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06 MAY 2020
CONSTITUTIONAL &
HUMAN RIGHTS DIVISION

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 151 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..... 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

CERTIFICATE OF URGENCY

I, **Allan Maleche**, Advocate, who has the conduct of this matter on behalf of the 1st - 8th Petitioners and **Emily Kinama**, Advocate on behalf of the 9th Petitioner, do hereby pray that this Court certifies that this Application and Petition as urgent and requires hearing at the earliest opportunity on the following grounds:

1. **THAT** this petition challenges the directives issued on 20th April 2020 by the 2nd Respondent to place into self-paid mandatory quarantine persons who have breached the curfew orders under the Public Order Act, Cap 56 of the Laws of Kenya, read together with the Public Order (State Curfew) Order, 2020, and offences listed in 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.
2. **THAT** there are currently more than 455 people who allegedly committed these offences and are in mandatory quarantine centres. That as of 3rd May 2020 the 2nd Respondent through the National Emergency Response Committee issued a press release directing the Inspector General of Police to designate 'curfew breakers holding place' to place those who have broken curfew orders. More arrests and detainment in these facilities are taking place every day without following due process of the law and in breach of the constitutional rights under Articles 48, 49, 50 and 51 of the Constitution of Kenya, 2010.
3. **THAT** the petition also challenges the manner in which the implementation of the mandatory quarantine is being carried out by the State in its efforts to combat COVID-19.
4. **THAT** there are currently persons who have been placed in mandatory quarantine, at their own cost and have received several extensions exceeding 28 days yet they have tested negative for COVID-19 and still face an additional 14 days in mandatory quarantine at their own cost without prior written reasons and contrary to the right to fair administrative action.

5. **THAT** unless this application is heard and determined urgently; several persons will continue to be highly prejudiced because of the violations visited against them by the Respondents without any legal basis; further the unprecedented culture of impunity and disregard for the rule of law will remain unchecked in the process of fighting COVID-19.
6. **THAT** it is therefore in the public interest and in the interest of justice that this application and petition be heard and be dispensed with on first priority.

Dated at Nairobi this 5th day of May 2020.

ADV

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DRAWN & FILED BY:-
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And

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 - 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

NOTICE OF MOTION

(Under Articles 27, 28, 31 and 48 of the Constitution, Rules 3, 4, 10 (2) (a), 13 and 19 of the Constitution of Kenya (Protection Of Rights And Fundamental Freedoms) Practice and Procedure Rules, 2013 and all enabling provisions of law)

TAKE NOTICE that this Honourable Court shall be moved on the.....day of 2020 at 9.00 A.M, or soon thereafter as Counsels for the Petitioners can be heard on an Application for orders **THAT:**

1. This Application together with the petition be certified urgent and heard expeditiously.
2. Pending hearing and determination of this application this court grants *ex parte* orders that the 1st to 7th Applicants/Petitioners be granted leave to prosecute this Application and the Constitutional Petition filed herein by way of initials of their names in place of their full names as prescribed in Rule 10 (2) (a) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
3. Pending hearing and determination of this Application and the Petition and during the duration of the Application, Petition and thereafter, the identities of the 1st to 7th Applicants/Petitioners be concealed in all pleadings, rulings, judgments, court processes and in open Court.
4. Pending hearing and determination of the petition, orders of prohibition do issue restraining the 2nd and 3rd Respondents from illegally detaining in mandatory quarantine centers persons who are; (i) accused of breaking curfew orders contrary to the Public Order Act, Cap 56 and (ii) accused of committing offences contrary to 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, without according them due process of the law and their constitutional right to fair trial.
5. Pending hearing and determination of the petition, orders of prohibition do issue against the 2nd and 3rd Respondents from illegally detaining persons who are accused of breaking curfew

orders in 'curfew breakers holding places' designated by the Inspector General of Police, without according them due process of law under the current Public Order Act and their constitutional right to fair trial.

6. Pending hearing and determination of the Application and Petition persons who have been arrested for contravening the Public Order Act, Cap. 56 on the curfew orders as well as 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 be presented in court for trial in order for the court to impose sanctions in accordance to the Constitution and as prescribed by the said laws and regulations.
7. Consequent to the grant of the prayers above, the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders.
8. The Cost of the Application be in the cause.

ON THE GROUNDS THAT: -

Urgency

1. On the 22nd of March 2020, the Cabinet Secretary in charge of Health (2nd Respondent) issued directives that anyone who arrived in Kenya from countries with COVID-19 cases was to be placed in mandatory quarantine for a period of 14 days, which were to apply with immediate effect. In addition, Kenya would close its boarders to passenger airlines as of 25th of March 2020 at midnight.
2. Considering the international effects of the COVID-19 pandemic and the timelines for the closure of boarders, many Kenyans returned back home between the 22nd March 2020 and 25th March 2020.
3. On arrival in Kenya, the government was neither prepared for implementation of their own directive nor did it provide the passengers with prompt, adequate and comprehensive information on how the mandatory quarantine process would take place - such as the places that were set aside for them to be placed under mandatory quarantine.

4. As of 20th April 2020, the 2nd Respondent introduced new directives by stating that those that are found to have committed offences listed in the Public Order Act (on breaking curfew orders) as well as 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 (the COVID-19 related Public Health Regulations) which require the wearing masks and the restriction of movement are to be placed under 14-days self-paid mandatory quarantine.
5. As a result, there was a rise in the arrest and detainment in government quarantine facilities, of persons who had allegedly committed offences under the Public Order Act, Public Order (State Curfew), 2020 and the COVID 19 related Public Health Regulations, 2020 which were issued.
6. On 20th April 2020, the 2nd Respondent issued a press release stating that over 455 people were placed in government facilities on mandatory quarantine for breaching curfew guidelines as well as the Public Health Regulations on restriction of movement and wearing masks. These people may still be under mandatory quarantine.
7. As recently as 3rd May 2020, the Ministry of Health issued another press release given by the CAS 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'.
8. This petition is therefore urgent because there is a claim for continuing violation of rights in that people are still being arrested and detained in quarantine facilities for committing offences under the Public Order Act and the Public Health Regulations, 2020 as well as the so-called 'curfew breakers holding places'.
9. There are also people who arrived in Kenya through Jomo Kenyatta International Airport from other countries between the 22nd of March 2020 and 25th of March 2020 and were placed

in mandatory quarantine whose days have been extended in quarantine for more than 28 days yet they tested negative for COVID-19.

Protection of identities of the 1st - 7th Applicants/Petitioners

10. The 1st - 7th Applicants/Petitioners are persons who were placed in mandatory quarantine for periods ranging in time between 14 days and 27 days.
11. The 1st-7th Applicants/Petitioners have faced social stigma from staff working at the airport as well as state officials at the airport because some of them arrived in Kenya from countries that had people who tested positive for COVID-19. In addition, they faced stigma from the staff working at the different facilities. They also continue to face social stigma by the public for being suspected of having COVID-19 by mere fact of having been in mandatory quarantine.
12. Since they have filed this petition challenging the manner of implementation of the mandatory quarantine procedures that were put in place following the COVID-19 pandemic, they could face victimization and further social stigmatization attached to the COVID-19 pandemic.
13. The disclosure of their identity will take away constitutional protection of their right to privacy.
14. The Applicants are willing to confidentially disclose their true identities only to the Court by way of presenting copies of their national identity cards and any other information that the court may direct.
15. It will be in the interests of justice for the court to grant these orders as no parties will be prejudiced.

WHICH APPLICATION is further supported by the Petition, and annexed Affidavits sworn by C.M, M.O.A, M.O, M.W.M, K.F, F.A, K.B, Allan Maleche and Christine Nkonge. As well as that sworn in support of the Petition by the last two affiants aforementioned on behalf of the other

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Petitioners as well as the Petition herein, and on such other or further grounds as may be adduced at the hearing hereof.

DATED at Nairobi this 5th day of May 2020.

ADVOC

ADVOC

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And

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Nairobi.
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Tel: 0704594962

TO BE SERVED UPON:-

1. The Hon. Attorney-General,
Attorney General Chambers,
State Law Office,
P. O. Box 40112 – 00100,
Nairobi.

2. The Cabinet Secretary, Ministry of Health
Afya House, Cathedral Road,
P. O. Box 30016–00100,
Nairobi.

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3. The Cabinet Secretary, Ministry of Interior and Coordination of National Government
Harambee House,
P.O Box 30510,00100
Nairobi.

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- THE CABINET SECRETARY, HEALTH 2ND RESPONDENT
- THE CABINET SECRETARY, INTERIOR
AND COORDINATION OF NATIONAL GOVERNMENT..... 3RD RESPONDENT

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AFFIDAVIT OF ALLAN MALECHE IN SUPPORT OF THE NOTICE OF MOTION

I, **ALLAN MALECHE**, a citizen of Kenya and resident of Nairobi, within the Republic of Kenya do solemnly make oath and state as follows:

1. **THAT** I am the Executive Director of the 7th Petitioner and have the authority to swear this Affidavit on behalf of Kenya Legal & Ethical Issues Network On HIV & Aids (KELIN).
2. **THAT** I am making this Affidavit in support of the Notice of Motion and the Prayers particularized therein especially those seeking certification for urgency and the protection of identity of the petitioners.
3. **THAT** for the purpose of the Motion, I fully rely on the information I have sworn in my Affidavit supporting the Petition. I also rely on the Petition.
4. **THAT** on the 22nd of March 2020, the Cabinet Secretary in charge of Health (2nd Respondent) issued directives that anyone who arrived in Kenya from countries with COVID 19 cases were to be placed in mandatory quarantine for a period of 14 days, which were to apply with immediate effect. In addition, Kenya would close its borders to passenger airlines as of 25th of March 2020 at midnight. (Annexed herein is a copy of the directive marked as AM 1).
5. **THAT** considering the international effects of the COVID-19 pandemic and the timelines for the closure of borders, thousands of Kenyans returned back home between the 22nd March 2020 and 25th March 2020.
6. **THAT** on arrival in Kenya, the government was neither prepared nor provide the passengers with prompt, adequate and comprehensive information on how the mandatory quarantine process would take place such as the places that were set aside for them to be placed under mandatory quarantine.
7. **THAT** in addition, as recently as 20th April 2020, the 2nd Respondent through a press release introduced new directives by stating that those are found to have contravened the COVID-19 related Public Health Regulations, 2020 which require the wearing masks and the restriction of movement as well as the Public Order Act, on curfew are to be placed under 14-days mandatory quarantine at the cost of the alleged

offenders. (Annexed herein are copies of press releases dated 19th March 2020 and 20th March 2020 marked as AM2).

8. **THAT** I am aware through the above press release by the 2nd Respondent on 20 April 2020, marked "AM 2", over 455 people were placed in government facilities on mandatory quarantine for breaching curfew guidelines as well as the Public Health Regulations on restriction of movement and wearing masks. These people are still under mandatory quarantine. (Annexed herein are copies of newspaper reports dated April 22, 2020; April 27, 2020 and April 30, 2020 marked as AM 3).
9. **THAT** on 29th April 2020, the Kenya Union of Clinical Officers brought to KELIN's attention reports of clinical officers being beaten, harassed, arrested and taken to mandatory quarantine on allegations of violating curfew and restriction of movement regulations. (Annexed herein is a copy of the Complaint letter from the Kenya Union of Clinical Officers dated 29 April 2020 marked as AM 4).
10. **THAT** as recently as 3rd May 2020, another Ministry of Health press release given by the Chief Administrative Secretary of Health Dr. Rashid Aman reading on behalf of the National Emergency Response Committee 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 herein is the press release marked as AM 5)
11. **THAT** as a result, there was a rise in the arrest and detainment, in government quarantine facilities of persons who have committed offences under the Public Order Act, Public Order (State Curfew), 2020 and the COVID 19 related Public Health Regulations which were issued without variation and publication of the order and regulations.
12. **THAT** this petition is therefore urgent because there is a continuing violation in that people are still being arrested and detained in quarantine facilities for committing offences under the Public Order Act and the Public Health Regulations, 2020 and a number of them are still in mandatory quarantine.
13. **THAT** there are Kenyan Citizens who are currently stranded in the United Kingdom, China and India and that there are ongoing evacuation processes to bring them back home and they will be subjected to

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mandatory quarantine in line with the Ministry of Health Guidelines. Many are expected to be arriving from the 5th May 2020 (Annexed herein is a press statement from the Kenya High Commission dated 27 April 2020 marked as AM 6). The petition is therefore urgent to prevent the returning Kenyans from undergoing similar violations that the 1st to 7th Petitioners underwent.

14. **THAT** there are also people who arrived in Kenya through Jomo Kenyatta International Airport from other countries between the 22nd of March 2020 and 25th of March 2020 and were placed in mandatory quarantine whose days have been extended in quarantine for more than 28 days yet they tested negative for COVID-19.

15. **THAT** the Constitution provides for the right to privacy and the Mutunga Rules does so as especially in instances such as this where the petitioners may face stigmatisation related to the COVID 19 pandemic.

16. **THAT** it will be in the interests of justice for the court to grant these orders as no parties will be prejudiced.

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

SWORN in Nairobi this 5th day of

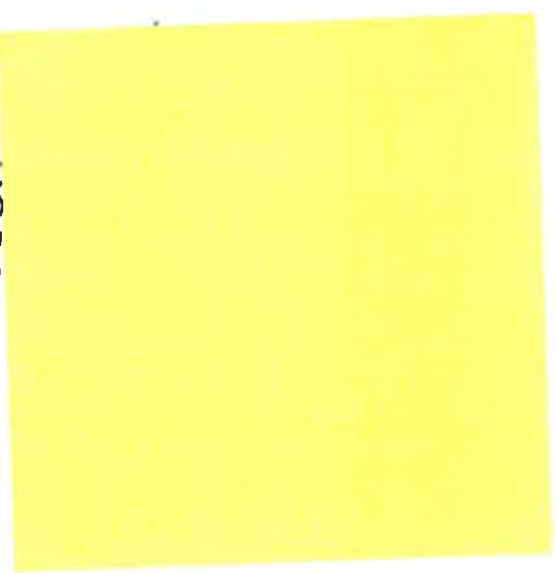
By the said

ALLAN MALECHE

DANIEL OMORO ACHACH
ADVOCATE
& COMMISSIONER FOR OATHS
P.O. BOX 26586 - 00100
NAIROBI

BEFORE ME
COMMISSIONER FOR OATHS

DRAWN & FILED BY:-
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- THE CABINET SECRETARY, INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT..... 3RD RESPONDENT

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AFFIDAVIT OF CHRISTINE NKONGE IN SUPPORT OF THE NOTICE OF MOTION

I, **CHRISTINE NKONGE**, a citizen of Kenya and resident of Nairobi, within the Republic of Kenya do solemnly make oath and state as follows:

1. **THAT** I am the Executive Director of the 9th Applicant/Petitioner and have the authority to swear this Affidavit on behalf of Katiba Institute.
2. **THAT** I am making this Affidavit in support of the Notice of Motion and the Prayers particularized therein especially those seeking certification for urgency and the protection of identity of the petitioners.
3. **THAT** for the purpose of the Motion, I fully rely on the information I have sworn in my Affidavit supporting the Petition. I also rely on the Petition.
4. **THAT** I have read the affidavit of Allan Maleche in support of the Notice of Motion application and I agree with the contents therein.
5. **THAT** what is deponed to in this Affidavit is within my knowledge save for information the sources whereof are otherwise disclosed.

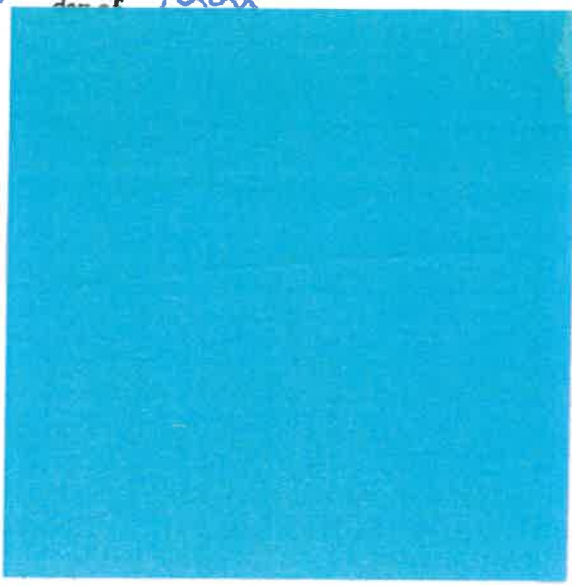
SWORN in Nairobi this

3rd day of March

20.

CHRISTINE NKONGE
 BEFORE ME
 COMMISSIONER FOR OATHS

DRAWN & FILED BY
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