrary to progressively realizing the right to the highest standard of health under Article 21(2) of the Constitution and Section 4 of the Health Act.
137. The 2<sup>nd</sup> Respondent also had a duty to ensure that third parties such as the government-approved facilities for mandatory quarantine such as hotels did not violate rights of persons in mandatory quarantine. M.W.M, avers that in the hotel where she was under

135

mandatory quarantine there was suspension of services because some of those in the quarantine facilities had failed to pay the bills. This was also a violation of the rights to dignity and humane treatment of those in quarantine.

b) Article 28 and 29(f) rights to dignity and humane treatment

138. The State also failed to abide by Article 29(f), which bound it to ensure that those in mandatory quarantine be treated in a dignified and not in an inhumane and degrading manner.
139. This was especially true for the case for Petitioner K.F, who was sprayed with unknown chemicals by Ministry of Health officials without her consent while in quarantine. The Ministry of Health officials told K.F. that they were 'decontaminating' them as well as the area, and that the chemicals were harmless. This was inhuman and degrading treatment that violated the right to dignity.
140. Further placing people in quarantine without thereafter making efforts to learn their health background and making provision to cater to any necessary health concerns or lack of provision of basic sanitary essentials at the quarantine centers to protect their dignity goes against the very same right to dignity.
141. The 2<sup>nd</sup> Respondent also violated Section 5(2) of the Health Act, which states that every person shall have the right to be treated with dignity, respect and have their privacy protected, and Section 9(2) of the Health Act which requires that health care providers must take all reasonable steps to obtain the user's informed consent to treatment.
142. C.M and her 9-year-old daughter P.M and F.A also aver that when they arrived in Kenya, the only lists of quarantine facilities available were four and five star rated hotels which they could not afford as government facilities were few and full. As a result, because the 2<sup>nd</sup> Respondent failed to offer other cheaper facilities they were forced to sleep on the airport arrivals terminal floor for several hours and this was in violation of their right to dignity and to be treated in a humane manner. This is also a violation the constitutional principle that a child's best interest are of paramount importance in every matter concerning the child. This also violated their rights of detained persons under Article 51 and sections 12 to 15 of the Persons Deprived of Liberty Act, 2014.

136

c) Article 43- the right to the highest attainable standard of health

143. The State also failed in its duty to ensure that the mental health of those in mandatory quarantine was monitored and treated. Section 2 of the Health Act defines health to mean *state of complete mental, physical and social- well-being and not merely the absence of disease or infirmity*. The protocols on quarantine stated that the officials stationed at the quarantine facilities, mostly nurses, were to offer psychosocial support. Instead, they concentrated on the physical health of those in quarantine. Even if they were to have met their obligations, the nurses did not have the qualifications to assess the mental health of those in quarantine. This failure to attend to the psychological cost of quarantine violated their rights to the highest standard of health.
144. The 2<sup>nd</sup> Respondent's failure to provide proper, timely and adequate information on the health status and medical results of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners who were in mandatory quarantine was a violation of their right to access to information under Article 35 of the Constitution read with sections 4 and 5 of the Access to Information Act.
145. Further the actions of the 2<sup>nd</sup> Respondent withholding medical results caused the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners mental anguish and affected their mental health and well-being as is highlighted in their affidavits which the 2<sup>nd</sup> Respondent had a duty to protect under Article 43(1)(a) of the Constitution. Petitioners M.O.A and M.O for example stated they had not received their results and the only way they were sure they tested negative for COVID 19 was that no ambulance collected them to take them to an isolation facility as this soon became the way they were sure someone had tested positive for COVID 19.
146. The 2<sup>nd</sup> Respondent also violated the rights of the 1<sup>st</sup>-7<sup>th</sup> Petitioners through the withholding of discharge forms as well as the written medical results until the payment of bills. This was a violation of the right to health care of the highest attainable standard of health through denial of medical results.
147. It is incumbent upon the state to ensure that it foots all the cost and related expense to the health care and treatment of all persons admitted to mandatory quarantine or isolation for symptomatic people; as an obligation under Article 43(1)(a) to protect people from the

spread of COVID-19. It is unreasonable for the government (or its agents) to continue detaining people placed in quarantine or in isolation for non-payment of accommodation fees and other attendant costs for the quarantine period.

148. The 2<sup>nd</sup> Respondent also discriminated in its treatment of people in mandatory quarantine. Some of those who were in quarantine and tested negative were subject to additional 14-day extensions at their own expense each time another person in the facility tested positive for COVID-19. In other facilities, however, people who tested negative were allowed to leave even though others in their facility tested positive for COVID-19.
149. Discrimination in treatment of those in mandatory quarantine facilities is a discriminatory public health practice that violates the right to the highest attainable standard of health care. Unlike other components of the right to health care of the highest attainable standard, that are to be progressively realized, the equal treatment/ non-discrimination of similarly situated individuals requires no special expertise or additional resources. It is an immediate realisable aspect of the right to healthcare of the highest attainable standard. The 2<sup>nd</sup> Respondent was therefore in violation of the 1<sup>st</sup> -7<sup>th</sup> Petitioners' rights under Article 43 (1)(a) and 21(2) of the Constitution.
150. In addition to the unjustifiable differential treatment of persons within mandatory quarantine the State extended the quarantine period without any consultations, or provision of official review forums and demand that the individuals being quarantined incur the additional cost; this is a violation of the right to fair administrative action and the highest attainable standard of health.
151. The State had a duty to put measures in place to cater for those who were subject to mandatory quarantine. In particular, the nature of the quarantine being mandatory means that the measures are to protect not only a person's health but it's to meet a public health objective. The attainment of public health measures within the State's obligation to protect the greater public cannot be at the cost of individuals.
152. In the alternative, the State's failure to provide passengers with sufficient, safe and adequate government-run facilities which meet public health standards, meant many were

forced to choose to stay in private facilities. By forcing these passengers to pay for the accommodations without giving them suitable alternatives, violated the passengers' right to access to information, and the right to the highest standard of health care under Article 43(1)(a) of the Constitution.

d) Article 53-Rights of children

- 153. The State also violated the rights of the children in the mandatory quarantine facilities by failing to provide for guidelines or protocols on the treatment of children in quarantine facilities. This failure violated the rights and the best interest of the child, and constituted a breach of the State's duty to address the needs of the vulnerable in society such as children as required under Articles 21(3), 53(1)(c) and (2), 43(1)(c) and Section 3 (d) of the Health Act.
- 154. By requiring that children be held in mandatory quarantine at their own cost (or that of their parents) the State breached its obligation to protect and fulfill the child's right to healthcare under Article 53(1) (c) which is not subject to the clause of progressive realisation and places an immediate obligation.
- 155. One of the Petitioners, CM, had a 9-year-old daughter, PM, who suffered severe psychological effects as a result of the implementation process of the mandatory quarantine. P.M was provided no help or assistance to deal with the psychological challenges she faced after sleeping on the airport floor because the government was unable to provide mandatory quarantine facilities that were affordable and accessible to her mother.
- 156. The State has not provided guidelines to address how to support and treat children in mandatory quarantine. For children in particular, it has failed to put in place measures to deal with effects on children as a result of prolonged detention which threatens their physical and mental health and welfare.
- 157. Failing to provide guidelines for handling children in mandatory quarantine also violates Articles 21(3), 43(1)(a) and 53 (1)(c) of the Constitution to the extent that the right of the child to the highest attainable standard of health is immediately and not progressively realized.

139

e) Article 39- Freedom of movement and Article 28 dignity

158. The 2<sup>nd</sup> Respondent violated the rights of M.O.A, for subjecting him to inhumane treatment by detaining him in Kenyatta University, a public facility for failure to pay the mandatory quarantine costs. Although later on released, the University informed him that they would still pursue him for remainder of the costs. These actions by the State of forceful detention for failure to pay bills was contrary to the right to freedom of movement, the right to dignity, right to be treated in a humane manner and the right to the highest attainable standard of health care.

f) Article 35 -right to information and Article 47 fair administrative action

159. The 2<sup>nd</sup> Respondent violated the right to access to information as read with the right to health by failing to provide passengers with accessible information related to their health. It did so primarily by failing to provide the written medical results to those who had undergone COVID-19 testing and tested negative. At several mandatory quarantine facilities, the Ministry of Health officials who were delivering test results failed to issue written results to those who had tested negative for COVID-19. Instead, and for the 1<sup>st</sup>- 7<sup>th</sup> Petitioners, they announced to the groups that they had tested negative. Only those who had tested positive were informed in person and taken away by an ambulance to an isolation facility.
160. The failure to adequately notify people of test results violated their right to access to critical medical information and, in turn, prevented them from exercising their right to the highest attainable standard of health. The State's failure to inform people also violated their right to access to information in violation of Sections 4 and 5 of the Access to Information Act.
161. For passengers who arrived in the country on 23<sup>rd</sup> and 24<sup>th</sup> of March 2020, the State failed to proactively disclose and publish information on mandatory quarantine facilities in violation Articles 35(1) and (3) of the Constitution and Sections 4 and 5 of the Access to Information Act.

140

162. After passengers waited for hours for information on where they would be quarantined, some state officials orally communicated that the few government facilities had quickly filled because they were less expensive than government-approved facilities such as the Crowne Plaza, Four Points Sheraton, Ole Sereni Hotel, Boma Inn, Pride Inn and Tribe Hotel which are four and five rated hotels.
163. It was not until 24<sup>th</sup> March 2020, in the afternoon that the government published a list of 57 facilities that were available. It only did so after several complaints and after seeing passengers sleeping at the arrival terminal. The 2<sup>nd</sup> Respondent should have adhered to the Article 10 national values and principles of accountability and transparency in ensuring that all the government-run facilities and government-approved facilities were published in advance, as it affected thousands of Kenyans who were placed in mandatory quarantine to also avoid violating passengers' rights to dignity and inhumane treatment by sleeping on the airport floor.
164. The 2<sup>nd</sup> Respondent also violated the right to information on health status when it withheld the medical results and discharge forms of those who were in mandatory quarantine pending the payment of their bills. This was contrary to the state's duty to observe, protect, promote and fulfil rights. Provision of medical results cannot be pegged on meeting payment of charges for quarantine facilities – despite the government time and again stating they had entered into 'contractual relationships' with the passengers. The duty of the State was to conduct the tests and provide the results, withholding of results was a disregard of the right to health care of the highest attainable standard of health.
165. On the issue of fair administrative action, the 2<sup>nd</sup> Respondent failed to inform those who tested negative for COVID-19 but who had others who tested positive in their quarantine facility that their quarantine would be extended at their own cost. The extension violated the right to fair administrative action because: (i) petitioner M.W.M avers the announcement of this extension was done by the 2<sup>nd</sup> Respondent on television without even informing those like them who were directly affected by the announcement; (ii) it was contrary to the protocols, which stated that if they tested negative they would only serve 14 days in mandatory quarantine and be required to serve a week or two in self-quarantine.



141

166. Likewise, M.O avers that he only found out about the extension of additional days on mandatory quarantine the day before being released from mandatory quarantine into self-quarantine as he had initially thought.

g) Article 31- the right to privacy

167. The 2<sup>nd</sup> Respondent's official action of announcing the medical results containing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners' health status in public, was in violation of the right to access to information under Articles 35 as read with Sections 4 and 5 of the Access to Information Act No. 31 of 2016 and the rights to privacy under Article 31 as read with Section 11 of the Health Act No. 21 of 2017 and Sections 16(1) of the Persons Deprived of Liberty Act No. 23 of 2014.

168. In addition, the 1<sup>st</sup>-7<sup>th</sup> Petitioners have a right not to have information relating to their private affairs such as health status unnecessarily revealed. Information relating to their health, COVID-19 status, and possible continued detention in what is ostensibly a health care facility is confidential and ought not to have been announced in an open manner. For the 1<sup>st</sup>-7<sup>th</sup> Petitioners the announcement of the medical results was either done in front of other people in the quarantine facilities and for M. W.M she further averred the result was announced in a Whatsapp group by a Ministry of Health official in the facility. In making the statements in front of other persons without their permission, the State violated the Petitioners' right to privacy protected under Article 39 of the Constitution.

iii. *Limitation of rights*

169. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have acted in contravention of Article 24 of the Constitution in seeking to limit rights and fundamental without legislation, or in an unjustifiable or unreasonable manner contrary to our values as an open and democratic society.

170. At the time the passengers were landing in Kenya from 22<sup>nd</sup> March 2020 when the directives were issued, there was no law regulating placing people in mandatory quarantine at

142

their own costs, and the directives issued by the 2<sup>nd</sup> Respondent were not law. The failure to put these directives into a statutory instrument subjected to parliamentary oversight and was in violation of the rule of law and the rights to fair administrative action. Therefore, the limitation of rights created by the mandatory quarantine directives did not meet the first requirement that only a law can limit rights under Article 24 of the Constitution.

171. Further, the oral directives issued by the 2<sup>nd</sup> Respondent as well as the press releases and policies, protocols or guidelines on COVID 19 published on its website have been inconsistent and contradictory. Because the Ministry of Health does not provide signed or dated documents of its decrees, the rules it announces are inconsistent and consistently changes. Subjecting Kenyans to the information changes of the 2<sup>nd</sup> Respondent violates the right to access to reasonable and reliable information. Further, it violates Article 10's requirement that the 2<sup>nd</sup> Respondent be transparent, accountable for its decisions and exercise good governance. Finally, these type of declarations may lead to abuse by law enforcement and lead to misunderstandings by other implementers and the general public, and further violate the rights of those in quarantine.

172. Finally, the decision to punish those in alleged breach of curfew orders by placing them in mandatory quarantine is an unjustifiable and unreasonable violation of the rights under Articles 48, 49, 50 and 51. Furthermore, it is demonstrative of the 2<sup>nd</sup> Respondent's inability to act within the law as the announcement was made in a press conference, not appreciating that the 2<sup>nd</sup> Respondent is not the Cabinet Secretary in charge for the implementation of the Public Order Act. Even more critical, the idea that one can be assumed to be infected by a disease only by virtue of breaching curfew is not supported by medical science and is not logically connected to any public health purpose and threatens fundamental rights against arbitrary detention of persons.

#### **I. PRAYERS**

173. The Petitioners, therefore, humbly pray that:
- a. A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' actions of arresting and detaining in self-paid mandatory quarantine facilities and designated 'curfew breakers holding places', persons who have violated curfew orders under the Public Order Act, Cap 56 as read with the Public (State Curfew) Order, 2020 is a violation of Article 29(f), 39,

143

43(1) (a), 48, 49, 50 and 51 of the Constitution and Section 8(6) of the Public Order, Act.

- b. A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' actions of arresting and detaining in self-paid mandatory quarantine, persons accused of violating the Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020 and the Public Health (Covid-19 Restriction of movement of persons and Related Measures) Rules, 2020 is contrary to the rule of law under Article 10, and violates Articles 29 (f), 43(1)(a), 49, 50 and 51 of the Constitution, as well as violates Regulation 10 of the Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020 and Regulations 9 and 11 of the Public Health (Covid-19 Restriction of movement of persons and Related Measures) Rules, 2020.
- c. An order of prohibition against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from detaining in designated 'curfew breakers holding places' and/or mandatory quarantine, persons who have been arrested for contravening the curfew orders under the Public Order Act, Cap. 56 as read with the Public (State Curfew) Order 2020.
- d. An order of mandamus compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to release persons arrested and detained in 'curfew breakers holding places' and/or mandatory quarantine for contravening the curfew orders under the Public Order Act, Cap. 56 as read with the Public (State Curfew) Order 2020 and to present such persons in court for trial in order for the court to impose sanctions in accordance to the Constitution and prescribed by law.
- e. An order of prohibition against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from detaining in designated 'curfew breakers holding places' and/or mandatory quarantine, persons who have been arrested for committing offences under the Public Health (COVID-19 Restriction of Movement of Persons and Other Related Measures) Rules, 2020 and Public Health Act (Prevention, Control and Suppression of COVID-19) Regulations, 2020.
- f. An order of mandamus compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to release persons arrested and detained in 'curfew breakers holding places' and/or mandatory quarantine for contravening the curfew orders under the Public Health (COVID-19 Restriction of Movement of Persons and Other Related Measures) Rules, 2020 and Public Health Act (Prevention, Control and Suppression of COVID-19) Regulations, 2020 and to be present such persons in court for trial in order for the court to impose sanctions in accordance to the Constitution and prescribed by law.
- g. A declaration that the directives issued by the 2<sup>nd</sup> Respondent with respect to detaining persons who broke curfew orders in mandatory quarantine at their own cost and 'curfew breakers holding places', is not a justifiable limitation of rights under Article 24 of the Constitution.
- h. A declaration that the 2<sup>nd</sup> Respondent acted *ultra vires* in issuing directives on detaining persons who have contravened the curfew orders in mandatory quarantine as well as 'curfew breakers holding places' and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent acted *ultra vires* in

144

implementing the directives, contrary to Article 47 and Sections 4 and 5 of the Fair Administrative Actions Act and the rule of law national values and principle under Article 10 of the Constitution.

- i. A declaration that the 2<sup>nd</sup> Respondents infringed the Petitioners rights and the rights of other passengers who arrived between the 23<sup>rd</sup> March and 25<sup>th</sup> March 2020 under Articles 21 and 43 (1) (a) of the Constitution as read with Sections 4 and 5 of the Health Act when it failed to put measures in place to prevent the spread of COVID 19.
- j. A declaration that the 2<sup>nd</sup> Respondent's implementation of mandatory quarantine was in violation of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners' rights under Articles 28, 29(f), 31, 39, 43(1)(a) of the Constitution
- k. A declaration that the 2<sup>nd</sup> Respondent's action of forcefully detaining the 2<sup>nd</sup> Petitioner for failure to pay bills for mandatory quarantine at a government facility contravened the 2<sup>nd</sup> Petitioner's rights under Article 29 (f), 39 and 45(1) of the Constitution.
- l. A declaration that the 2<sup>nd</sup> Respondent's failure to provide written medical results of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners for a period of more than 24 hours after testing after testing for COVID -19 was unreasonable and the announcing the medical results containing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners' health status in public, was in violation of the right to access to information under Articles 35 as read with Sections 4 and 5 of the Access to Information Act No. 31 of 2016 and the rights to privacy under Article 31 as read with Section 11 of the Health Act No. 21 of 2017 and Sections 16(1) of the Persons Deprived of Liberty Act No. 23 of 2014.
- m. A declaration that the 2<sup>nd</sup> Respondent by requiring the 1<sup>st</sup> Petitioner's child to pay for mandatory quarantine violated the child's right to healthcare under Article 53(1)(c) of the Constitution.
- n. A declaration that the 2<sup>nd</sup> Respondent's failure to provide for guidelines for the treatment, handling and management of children in quarantine facilities is a violation of the 1<sup>st</sup> Petitioner's child's rights under Article 43(1)(a), 53 (1)(c) and 53(2) of the Constitution.
- o. The 3<sup>rd</sup> Respondent issues a circular, within seven days from the date hereof, stating that the arrest and detention of persons in designated 'curfew breakers holding places' and/or mandatory quarantine facilities is prohibited.
- p. The 2<sup>nd</sup> Respondent, in consultation with the county governments and non-state actors in the health sector, within fourteen (14) days from the date hereof, revise the COVID-19 Quarantine Protocols published on 27<sup>th</sup> March 2020, so that it is compliant with the Constitution of Kenya, 2010 and that it incorporates principles from the Interim Guidance on considerations for quarantine of individuals in the context of

145

containment of coronavirus disease (COVID-19) published by the World Health Organization on 19<sup>th</sup> March 2020.

- q. An order of mandamus compelling the 2<sup>nd</sup> Respondent to develop and publicise guidelines on the care of children in quarantine facilities.
- r. An order for special damages for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners for the following costs they paid in mandatory quarantine and extended mandatory quarantine as particularised below:
  - i. C.M – Kenya Shillings One hundred and twelve thousand (Kes. 112,000)
  - ii. M.O.A – Kenya Shillings Six thousand seven hundred and eighty-five (Kes. 6,785)
  - iii. M.W.M – Kenya Shillings One hundred and sixty-nine thousand and two hundred (Kes. 169,200)
  - iv. K.F – Kenya Shillings Ninety-eight thousand (Kes. 98,000)
  - v. F.A - Kenya Shillings Ninety-eight thousand (Kes. 98,000)
  - vi. K.B - Kenya Shillings Sixty-five thousand (Kes. 65,000)
- s. An order that the 2<sup>nd</sup> Respondent pays the general damages for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners for the physical and emotional distress the petitioners underwent in mandatory quarantine and for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Petitioners emotional distress for the extension of the mandatory quarantine.
- t. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent does, within twenty-one (21) days from the date hereof, file affidavits in this Court detailing their compliance with the implementation of these orders.

146

u. Costs of this Petition and any other just and expedient order the Court may deem fit to make.

DATED at Nairobi this 5<sup>th</sup> day of MAY 2020.

ADV

ADV

**DRAWN & FILED BY:-**

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**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO..... OF 2020**

**IN THE MATTER OF THE DEFENCE OF THE CONSTITUTION UNDER ARTICLES 3, 10,  
19, 20, 22 AND 258 OF THE CONSTITUTION OF KENYA**  
**AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 19, 21, 28, 29, 31, 39,43,  
47,51 AND 53 OF THE CONSTITUTION OF KENYA, 2010**  
**AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 8(6) OF THE PUBLIC  
ORDER ACT, CAP 56 OF THE LAWS OF KENYA**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 4 AND 5 OF THE  
HEALTH ACT NO. 21 OF 2017**  
**AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 4 AND 5 OF THE  
ACCESS TO INFORMATION ACT, NO. 31 OF 2016**  
**AND**

**IN THE MATTER OF SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT  
NO. 4 OF 2015**  
**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE PUBLIC HEALTH  
(COVID 19 RESTRICTION OF MOVEMENT OF PERSONS AND OTHER RELATED  
MEASURES) RULES, 2020 AND PUBLIC HEALTH ACT (PREVENTION, CONTROL AND  
SUPPRESSION OF COVID 19) REGULATIONS, 2020**

**BETWEEN**

- C.M (Suing on her on behalf and on behalf of PM (Minor) as parent..... **1ST PETITIONER**
- M.O.A.....**2ND PETITIONER**
- M.O.....**3RD PETITIONER**
- M.W.M.....**4TH PETITIONER**
- K.F.....**5TH PETITIONER**
- F.A.....**6TH PETITIONER**
- K.B.....**7TH PETITIONER**
- KENYA LEGAL & ETHICAL ISSUES NETWORK ON HIV & AIDS (KELIN)..... **8TH PETITIONER**
- KATIBA INSTITUTE.....**9TH PETITIONER**

**AND**

- HON. ATTORNEY GENERAL ..... **1ST RESPONDENT**
- THE CABINET SECRETARY, HEALTH ..... **2ND RESPONDENT**
- THE CABINET SECRETARY, INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT.....**3RD RESPONDENT**

**AFFIDAVIT IN SUPPORT OF THE PETITION**

I, **ALLAN ACHESA MALECHE**, of P.O.BOX 112 – 00202, Nairobi, a male adult Kenyan of sound mind residing and working for gain in Nairobi County within the Republic of Kenya, and the Executive Director of the 8<sup>th</sup> Petitioner herein whose address for purposes of Petition is care of KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV AND AIDS, 4<sup>th</sup> Floor, Somak Building, Mombasa Road P.O. Box 112 – 00202, Nairobi, do hereby make a solemn oath and state as follows;

1. **THAT** I am an advocate of the High Court of Kenya and the Executive Director of the Kenya Legal and Ethical Issues Network of HIV and AIDS (KELIN) who has the joint conduct of this matter on behalf of the 1<sup>st</sup> – 8<sup>th</sup> Petitioners thus competent to swear this Affidavit.
2. **THAT** I have the authority of the Board of Directors to swear this Affidavit on behalf of KELIN herein.
3. **THAT** I am conversant with the contents of the Petition, I have interacted with the Petitioners, I fully understand the issues in question and I further adopt the contents of the Petition filed herein as if the same were set out *seriatim*.
4. **THAT** KELIN is a non- partisan, non-profit making and non- governmental organization duly registered under the Non-Governmental Organizations Act, working to protect and promote health related human rights in Kenya.
5. **THAT** the mandate of KELIN is achieved by facilitating access to justice for those who have faced human rights violations, creating partnerships with key stakeholders, building capacities of communities to know their rights and analysing laws and policies to ensure they integrate human rights principles.
6. **THAT** KELIN's vision is the full enjoyment of health related human rights for all while its mission is to promote and protect health related rights for all.
7. **THAT** following the global outbreak of the coronavirus disease ("COVID-19") pandemic, and the reporting of the first case in Kenya on 12<sup>th</sup> March 2020, the Kenyan government introduced measures aimed at containing the virus. Some of the measures introduced include: travel restrictions, self-quarantine, mandatory quarantine, closure of schools and institutions of higher learning, work from home advisories, curfew, movement restrictions, among others.
8. **THAT** one such measure as announced on 22<sup>nd</sup> March 2020 by the Cabinet Secretary for Health was a directive abolishing self-quarantine and instituting mandatory quarantine for all



individuals returning to the country. (Annexed and Marked "AM-001" is a copy of the Press Statement by Cabinet Secretary for Health dated 22<sup>nd</sup> March 2020).

9. **THAT** the instant petition acknowledges, as guided by the World Health Organization (WHO), that quarantine is a public health measure that aims to achieve the goal of preventing introduction of the virus to new areas or to reduce human-to-human transmission in areas where the virus that causes COVID-19 is already circulating. Further, that quarantine involves the restriction of movement, or separation from the rest of the population, of healthy persons who may have been exposed to the virus, with the objective of monitoring their symptoms and ensuring early detection of cases (Annexed and Marked "AM-002" is WHO's interim guidance dated 19<sup>th</sup> March 2020 on quarantine of individuals in the context of containment for coronavirus disease (COVID-19).
10. **THAT** self-quarantine is described on the Ministry of Health's website as the act of any person who may have been exposed to COVID-19 separating themselves for 14 days to monitor if they develop symptoms. This was initially recommended for any person who had travelled into Kenya 14 days prior to its publication. Mandatory quarantine is distinguished from self-quarantine in that it is non-voluntary and it takes place at a government designated facility. (Annexed and Marked "AM-003" is a screen shot taken on 3<sup>rd</sup> May 2020 at 11.50 AM from the Ministry of Health's website under the tab of Self-Quarantine).
11. **THAT** both self-quarantine and mandatory quarantine serve the same objective which is to prevent or curb the spread of an infectious disease, in this case COVID-19.
12. **THAT** the measure abolishing self-quarantine and imposing mandatory quarantine was not accompanied by reasons and it remains unclear why the Ministry of Health opted to impose mandatory quarantine on people traveling into Kenya while less restrictive measures were available.
13. **THAT** I acknowledge that quarantine is an important public health measure, and the decision to introduce the same in Kenya was to some extent necessary, if only as a component of a comprehensive public health response to COVID-19.
14. **THAT** quarantine is inevitably a restriction on a person's liberty and freedoms, even when implemented to achieve important goals such as the preservation of life and promotion of public health. While I acknowledge the value of the measure in principle, I aver that its implementation in compliance with the Constitution and the rule of law is of the utmost importance in a constitutional democracy.

15. **THAT** I aver that the implementation of mandatory quarantine by the government has in many respects not been in compliance with the Constitution and the rule of law. It has been poorly executed in a way that is uncoordinated, unreasonable, arbitrary, contrary to laid down guidelines, and at times abusive. This puts people in quarantine at risk of infection and exposing them to gross violations of human rights.
16. **THAT** this observation triggered over 60 multi-sectoral stakeholders, including KELIN, to write an advisory to the government, which *inter alia*, expressed concern that the implementation of mandatory quarantine and isolation of people affected by COVID-19 was uncoordinated, unplanned and not guided by policy. (Annexed and Marked "AM-004" is the Multi-Stakeholder Advisory Note dated 28<sup>th</sup> March 2020).
17. **THAT** in the advisory, the stakeholders were concerned with the decision to mandatorily quarantine people in hotels and government facilities without measures being put in place to protect the workers of such facilities from infection. The stakeholders were also concerned as to why people in quarantine were being forced to incur costs of the quarantine facilities.
18. **THAT** KELIN, working with the 9<sup>th</sup> Respondent and other organization, set a legal aid support system to provide *pro bono* legal advice to those who were facing human rights violations during the COVID-19 period. (Annexed and Marked "AM-005" is a copy of the legal aid poster).
19. **THAT** consequently, KELIN received numerous complaints from people in quarantine facilities and their family members who reported several issues including:
  - i. That implementation of the mandatory quarantine was exposing them to increased risk of contracting COVID-19. From the onset, when they arrived at JKIA, they were held at the airport, and transported in congested buses, no measures were implemented by authorities to ensure social distancing and hygiene recommendations to prevent spread of COVID-19. In addition, certain features of and circumstances within designated facilities for mandatory quarantine did not adequately ensure prevention of transmission, and the promotion of health and hygiene.
  - ii. That the list of quarantine facilities given to quarantined individuals included both private hotels and government institutions, all of which were charging relatively high costs per day, which costs were to be personally incurred by the individuals who were effectively detained in these institutions.
  - iii. That for most of the people who selected government owned quarantine facilities, they encountered deplorable living conditions in those facilities, poor hygiene, scarcity of water, poor ventilation and crowding – ripe conditions for further spread of COVID-19, rather than prevention.

- iv. That upon entry in the mandatory quarantine facilities, the government neglected to provide quarantined individuals with information on quarantine protocols, information about COVID-19 symptoms, treatment and prevention, timely indications of the expected length of quarantine, and other information relevant to enable people to appreciate their rights, responsibilities and expectations. This caused immense distress for people in quarantine as well as the families of people quarantined.
- v. That the government had little regard for their general mental and physical health, safety and well-being, thus defeating the public health objective of their quarantine.
- vi. That the government also had little regard for the health of those with pre-existing conditions, and failed to conduct adequate and timely screening to identify pre-existing conditions.
- vii. That the government had little regard for its obligation to protect the rights of children. The mental and physical well-being of children was not guaranteed; information was not provided in a child friendly manner; measures were not put in place to ensure they were protected from abuse; and the best interest principle was not observed.
- viii. That the government had little regard for its obligation to ensure women are protected and did not put measures in place to prevent abuse. Women, who are more vulnerable to sexual and physical violence, were placed in quarantine facilities where they were forced to share facilities and in some cases even rooms.
- ix. That there was poor turnaround time for testing with COVID-19 test results, taking anywhere between 4 -7 days to complete.
- x. That test results were not communicated to quarantined individuals in a timely, confidential and dignified manner, subjecting people to unnecessary anxiety and increasing social stigma associated with COVID-19.
- xi. That the government proceeded to arbitrarily extend the quarantine period beyond the recommended 14 days without availing quarantined individuals with any information, without providing adequate reasons or mechanisms to appeal, and at their own individual costs.
- xii. The government neglected and ignored the concerns of quarantined persons, refused to provide them with information, health services for pre-existing condition and mental health – thus exposing them to grave violations of their rights to dignity, information, health and threatening their right to life.
- xiii. That decisions generally in enforcing quarantine were unreasonable, arbitrary, and inconsistent and people subjected to these measures were not provided with mechanisms to reasonably challenge these decisions in the circumstances.

20. **THAT** based on the foregoing complaints, 27 organisations, including KELIN, and 47 individuals sought again to engage government on our concerns. We wrote a request for information letter dated 6<sup>th</sup> April 2020 to the Cabinet Secretary Ministry of Health seeking the following information:

- i. An explanation as to why the Ministry of Health was not adhering to its own guidelines relating to managing the designated mandatory quarantine facilities. For instance, why were people who had first tested negative not released into self-quarantine as per the self-quarantine protocols?
- ii. Whether the circular extending the quarantine period applied to all quarantine facilities? If so, why? If not, why not? At whose cost?
- iii. The total number of designated quarantine facilities as at 6<sup>th</sup> April 2020 and the number of occupants in each. The number of health care workers and their cadres that had been deployed to those quarantine facilities.
- iv. How many people were in quarantine then? How many had been tested and received their results?
- v. What measures were being taken to safeguard the health of people in quarantine facilities who had pre-existing medical conditions?
- vi. What was the time period taken when one tests positive in a quarantine facility before they were transferred to medical facility for isolation?
- vii. Whether health care workers and hotel attendants who had come into contact with the persons who have tested positive, had themselves been tested and provided with personal protective equipment (PPEs)?

(Annexed and Marked "AM-006" is a copy of the Open Letter and Request for Information Letter on Implementation of Mandatory Quarantine dated 6<sup>th</sup> April, 2020).

21. **THAT** despite the efforts of different parties (including the media) to underscore the deplorable conditions in some quarantine facilities the government did little to address this and many persons remained under undignified conditions for the entire quarantine period further impairing their rights.

22. **THAT** on or about the 9<sup>th</sup> and 10<sup>th</sup> of April a number of individuals in mandatory quarantine wrote to the Director General health expressing their inability to make payments for the additional days in quarantine (Annexed and Marked "AM-007" are copies of various letters written by individuals in quarantine and received by the Ministry of Health).

23. **THAT** despite concerns from individuals in quarantine, their families, and other stakeholders, the government through the Government Spokesperson in a press statement dated 11<sup>th</sup> April 2020 refused to take up responsibility for the bills of the quarantine facilities. (Annexed and

Marked "AM-008" is a copy of the Press Statement dated 11<sup>th</sup> April 2020 by the Government Spokesperson).

24. **THAT** this action contradicts the previous position taken by the 2<sup>nd</sup> Respondent where in a number of press briefings and in response to questions posed to them by journalists had indicated they would deal with cases regarding inability to pay for mandatory quarantine on a case to case basis. (Annexed and Marked "AM-009" is a copy of sections of press briefings by the 2<sup>nd</sup> Respondent).
25. **THAT** in a further show of disdain, and rather than addressing the concerns of people in quarantine, the government through the Acting Director General Health in a memo dated 16<sup>th</sup> April, 2020 further extended the quarantine period beyond 28 days. (Annexed and Marked "AM-010" is a copy of the Memo dated 16<sup>th</sup> April 2020 by the Ag. Director General for Health brought to our attention by people in quarantine).
26. **THAT** in light of the memo dated 16<sup>th</sup> April 2020, six individuals in mandatory quarantine wrote an open letter to the Acting Director General Health raising concerns on the neglect, extortion and risks members impacted by this quarantine enforcement are faced with as a result of the actions of the agents of the 2<sup>nd</sup> Respondent. (Annexed and Marked "AM-011" is a copy of the letter dated 18<sup>th</sup> April 2020 by six individuals in mandatory quarantine at KMTC-Nairobi).
27. **THAT** I aver that the decisions by the government in implementation of mandatory quarantine have been arbitrary and unreasonable.
28. **THAT** the World Health Organisation in a guidance note issued on 19<sup>th</sup> March 2020 advised countries that before they implement quarantine they ought to:
- i. Properly communicate such measures to reduce panic and improve compliance.
  - ii. Provide people with clear, up-to-date, transparent and consistent guidelines, and with reliable information about quarantine measures.
  - iii. Constructively engage with communities.
  - iv. Provide persons who are quarantined with health care; financial, social and psychosocial support; and basic needs, including food, water, and other essentials. The needs of vulnerable populations should be prioritized.
  - v. Take into account cultural, geographic and economic factors that may affect the effectiveness of quarantine. Rapid assessment of the local context should evaluate both the drivers of success and the potential barriers to quarantine,

and they should be used to inform plans for the most appropriate and culturally accepted measures.

(Annexed and marked "AM-012" is the interim guidance note on **Considerations for quarantine of individuals in the context of containment for coronavirus disease (COVID-19) issued by the World Health Organization**).

29. **THAT** the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, that Kenya has signed and ratified, require certain criteria are met when rights are restricted including the freedom of movement. The principles include:

- i. That the restriction is provided for and carried out in accordance with the law;
- ii. That the restriction pursues a legitimate objective of pressing public or social need;
- iii. That the restriction is proportionate and strictly necessary in a democratic society to achieve the objective;
- iv. That there are no less intrusive and restrictive means available to reach the same objective;
- v. That the limitation is not applied for any other purpose than the prescribed objective;
- vi. That the restriction is based on scientific evidence and not drafted or imposed arbitrarily i.e. in an unreasonable or otherwise discriminatory manner.

(Annexed and marked "AM-013" are the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights)

30. **THAT** in February, 2018 the Ministry of Health published the Tuberculosis (TB) Isolation Policy to guide the isolation of TB patients following a directive by the High Court in *Daniel Ngetich and Others v the Attorney General* Petition 329 of 2014 noting that the rights of patients must be protected during the implementation of public health objectives. Of significance in this policy is the guidance of involuntary isolation which requires that all of the following are met:

- i. Isolation is necessary to prevent the spread of TB;
- ii. There is evidence that isolation is likely to be effective in the case;
- iii. The patient refuses to remain in isolation despite being adequately informed of the risk, the meaning of being isolated, and the reasons for isolation;
- iv. The patient's refusal puts others at risk;
- v. All prior restrictive measures have been attempted prior to forcing isolation;

- vi. All other rights and freedoms (such as basic civil liberties) besides movement are protected;
- vii. Due process and all relevant appeal mechanisms are in place;
- viii. Patient has, at least, basic needs met; and
- ix. The isolation time given is the minimum necessary to achieve its goal.

(Annexed and marked "**AM-014**" is the TB Isolation Policy)

31. **THAT** I submit that these principles are embodied in values and rights in the Kenyan Constitution, and mirror Article 24 provisions on the limitation of rights and fundamental freedoms.
32. **THAT** it is my averment that the government neglected, ignored, refused and failed to follow laid down guidelines, both international and national, in properly implementing mandatory quarantine despite this information being within their knowledge.
33. **THAT** in KELIN's experience working with people living with and affected by infectious diseases such as HIV and tuberculosis over many years, I appreciate that these principles are not solely to protect individual human rights but that they are also critical to responding to public health crises effectively. The failure to apply intrusive public health interventions in measured, rights-affirming ways has a tendency to foster public fear, social stigma and health care avoidance – some of the biggest barriers to effective disease prevention and health service delivery as well as public-health promoting behaviour change.
34. **THAT** I am guided by the Constitution to note that the government has a fundamental duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights; including the right to the highest attainable standard of health, right to dignity, right to access information, among others.
35. **THAT** I aver that the resultant impact of the failures of the government to fulfil its obligations exposed the people in quarantine to human rights violations.
36. **THAT** to the extent that the government has failed to implement quarantine in a constitutionally-sound manner, I am gravely concerned that this failure poses a threat to the ability of the government's ongoing and future interventions to address COVID-19 in Kenya effectively.

37. **THAT** at the time of filing this petition, KELIN has not received any response from the government with regards to the request for information on the manner in which mandatory quarantine was being implemented in the country.

38. **THAT** what is deponed to herein is true to the best of my knowledge, information and belief, save for information whereof sources of information have been disclosed.

SWORN by the said )  
ALLAN ACHESA MALECHE )  
at NAIROBI this 3<sup>rd</sup> day )  
of May 2020 )  
BEFORE ME )  
COMMISSIONER FOR OATHS )



**DEPONENT**

**DRAWN AND FILED BY:**

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482

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. .... OF 2020**

**IN THE MATTER OF THE DEFENCE OF THE CONSTITUTION UNDER ARTICLES 3, 10, 19, 20, 22 AND 258 OF THE CONSTITUTION OF KENYA**  
**AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 19, 21, 28, 29, 39, 43, 47 AND 53 OF THE CONSTITUTION OF KENYA, 2010**  
**AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 8(6) OF THE PUBLIC ORDER ACT, CAP 56 OF THE LAWS OF KENYA**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 4 AND 5 OF THE HEALTH ACT NO. 21 OF 2017**  
**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 3, 5, 12, 13, 14 AND 15 OF PERSONS DEPRIVED OF PERSONAL LIBERTY ACT NO. 23 OF 2014**

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 4 AND 5 OF THE ACCESS TO INFORMATION ACT, NO. 31 OF 2016**  
**AND**

**IN THE MATTER OF SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**  
**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE PUBLIC HEALTH (COVID-19 RESTRICTION OF MOVEMENT OF PERSONS AND OTHER RELATED MEASURES) RULES, 2020 AND PUBLIC HEALTH ACT (PREVENTION, CONTROL AND SUPPRESSION OF COVID-19) REGULATIONS, 2020**  
**BETWEEN**

- C.M (Suing on her own behalf and on behalf of PM (Minor) as parent..... 1<sup>ST</sup> PETITIONER
- M.O.A.....2<sup>ND</sup> PETITIONER
- M.O.....3<sup>RD</sup> PETITIONER
- M.W.M.....4<sup>TH</sup> PETITIONER
- K.F.....5<sup>TH</sup> PETITIONER
- F.A.....6<sup>TH</sup> PETITIONER
- K.B.....7<sup>TH</sup> PETITIONER
- KENYA LEGAL & ETHICAL ISSUES NETWORK ON HIV & AIDS (KELIN)..... 8<sup>TH</sup> PETITIONER
- KATIBA INSTITUTE.....9<sup>TH</sup> PETITIONER

**AND**

- HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT
- THE CABINET SECRETARY, HEALTH ..... 2<sup>ND</sup> RESPONDENT
- THE CABINET SECRETARY, INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT.....3<sup>RD</sup> RESPONDENT

483

**AFFIDAVIT OF CHRISTINE NKONGE IN SUPPORT OF THE PETITION**

I, **CHRISTINE NKONGE**, of P.O. Box 26586 - 00100, a female adult Kenyan of sound mind residing and working for gain in Nairobi County within the Republic of Kenya, and the Executive Director of the 9<sup>th</sup> Petitioner herein whose address for purposes of Petition is care of KATIBA INSTITUTE, 5 THE CRESCENT, OFF PARKLANDS ROAD, NAIROBI, do hereby make a solemn oath and state as follows:

1. **THAT** I am conversant with the contents of the Petition, and fully understand the issues in question and I further adopt the contents of the Petition filed herein as if the same were set out *seriatim*. (Annexed to this affidavit is Katiba Institute's certificate of incorporation marked as "CN-1")
  
2. **THAT** on 28<sup>th</sup> February 2020 the President established the National Emergency Response Committee on Coronavirus and made the 2<sup>nd</sup> Respondent the Chairperson. (Annexed to this Affidavit and marked as "CN-1A" is a copy of the Executive Order).
  
3. **THAT** on 22<sup>nd</sup> March 2020, the 2<sup>nd</sup> Respondent made an announcement aired on Kenyan television stations in which he gave the following directives, inter alia:
  - a. "All international flights are suspended effective Wednesday the 25<sup>th</sup> March at midnight and the only exception to this are cargo flights whose crew must observe strict guidelines.
  - b. Those coming into the country between now and Wednesday, be they Kenyans or foreigners will undergo mandatory quarantine at a government designated facility at their own expense.
  - c. Countries wishing to evacuate their nationals must make arrangements to do so within this period.
  - d. Kenyans who are currently in foreign countries and would not have come back within the said period are advised to observe the guidelines issued in their respective countries.
  - e. Whereas we had allowed Kenyans and foreigners with valid permits to come into the country we have observed there are those who are not observing self-quarantine protocols. Consequently, NERC [National Emergency Response Committee] has decided that all persons who violate the self- quarantine protocols will be forcefully quarantined for a full

484

14 days, at their cost and thereafter, arrested and charged in accordance with the Public Health Act....”.

4. **THAT** this press statement was published on the Ministry of Health website with the title ‘National Emergency Response Committee Press Statement on the Update of Coronavirus in the Country and Response Measures.’ (Annexed hereto is a copy of the press statement marked as “CN-2”).
5. **THAT** based on 23<sup>rd</sup> March directives, in the press statement any person who arrived by air from 22<sup>nd</sup> March 2020, were required to enter into self-paid mandatory quarantine, at government approved facilities for 14 days.
6. **THAT** between 22<sup>nd</sup> March 2020, when the directive was issued and 25<sup>th</sup> March 2020 at midnight, when international flights were stopped, several flights arrived in Kenya, carrying many passengers and on arrival at Jomo Kenyatta International Airport, passengers experienced significant inadequacies caused by the government ill-preparedness to administer their own directives. (Annexed hereto are copies of media reports marked as “CN-2A”)
7. **THAT** on 25<sup>th</sup> March 2020, the 3<sup>rd</sup> Respondent, the Cabinet Secretary in charge of the Ministry of Interior and Coordination of National Government, enacted an order, under Section 8 of the Public Order Act, issuing a nation-wide curfew between 7.00PM and 5.00AM. That order is contained in Legal Notice No. 36, Public Order (State Curfew) Order, 2020. (Annexed hereto is a copy of the Order marked as “CN-3”).
8. **THAT** on 3<sup>rd</sup> April 2020, the Ministry of Health published on its website the “COVID-19 Mandatory Quarantine Site Protocols: Interim Guidelines. These Interim Guidelines were accessed by the 9<sup>th</sup> Petitioner on ---. Annexed hereto is a copy of the guidelines marked as “CN-4”).
9. **THAT** page 3 of the Interim Guidelines state that:

“The possible quarantine settings include hotels, dormitories, other facilities catering to groups, or the home of the contact. Regardless of the setting, an assessment must ensure that the appropriate conditions for safe and effective quarantine are being met including linen processing and laundry. The designated centres are housing persons who have arrived in the

485

country from countries with confirmed COVID-19 cases or persons who may need to be confined because they have been in contact with a confirmed COVID-19 case in the country.”

10. **THAT** at page 7, the Interim Guidelines state that:

“Quarantine for COVID-19 is recommended for individuals who have been directly exposed to the virus or who have travelled to areas where there are large numbers of people infected in order to prevent further transmission.”

11. **THAT** on 3<sup>rd</sup> April 2020, the Ministry of Health also published the COVID-19 Mandatory Quarantine Protocols, dated 27<sup>th</sup> March 2020. The Mandatory Quarantine Protocols, were available on the Ministry of Health’s website. (Annexed hereto is a copy of the Protocols marked as “CN-5”).

12. **THAT** the COVID-19 Mandatory Quarantine Protocols included the following information:

“All clients shall be quarantined in a well-ventilated single- room. (With open windows and an open door).

As observed in Wuhan, the mean incubation period for COVID-19 was 5.2 days for the majority of the cases. The Ministry of health has therefore planned for testing from Day 5 of quarantine...” (they also provided for a second test on the 10<sup>th</sup> day”).

13. **THAT** at p. 14 of the Quarantine Protocols, these latest protocols also provided the following information to those in mandatory quarantine:

“5. Results will be delivered within 24 hours after sample collection.

6. Positive results will be communicated to the suspected case and transferred to the isolation facility for treatment.

7. Negative results will be relayed to their owners.

8. Following the first negative test, the persons will be released into self-quarantine as per the self-quarantine protocols.

9. All in self-quarantine will be expected to continue daily monitoring of COVID 19 symptoms: Fever, cough, shortness of breath

10. Those found to be negative will continue self-quarantine till 14 days after discharge from the mandatory quarantine sites are over.

- 486
11. All people in quarantine should have a repeat test on day 10 of quarantine.
  12. Anyone who develops symptoms during the period of quarantine should be tested for COVID 19.
  13. Close contacts of anyone found to have positive results of COVID 19 will go into self-quarantine.”
14. **THAT** on 3<sup>rd</sup> April, 2020, the 2<sup>nd</sup> Respondent published the Public Health (Prevention, Control and Suppression of COVID-19) Regulations, 2020 (Legal Notice No. 49)-the Prevention, Control and Suppression Regulations. (Annexed hereto is a copy of the Prevention, Control and Suppression Regulations marked as “CN-6”).
  15. **THAT** the Prevention, Control and Suppression regulations were only published after all the passengers had landed in Kenya and were already in mandatory quarantine. The regulations stated in Rule 12(4) that quarantine is limited to 14 days.
  16. **THAT** Rule 4 of the Prevention, Control and Suppression Rules authorized a “medical officer of health or public health officer” to inspect the premises of anyone who tests positive for COVID-19 and force all the people in that premises to either be removed to a health care facility if they test positive for COVID-19 or be detained in a quarantine facility. Section 10 of the Prevention, Control and Suppression Rules also made aiding or abetting the escape from a quarantine facility a crime.
  17. **THAT** on April 4<sup>th</sup> 2020, as the passengers were entering the final days of the 14-day mandatory quarantine, the Ministry of Health changed its policies. The Ministry of Health, again via television communication, stated that those people who had been detained at the facilities for 14 days and tested negative would be detained in quarantine at their own expense for an additional 14 days if others had tested positive at their facility. (Annexed hereto is a copy of the Ministry of Health’s COVID 19 Mandatory Quarantine Discharge Protocol, marked as “CN-7”).
  18. **THAT** the new, verbally communicated policy also contradicted the main guidelines, which stated that those who tested negative would be sent home for self-quarantine for 14 days after completion of their mandatory quarantine.

- 487
19. **THAT** on 6<sup>th</sup> April, 2020, the 2<sup>nd</sup> Respondent, the Cabinet Secretary in charge of Health, published Legal Notice 50, Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, 2020—the Restriction of Movement Measures. (Annexed hereto is a copy of the Restriction of Movement Measures marked as “CN-8”).
  20. **THAT** on 6<sup>th</sup> April 2020, the 2<sup>nd</sup> Respondent published four other orders. These orders established the Nairobi Metropolitan area and the Counties of Mombasa, Kilifi, and Kwale, respectively, as “restricted areas” subject to the rules set forth in the Restriction of Movement Measures. (Annexed hereto is a copy of these orders marked as “CN-9”).
  21. **THAT** on 17<sup>th</sup> April 2020, the 2<sup>nd</sup> Respondent, the Cabinet Secretary of Health, issued Legal Notice No. 57, Public Health (Restriction of movement of persons and related measures) Variation Rules, 2020 in which Rules 4A and 5(5) were inserted. These rules restricted the operation of ferry services and imposed criminal penalties for violations of those restrictions. (Annexed hereto is a copy of the Variation Rules marked as “CN-10”).
  22. **THAT** on 20<sup>th</sup> April 2020, in spite of the Public Order Act and the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, listing offences and penalties for their breach, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent failed in upholding the law. Instead, the 2<sup>nd</sup> Respondent in his daily briefings on national television noted the following *“We have also quarantined 455 other persons for defying National curfew regulations. It is important to note because once you are out during curfew hours it is assumed that you have now been exposed and therefore if you are taken, you will be taken to a quarantine site for 14 days at your own cost.”* (Annexed hereto is a copy of the report marked as “CN-10 A”).
  23. **THAT** in addition to the above on 20<sup>th</sup> April 2020, the Kenya News Agency—a state-run news site—published an online report announcing that those who violated the curfew will be arrested and quarantined. The report is available at <https://www.kenyanews.co.ke/curfew-flouters-to-quarantined/> (last visited 29<sup>th</sup> April 2020) (Annexed hereto is a copy of this report marked as “CN-11”). Further media reports have indicated people being arrested on allegations of violating the COVID-19 regulations on masks, movement restrictions as well as curfew (Annexed hereto are copies of media reports marked as “CN-11A”).

488

24. **THAT** as recently 3<sup>rd</sup> May 2020, the Ministry of Health issued another press release given by the CAS of Health Dr. Rashid Aman, on behalf of the National Emergency Response Committee, stating that as a result of debates on people being held in quarantine, curfew breakers will no longer be held in government quarantine facilities and that the Inspector General of Police was directed by the committee to designate a 'curfew breakers holding place'. (Annexed hereto is a copy of this report marked as "CN-12").

25. **THAT** the government's obligation during this global health pandemic is to promote, observe, respect and protect the rights of citizens and residents, as provided for under the Constitution and International law. International and human rights bodies have provided guidance on states' obligations in responding to COVID-19; some of these guidelines are:

- The African Commission on Human and Peoples' Rights' 'Press Statement on human rights based effective response to the novel COVID-19 virus in Africa' (accessible via <https://www.achpr.org/pressrelease/detail?id=483>).
- The Inter-Agency Working Group on Violence against Children coordinated by the United Nation - on protecting the rights of children and safeguarding their well-being during and after the COVID-19 pandemic (accessible via [https://www.ohchr.org/Documents/Events/COVID-19/Appendix\\_for\\_Action\\_IAWG-VAC.pdf](https://www.ohchr.org/Documents/Events/COVID-19/Appendix_for_Action_IAWG-VAC.pdf)).
- The Office of the High Commissioner for Human Rights' COVID-19 guidance (accessible via [https://www.ohchr.org/Documents/Events/COVID-19\\_Guidance.pdf](https://www.ohchr.org/Documents/Events/COVID-19_Guidance.pdf))
- Committee on Economic, Social and Cultural Rights' 'Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights' (accessible via [https://undocs.org/E\\_C.12/2020/1](https://undocs.org/E_C.12/2020/1))

(Copies of these documents are annexed hereto and marked as "CN-13").

489

26. **THAT** what is deponed to in this Affidavit is within my knowledge save for information whereof the sources are otherwise disclosed.

SWORN in Nairobi this 3<sup>rd</sup> day of May 2020.

**CHRISTINE NKONGE**



BEFORE ME



COMMISSIONER FOR OATHS

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**DRAWN & FILED BY: -**

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