

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION OF 2020

In the Matter of Articles 1, 2, 3, 10, 19, 20(1)(4), 21, 22, 24, 25, 26(1), 28, 29,
35, 47, 216, 232(1), 258 and 259 of the Constitution

and

In the Matter of Section 4 and 9 of the Access to Information Act, 2016

and

In the Matter of Section 5, 6 and 10 of the Health Act, 2017

and

In the Matter of Section 3 and 4 of the Fair Administrative Action Act,
2015.

BETWEEN

ERICK OKIOMA1ST PETITIONER
ESTHER NELIMA..... 2ND PETITIONER
CHRIS OWALLA3RD PETITIONER
CM.....4TH PETITIONER
FA.....5TH PETITIONER
KB6TH PETITIONER
MO7TH PETITIONER
EL.....8TH PETITIONER
KATIBA INSTITUTE9TH PETITIONER
KENYA LEGAL AND ETHICAL ISSUES NETWORK
ON HIV/AIDS (KELIN).....10TH PETITIONER
THE KENYA SECTION OF THE INTERNATIONAL
COMMISSION OF JURISTS (ICJ KENYA)11TH PETITIONER
TRANSPARENCY INTERNATIONAL KENYA12TH PETITIONER
ACHIENG ORERO.....13TH PETITIONER

(9th to 13th Petitioners suing on behalf of health and human rights civil
society and non-governmental organisations)

VERSUS

MUTAH KAGWE, CABINET SECRETARY
FOR HEALTH..... 1ST RESPONDENT
PATRICK AMOTH, AG DIRECTOR GENERAL,
MINISTRY OF HEALTH.....2ND RESPONDENT
CORNEL RASANGA, GOVERNOR OF
SIAYA COUNTY.....3RD RESPONDENT
COUNCIL OF GOVERNORS4TH RESPONDENT

FRED OKENGO MATIANGI, CS INTERIOR AND
COORDINATION OF NATIONAL
GOVERNMENT5th RESPONDENT

HILARY NZIOKI MUTYAMBAL, INSPECTOR GENERAL
OF THE POLICE, KENYA6th RESPONDENT

JOSEPH WAKABA MUCHERU, CABINET
SECRETARY FOR INFORMATION
AND COMMUNICATIONS7th RESPONDENT

THE COMMISSION ON ADMINISTRATIVE
JUSTICE8th RESPONDENT

DANIEL YUMBYA, CHIEF EXECUTIVE OFFICER,
KENYA MEDICAL PRACTITIONERS' AND
DENTISTS COUNCIL.....9th RESPONDENT

AND

KENYA NATIONAL COMMISSION ON
HUMAN RIGHTS (KNCHR)1ST INTERESTED PARTY

NOTICE OF MOTION

(Under Article 22, 23 and 258 of the Constitution of the Republic of Kenya
and all enabling statutes and provisions of the law)

TAKE NOTICE that this matter will be heard on the of
2020 at 9:00 am or soon after as the matter may be listed for hearing of the
Petitioners' application for orders that:

1. This matter be certified urgent.
2. Pending hearing of the Notice of Motion and Petition a conservatory order
be issued compelling the Respondents to supply the Petitioners with the
information sought under Article 35 of the Constitution through their
letters dated 6 April 2020, 15 April 2020, 17 April 2020, 18 April 2020, 22
April 2020 and 29 April 2020 within **48 hours from service of the court's
orders.**
3. The Respondents bear the costs of this Notice of Motion

1. Basis for motion

1. Article 33 entitles every person the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas.
2. Article 35(1) guarantees every citizen the right of access to information held by the State and information held by another person that is required for the exercise or protection of any right or fundamental freedom.
3. Under Article 35(3) the State has an affirmative duty to provide the public with any important information affecting the nation.
4. Article 43 guarantees every person the right to the highest attainable standard of health, which includes the right to health care services.
5. The need to seek, receive and impart information is even more crucial during a global health pandemic. The progression of the pandemic is unpredictable and ever-changing. As of the filing of this Notice of Motion, Kenya had reported over 6,000 cases with more than 140 fatalities. Globally there were more than 10 million confirmed cases and more than half a million fatalities.
6. As has been evident throughout the world, the scope of the harm to life and health has significantly depended on the efficacy of the government's response. The Petitioners, and the public at large, are entitled to information about the government's response.
7. Health depends not only on readily accessible health care, but also on access to accurate information about the nature of the threats, the government's efforts to address those threats, and the means to protect oneself, one's family, and one's community.
8. The right to freedom of expression, which includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, through any media, applies to everyone, everywhere, and may only be subject to narrow restrictions. This right is particularly important under the circumstances, since the dissemination of timely and accurate information about the virus may help the public protect themselves and prevent the spread of the virus.

9. For all of these reasons, on 6 April 2020, 15 April 2020, 17 April 2020, 18 April 2020, 22 April 2020, and 29 April 2020 the Petitioners requested the Respondents to provide information under Article 35 of the Constitution. The letters among others requested the Respondents to provide the Petitioners with information—
- on the implementation of mandatory quarantine;
 - on Siaya County’s burial of James Oyugi in the dead of the night - violating cultural norms, lacking dignity, and inconsistent with standards for burials during the pandemic;
 - support that the Respondents provide to health care workers risking their health to protect the community;
 - the rationale for extending quarantine beyond 28 days; and
 - rationale for mandatory quarantine as punishment for those who allegedly commit curfew offences.

2. Threat arising from the refusal to supply information

10. To date, the Respondents have refused to provide the information sought by the Petitioners even though the information is necessary for the exercise of rights to life, liberty and health.
11. The Respondent’s failure or refusal to supply Petitioners with the information violates the values and principles of governance in Article 10—especially human dignity, rule of law, social justice, human rights, good governance, transparency and accountability. It also violates the principles of public service under Article 232(1)(c) and (f) of the Constitution.
12. The refusal violates the Respondent’s obligation under Article 35(1)(a) and 35(3). Article 43, which concern the violation of fundamental rights and freedoms—not just the right to information, but the right to life and health. The lives and health of thousands could turn on how the Respondents address the pandemic. By denying the public the information necessary to determine the sufficiency of their response, the Respondents are insulating themselves from scrutiny, preventing the public from participating in, and being informed about, the government response,

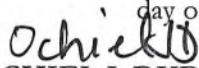
and preventing open discussion about the most effective way for the government to save lives and limit the damage the virus will cause.

13. Any delay in addressing the Respondents' refusal to provide information could significantly impair the public's ability to participate in the steps taken to protect themselves and could prevent the Respondents from receiving important information about how better to address the crisis. Given what is at stake for the Petitioners and the public, addressing this failure is urgent and necessary.
14. Unless this court intervenes and grants the conservatory orders sought, the Respondents' conduct will increasingly endanger the Petitioners' right to life and health in the face of the escalating threat of the COVID 19 pandemic.

Dated at Nairobi this

day of

2020


OCHIEL J. DUDLEY
ADVOCATE FOR THE 9TH PETITIONER

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