

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, 165, 232(1), 258 and 259 of the Constitution of Kenya, 2010
and
In the Matter of Section 4, 9, 20, 25 and 28 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 OKIOMA 1ST PETITIONER
ESTHER NELIMA..... 2ND PETITIONER
CHRIS OWALLA 3RD PETITIONER
CM..... 4TH PETITIONER
FA..... 5TH PETITIONER
KB 6TH PETITIONER
MO 7TH PETITIONER
EL..... 8TH PETITIONER
KATIBA INSTITUTE 9TH 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 KENYA 12TH PETITIONER
ACHIENG ORERO..... 13TH PETITIONER
(9th to 13th Petitioners suing on behalf of health and human rights civil society
and non-governmental organisations)

VERSUS

MUTAHI 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 MUTYAMBAI, 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 COUNCIL9th RESPONDENT

AND

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

PETITION

This Petition concerns the right of access to information as guaranteed under Article 35 of the Constitution of Kenya, 2010 (The Constitution). This right obliges the State and public entities to provide information, both proactively and upon request, so that citizens can be informed of the State's actions, participate in State affairs, and enjoy the rights protected under the Constitution. Although the right of access to information is always important, timely and accurate information is particularly important during a global health pandemic.

This humble Petition is filed by the 1st-8th and 10th, 12th and 13th Petitioners, whose address of service is Nerima Were, Advocate, C/O KELIN, Kuwinda Lane, off Lang'ata Road, Karen C , P.O. Box 112-00202, Nairobi; the 9th Petitioner, whose address of service is Dudley Ochiel, Advocate, C/O Katiba Institute, 5 the Crescent, Off Parklands Road, Westlands, P.O. Box 26586-00100, Nairobi; the 11th Petitioner whose address of service is Patrick Ngunjiri, C/o Patricks Law Associates (Plass

Advocates), Old Mutual Building, 4th Floor, Kimathi Street, Suite 401, P.O. Box 16727 – 00100 GPO.

A. THE PARTIES

1. The 1st Petitioner, Erick Okioma, is a resident of Kisumu County. He works as a community health champion for a community-based organisation called Nelson Mandela TB HIV Community Information and Resource Center. The 1st Petitioner relies on accurate and timely public health information to provide community health services.
2. The 2nd Petitioner, Esther Nelima, is a resident of Mombasa County. She works as a community health advocate with a community-based organisation called Coast Advocacy Network. The 2nd Petitioner relies on accurate and timely public health information in order to provide community health services.
3. The 3rd Petitioner, Chris Owalla, is the Executive Director of Community Initiative Action Group Kenya, a social justice organisation with operations based in Western Kenya along the Lake Victoria Basin. He works within Siaya County.
4. The 4th-8th Petitioners are persons and the family members of persons who were held in mandatory quarantine after they travelled to Kenya.
5. The 9th Petitioner, Katiba Institute, is a constitutional research, policy and litigation institute established to further implementation of Kenya's 2010 Constitution and to develop a culture of constitutionalism in Kenya.
6. The 10th Petitioner, Kenya Legal and Ethical Issues Network On HIV and AIDS (KELIN), is a non-partisan, non-profit organisation and non-governmental organisation duly registered under the Non-Governmental Organisations Act, working to protect and promote health-related human rights in Kenya.
7. The 11th Petitioner, The Kenyan Section of the International Commission of Jurists Kenya (ICJ Kenya) is a non-governmental, non-profit, and member-based organisation of jurists committed to the realisation and promotion of human rights,

justice, rule of law and democracy in Kenya and around Africa through the application of legal expertise and international best practices.

8. The 12th Petitioner, Transparency International Kenya (TI Kenya), is a not-for-profit organisation aimed at developing a transparent and corruption-free society through good governance and social justice initiatives.
9. The 13th Petitioner, Achieng Orero, is a Staff Attorney at Women's Link Worldwide, an international non-profit human rights organisation working in East Africa, Latin America and Europe.
10. The 1st Respondent is the Cabinet Secretary in charge of the Ministry of Health. He is being sued in his capacity as the Cabinet Secretary and in his individual capacity because he has either failed or refused to provide the information sought by the Petitioners through the letters dated 30 March 2020, 6 April 2020, 9 April 2020, 15 April 2020, 17 April 2020, 27 April 2020 and 28 April 2020.
11. The 2nd Respondent is the Acting Director-General at the Ministry of Health. He is being sued in his capacity as the Acting Director-General and in his individual capacity because he has either failed or refused to provide the information sought by the Petitioners through the letters dated 10 April 2020, 18 April 2020 and 28 April 2020.
12. The 3rd Respondent is the elected governor of Siaya County. He is being sued in his capacity as governor and in his individual capacity for either failing or refusing to provide the information that was sought in the letter dated 15 April 2020.
13. The 4th Respondent is the Council of Governors established under the Intergovernmental Relations Act. The Council is sued for failing or refusing to respond to the request for information dated 27 April 2020.
14. The 5th Respondent, the Cabinet Secretary for Interior and Coordination of National Government, is being sued in his official and individual capacities for failing or refusing to respond to the request for information dated 27 April 2020.
15. The 6th Respondent, the Inspector General for the Kenya Police Service, is being sued in his official and individual capacities for failing or refusing to respond to the request for information dated 27 March 2020.

16. The 7th Respondent, the Cabinet Secretary for Information and Communications, is being sued in his official capacity as the Cabinet Secretary in charge of the development of regulations to implement the Access to Information Act, 2016.
17. The 8th Respondent, the Commission on Administrative Justice, is an independent commission established under article 59(4) of the Constitution and the Commission on Administrative Justice Act. The 8th Respondent is designated under Part IV of the Access to Information Act with the responsibility to review access to information decisions and, under Part V, is granted oversight and enforcement of the Access to Information Act. Under Part VI of the Access to Information Act, the 8th Respondent is to consult with the Ministry of Information, Communication and Technology (ICT) to make regulations that will assist in carrying out the Act.
18. The 9th Respondent, the Chief Executive Officer of the Kenya Medical Practitioners' and Dentists Council, is sued in his capacity as the chief executive officer and in his individual capacity for failing or refusing to respond to the request for information dated 27 March 2020.
19. The 1st Interested Party, the Kenya National Commission on Human Rights, is established under Article 59(1) of the Constitution and the Kenya National Commission on Human Rights Act, 2011. The 1st Interested Party has a number of functions, including to promote respect for human rights; promote protection and observance of human rights in public institutions; monitor, investigate and report observance of human rights; and investigate any conduct in state affairs. The 1st Interested Party is enjoined because of its mandate to promote human rights and hold the State and its agents accountable for human rights violations.

B. FACTS IN SUPPORT OF THE PETITION

a. The State's Response to the coronavirus

20. On 30 January 2020, the World Health Organisation declared the coronavirus a global health emergency of international concern.¹ On 11 March 2020, the WHO declared COVID-19 a pandemic.²
21. On 12 March 2020, the 1st Respondent announced Kenya's first case of coronavirus.
22. On 20 March, the government requested that public service vehicles reduce the number of passengers they carry to reduce the risk of spreading the virus during commutes. On 22 March, the government announced that all international flights, except for cargo flights, would be suspended as of midnight on 25 March. Any travellers entering the country before the suspension were to be quarantined in a government-designated facility. The government asserted that anyone who violated the quarantine requirements would be forcefully quarantined at their own expense.
23. On 25 March, President Kenyatta announced that in two days a nationwide curfew would go into effect that would prohibit movement between 7 pm and 5 am. The next day, the 5th Respondent published the Public Order (State Curfew) Order, 2020—the 'Curfew Order'—which gave effect to the President's announcement.³ The Curfew Order was promulgated under s 8(1) of the Public Order Act. It imposed a 21-day, country-wide ban on public gathering and movement from 7 pm to 5 am. This was extended for two further 21-day periods on 25 April 2020⁴; and on 16 May 2020.⁵ On

¹World Health Organisation, 'Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-NCoV)' <<https://tinyurl.com/rjdtx2k>> accessed 15 May 2020.

² Tedros Adhanom Ghebreyesus, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (11 March 2020) <<https://tinyurl.com/vyvm6ob>> accessed 15 May 2020.

³ Public Order (State Curfew) Order 2020 (Leg No 36).

⁴ Uhuru Kenyatta, 'The Fifth Presidential Address on the Coronavirus Pandemic' (State House, Nairobi, Kenya, 25 April 2020) <<https://tinyurl.com/y9nlrenb>> accessed 15 May 2020.

⁵ Uhuru Kenyatta, 'The Sixth Presidential Address on the Coronavirus Pandemic' (State House, Nairobi, Kenya, 16 May 2020) < <https://www.president.go.ke/2020/05/16/the-sixth-presidential-address-on-the-coronavirus-pandemic-at-state-house-nairobi-saturday-16th-may-2020/>>.

6 June 2020, the President extended the curfew order for another thirty days, but revised the curfew hours to between 9 pm to 4 am.

24. Subsequent regulations were imposed under the Public Health Act. On 31 March 2020, the Cabinet Secretary for Health published the Public Health (Prevention, Control and Suppression of COVID -19) Rules, 2020—the ‘Prevention and Control Regulations’. These regulations largely tracked Section 36 of the Public Health Act. They gave the Cabinet Secretary the authority to designate ‘any place’ an infected area and to regulate activities within infected areas when ‘deemed necessary for preventing the spread of or for the eradication of COVID-19’.⁶ Every person in an infected area is required to ‘undergo such medical inspection or examination as the medical officer of health may direct’.⁷ And everyone in an infected area may be placed under 14-day observation and surveillance in any place selected by the medical officer of health. The regulations make it a crime to ‘escape’ or assist someone to ‘escape’ from this quarantine.
25. On 6 April, the President made a second address to the nation in which he stated that the coronavirus presented Kenya with ‘the greatest health challenge our country has ever faced’.⁸ He told the public that the coronavirus presented an ‘extraordinary emergency’ and that Kenyan’s national interest had ‘never... been threatened to this extent before’.⁹ He told the public that ‘Our families, our schools, our way of life, the way we worship, our economy, our businesses, our workers, every single Kenyan stands threatened by this invisible, relentless enemy that is COVID-19’.¹⁰
26. On the same day, the 1st Respondent published the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules 2020—the ‘Movement Restriction Regulations’.¹¹ The Regulations were promulgated under Section 36(m) of the Public Health Act. The Movement Restriction Regulations

⁶ Public Health (Prevention, Control and Suppression of COVID-19) Rules 2020 (Leg No 49) rule 2.

⁷ *ibid* rule 12(2).

⁸ H.E. Uhuru Kenyatta, CGH, President and Commander-in-Chief of Kenya Defence Forces, ‘Presidential Address on Enhanced Measures in Response to the Covid-19 Pandemic’ (State House, Nairobi, Kenya, 6 April 2020) para 33 <<https://www.president.go.ke/2020/04/06/17505/>> accessed 11 April 2020.

⁹ *ibid* 4, 12.

¹⁰ *ibid* 5.

¹¹ Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules 2020 (Leg No 50).

elaborated and expanded upon the powers conveyed under the Prevention and Control Regulations. The Movement and Restriction Regulations defined an ‘infected area’ as ‘an area to which the rules apply’ as declared by the 1st Respondent. It also provided a broad definition of a ‘public place’, which included a place of work. And it defined ‘restriction period’ as the period specified by the 1st Respondent when declaring an area an infected area.¹²

27. The Movement Restriction Regulations imposed broad limitations on individual movement and transportation. With certain exceptions, the rules limited people’s movement into and out of an infected area during a restriction period. The rules prohibited both public transportation and private vehicles from going in or out of an infected area. They also limited movement within an infected area, limited the number of passengers public transport and private vehicles could carry, and required that anyone in a vehicle ‘wear a proper mask that must cover the person’s mouth and nose’.
28. Any person violating the rules is subject to a twenty thousand shilling (Kshs. 20,000) fine, six months’ imprisonment, or both. Also, violators will have their vehicle impounded ‘pending their arraignment in court and/or for the duration of the restriction period’.
29. The Movement Restriction Regulations also restrict the conduct of people in public places (which also includes a workplace). They require that people stay a metre apart and use a ‘proper face mask’. Businesses are required to provide hand washing or hand-sanitizing facilities, enact measures to ensure physical distancing, and regularly sanitize their premises. As with the restrictions on transportation, violators of these rules are subject to a twenty thousand shilling (Kshs. 20,000) fine, up to six months imprisonment, or both.
30. The Prevention, Control and Suppression of COVID -19 Rules 2020 and the Movement Restriction Regulations both provide guidance on the removal and disposal of bodies of persons who have died from COVID-19. The Prevention, Control and Suppression of COVID-19 Rules provide for a burial and cremation and limit the

¹² *ibid* rule 2.

number of persons that may attend a burial or cremation to 15 persons.¹³ The Movement Restriction Regulations, provide that a burial and cremation must take place within 48 hours when someone has died of COVID-19.¹⁴ On 16 April 2020, the 1st Respondent published Interim Guidelines on the Handling of Human Remains Affected with COVID-19 in Kenya.¹⁵ These provide guidance on the measures to be put in place when handling dead bodies and how to ensure the protection, dignity and respect for the deceased individual and the next of kin.

31. In a memorandum issued on 3 April 2020, the 2nd Respondent announced that those in quarantine would be required to remain for an additional 14 days. The reasons provided in the memo included the failure to: maintain optimal social distance between persons; and the prescribed hygiene standards. A further memorandum on 7 April 2020, indicated that if any person tested positive for COVID-19 on the 8th day of their quarantine, all persons held in that facility will be held for a further 14 days.
32. On 19 April 2020, the Ministry of Health Chief Administrative Secretary (CAS) Dr Mercy Mwangangi announced that those alleged to have violated the curfew regulations would 'be assumed to have been in contact with suspected cases, hence will be quarantined for 14 days'.
33. On 3rd May 2020, the Ministry of Health issued another press release given by Dr Rashid Abdi Aman, Chief Administrative Secretary in charge of Health, who spoke on behalf of the National Emergency Response Committee. Dr. Aman stated 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'.
34. In April 2020, the Ministry of Health issued the Kenya COVID-19 RMNH Guidelines: A Kenya Practical Guide for Continuity of Reproductive, Maternal, Newborn and Family Planning Care and Services in the Background of COVID 19 Pandemic (hereafter referred to as RMNH Guidelines). The Guidelines were intended

¹³ Regulation 8 of the Prevention, Control and Suppression on COVID-19 Rules.

¹⁴ Regulation 8 of the Movement and Restriction Regulations.

¹⁵ Ministry of Health, 'Interim Guidelines on the Handling of Human Remains Affected with COVID-19 in Kenya' < <https://www.health.go.ke/wp-content/uploads/2020/06/Interim-Guidance-on-Handling-of-Human-Remains-Infected-with-COVID-19.pdf>> accessed on 17 June 2020.

to provide health care service providers as well members of the general public, particularly women and girls, with information related to provision and acquisition of sexual and reproductive health services.

b. Petitioners' Requests for Information

35. Concerned by the threat to the lives, health and safety of 'every single Kenyan' and the drastic—and, at times, inconsistent erratic—measures taken by the Respondents, the Petitioners wrote a series of letters requesting for information.
36. On 30 March 2020, 6 April 2020, 9 April 2020, 10 April 2020, 15 April 2020, 16 April 2020, 17 April 2020, 18 April 2020, 27 April 2020 and 28 April 2020, the Petitioners requested that the Respondents provide information under Article 35 of the Constitution. The letters among others requested the Respondents to provide the Petitioners with information on—
 - a. the implementation of mandatory quarantine;
 - b. 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;
 - c. support that the 1st Respondent is providing to health care workers risking their health to protect the community;
 - d. the 8th Respondent's obligation to enforce the Access to Information Act, 2016.
 - e. the rationale for extending quarantine beyond the initial 14-day period;
 - f. the rationale for mandatory quarantine as punishment for those who allegedly commit curfew offences; and
 - g. the guarantee on essential reproductive health services during the COVID-19 Pandemic.

37. On 14 April 2010, the 9th, 10th and 12th Petitioners set up a legal aid support system to provide *pro bono* legal advice to those who were facing human rights violations during the COVID-19 period. As a result of this system, the 10th Petitioner received complaints from the 4th-8th Petitioners, persons, or the family of persons, who were being held in mandatory quarantine.
38. The 4th-7th Petitioners travelled to Kenya after 23 March 2020, and the 8th Petitioner is the parent of a person who travelled into Kenya after 23 March 2020, following the imposition of a travel ban into the country. They had been informed on their flights that they would be held in mandatory quarantine. Upon arrival, they were provided with little or no information about the government's COVID-19 policy as they waited to be cleared to enter the country.
39. When the 4th-7th Petitioners asked for information, they were told that the officials at the airport were waiting for orders 'from the top'. The 8th Petitioner, for instance, was abruptly informed that her daughter would be held in mandatory quarantine while waiting to collect her. Because she was unable to reserve a room online, she was forced to ask a friend living close by to travel to hotel in the middle of the night to book a room for her daughter.
40. On 24 March, the 4th Petitioner was forced to travel to Crowne Plaza at 3 am with her 9-year-old daughter only to be turned away and returned to Jomo Kenyatta International Airport because she could not afford accommodation fees upfront. She had not been informed beforehand that advance payments were required for mandatory quarantine. The 6th Petitioner, who was travelling to Mombasa, was forced to ask multiple people for information on mandatory quarantine until she was eventually told she would be forced to undergo quarantine in Nairobi County, despite not being a resident of Nairobi and having checked her luggage to Mombasa.
41. Once they arrived at the mandatory quarantine facilities, the 4th-7th Petitioners were not given information on the protocols and process to be used during the mandatory quarantine. The 8th Petitioner, for instance, had to send her daughter the Ministry of Health Quarantine Protocols she found online because her daughter had not been given any information and was getting increasingly distressed. The 6th Petitioner, a

person with asthma who was already suffering from a cold, became increasingly worried about the lack of information about testing while she was in quarantine.

42. Because of their concerns, on 30 March 2020 the 4th-6th Petitioners sent a letter to the 1st Respondent requesting that testing takes place and that results are made available within 24 hours.
43. Following concerns raised by the 4th-8th Petitioners, their family members, other individuals in mandatory quarantine, and the media reports, on 6 April 2020, the 9th-12th Petitioners, together with 23 other organisations and 47 individuals, wrote to the 1st Respondent requesting for the following information:
 - a. An explanation as to why the Ministry of Health was reportedly not adhering to its guidelines relating to managing the designated mandatory quarantine facilities.
 - b. Clarification on the circular issued by the 1st Respondent that extended the quarantine, where the extension would apply, why it had been issued, and who would bear the cost of the extension.
 - c. The total number of designated quarantine facilities as at the date of the letter.
 - d. The number of healthcare workers (including details on the groups of workers) that had been deployed to each of these facilities.
 - e. The number of people held in quarantine who had been tested and had received their results.
 - f. The measures being taken to safeguard the health of people in quarantine facilities who had a pre-existing medical condition.
 - g. The time between a positive test and referral to an isolation facility.
 - h. Whether healthcare workers and other staff who had had contact with people who had tested were also tested and whether healthcare workers and staff had access to Personal Protective Equipment.

44. On 8 April 2020, the 8th Respondent wrote to the 1st Respondent, requesting that he respond to the 6 April letter as required under Sections 9(1) and (4) of the Access to Information Act, 2016.
45. On 16 April 2020, the 12th Petitioner, becoming increasingly frustrated with the lack of response to the requests for information, wrote to the 8th Respondent, asking it to exercise its mandate to enforce the Access to Information Act, 2016 given the urgency and importance of the information required.
46. On 13 April, the 3rd Petitioner received numerous calls from people in Kamalunga Village, Simur Kondiek Sub-Location, Ukwala telling him that a person with COVID-19 had been buried in their village in an unusual manner. Upon further investigation, he learned that on or about 12 April 2020, the late James Oyugi was buried in a bizarre ceremony, in the middle of the night, in which his body was tossed into a shallow grave by officials wearing Personal Protective Equipment, without following any religious or cultural rituals. Although this occurred a month after the first COVID-19 diagnosis in the country, and after the publication of the Prevention, Control and Suppression of COVID-19 Regulations and the Movement Restriction Regulations, the burial was handled hurriedly and without due regard to the dignity and respect of all the persons involved, suggesting that the authorities were either unprepared for or unaware of the necessary protocols for burials of those suspected to have COVID-19.
47. After the burial the 3rd Petitioner began to receive enquiries from the communities in which he works with. Many were afraid that the incident would result in a bad omen and that they would be treated similarly if they were found to have COVID-19. As a leader in his community, the 3rd Respondent was unable to assuage these fears because he did not understand why the late James Oyugi had been buried in the manner he had.
48. Following the incident, the 3rd, 10th and 12th Petitioners, together with 1 other person and 12 other organisation, again wrote to the 1st and 3rd Respondents seeking information on the undignified burial and violation of the guidelines for handling

bodies that were either suspected or confirmed to be infected with COVID-19. This letter further requested the following information:

- a. An explanation as to the process undertaken to authorise the burial that took place contrary to the Ministry of Health's Guidelines for the safe disposal of human remains of a person who has died from suspected or confirmed COVID-19.
 - b. Measures put in place to ensure that the act was not replicated.
 - c. Measures put in place to ensure that this act does not result in stigma against James Oyugi's family and community.
 - d. Measures put in place to secure the mental health and wellbeing of James Oyugi's family members and members of his community.
 - e. Quarantine or isolation of close contacts of James Oyugi.
49. The 1st Petitioner works with a community-based organisation in Nyalenda, Kisumu County and has experience in advocacy on behalf of those infected with HIV, TB and Malaria. Since the announcement of the first COVID-19 case in Kenya he has been working within his community to share information and to ensure persons with TB and HIV do not experience a disruption of access to health services. As a community practitioner in the health field, he has become increasingly frustrated with the lack of information from the County Government of Kisumu. He has not been told, for instance, which facilities have been designated COVID-19 facilities, where people can be tested, what resources the county has made available, and how those resources are being used.
50. The 10th Petitioner, collaborated with health care workers' unions and conducted three surveys to gauge how prepared clinical officers, nurses, and doctors were to respond to COVID-19. While conducting the surveys, the 10th Respondent received concerns from the public, healthcare workers, and their unions that the government was not providing enough support to healthcare workers and that this was causing public anxiety and emotional distress among healthcare workers.

51. Healthcare workers are at the core of the response to the pandemic, yet the 1st Respondent has not been forthcoming on the steps being taken to prepare healthcare workers to handle the pandemic and to protect them, their families, and the members of the public that might be in contact with them from infection. Healthcare workers have continued to raise concerns about the occupational safety and the health risks they face. Informed by the results of the surveys and the lack of information from the 1st Respondent, the 1st and 10th-12th Petitioners, together with 13 other organisations and 14 individuals, wrote to the 1st Respondent on 17 April 2020 seeking information on the provision of support to the healthcare workers in the response to COVID 19. The letter sought the following pertinent information:

- a. The number health care workers trained in each designated COVID-19 facility by cadre; evidence of team-based approaches in COVID-19 facilities e.g. the number of Intensive Care Units teams with nurses, clinical officers, anaesthetists, general physicians and critical care specialists; and the number of health care workers deployed in each county.
- b. The number of designated COVID-19 management facilities; their distribution around the country; their capacity to manage severe cases; their capacity to manage critical cases; and their laboratory capabilities.
- c. The number of personal protective equipment (masks, gloves, goggles, gowns, hand sanitiser, soap and water, cleaning supplies) procured and distributed to health care workers and the distribution schedule.
- d. The number of health care workers tested for COVID-19.
- e. Whether health care workers in health facilities treating suspected and confirmed COVID-19 patients are being provided with (a) catering services; (b) accommodation; (c) transport to their accommodation.

52. The 7th Petitioner was tested for Coronavirus on 2 April 2020, 7 days after he arrived in Nairobi and was detained in mandatory quarantine. He expected to receive his results within 24 hours but was forced to request for them after 48 hours, and they

were orally provided to him. Following this, he became aware only through a commotion outside his room that some persons in his facility had tested positive for COVID-19. On 7 April 2020, on the day that his 14-day quarantine period was to be completed, he and other people in his facility were informed that they were required to stay an additional 14-days because of the positive tests. The 7th Petitioner, wrote to the 1st Respondent seeking an explanation for the extension of the quarantine period on 9 April 2020.

53. On 4 April 2020, the 8th Petitioner learned from a media briefing that her daughter's quarantine period would be extended for a further 14 days. The 8th Petitioner had no clear information as to why her daughter's quarantine had been extended particularly given that she had already tested negative for the virus. In hopes of getting information, on 9 April 2020, the 8th Petitioner wrote to the 1st Respondent seeking, among other things, the following information:

- a. why her daughter not been issued with a personal notification slip confirming she had tested negative for Covid-19;
- b. why her daughter was still being held at the quarantine facility in violation of the Ministry's protocols and the best practice recommendations issued by the World Health Organisation¹⁶;
- c. why her daughter had not been told when she would be discharged and the conditions that would be imposed once discharged;
- d. why the 1st Respondent had not informed her daughter about the effect that another person's positive test at her quarantine facility would have on her and what protocols had been put in place to address positive tests in the facilities; and
- e. who was responsible for ensuring that people who had tested positive were removed from the quarantine facility as soon as reasonably possible and what steps were being taken to mitigate the risk to her

¹⁶ Ministry of Health, 'COVID-19 Quarantine Protocols' (27 March 2020), <<https://www.health.go.ke/wp-content/uploads/2020/04/L-Quarantine-Protocols-for-Sites-with-Lab.pdf>> (accessed on 17 June 2020).

daughter and others while still protecting the rights to privacy and dignity of those who had tested positive.

54. The 8th Petitioner followed the above with a letter on 10 April 2020, addressed to the 2nd Respondent underscoring the financial difficulty placed on her and her family by her daughter's continued detention in mandatory quarantine. In this the letter the 8th Petitioner asked that the 2nd Respondent to find alternative ways to compensate the quarantine facilities and refund her for the expenses that had already been incurred.
55. In response to the circular issued by the 2nd Respondent extending the mandatory quarantine period beyond 28 days, people who were affected by the circular wrote to the 2nd Respondent and copied the 10th and 12th Petitioners. They requested, among other things, the following information:
 - a. Why the 2nd Respondent had decided to extend the quarantine period for everyone based on violations of social distancing requirements even though most of those in quarantine had complied with social distancing requirements;
 - b. Whether Ministry of Health officials assigned to their quarantine facilities posed a risk to them;
 - c. Why there was a delay in moving people who had tested positive from the quarantine facilities to isolation facilities; and
 - d. Whether the Ministry of Health would bear the cost for the extended stay.
56. The authors of the letter also raised concerns about inequitable treatment in quarantine facilities. They noted that some people in quarantine were allowed to use ATMs outside of the facility; that some people's passports had been unlawfully seized; and that the Ministry of Health failed to effectively explain the social distancing policies at the quarantine facilities while, at the same time, using a failure to adhere to comply with these policies as a justification to extend quarantine.

57. Since the first case was announced in Kenya, the 2nd Petitioner, a community health advocate who works in Mombasa, Kilifi, and Kwale Counties, has faced significant challenges accessing information about the Pandemic and the government's response. She has become increasingly concerned that the curfew is preventing people from accessing health services during curfew hours. Because of the lack of information, women have not been attending ante-natal and post-natal care and others did not know whether or where they could access health services. Many people who live in Kilifi and Kwale counties have to travel to Mombasa to receive essential health services. Those people are now barred from entering Mombasa, and because she does not have accurate information from the government, she does not know what to tell them and can no longer assist members in her community effectively.
58. On 19 April 2020, the Ministry of Health announced that persons alleged to have breached curfew will be held in mandatory quarantine. On 3 May 2020, the 6th Respondent stated that accused curfew violators would be sent to 'curfew-breakers holding places' rather than quarantine facilities.
59. Noting that mandatory quarantine was increasingly being used as a punishment to detain those alleged to have violated curfew, travel restrictions, directives on wearing masks, and social gathering restrictions, the 1st, 2nd, and 10th-12th Petitioners, together with 24 other organisations and 26 individuals, wrote on 27 April 2020. The letter requested information from each party was addressed to the 1st, 4th, 5th, 6th, 8th and 9th Respondents, as well as the 1st Interested Party, seeking specific information around the use of mandatory quarantine as a punishment, including the following:
- a. To the 1st Respondent: Whether the Ministry of Health supports the use of quarantine facilities for punitive measures as part of the COVID-19 response; a justification, legal scientific or otherwise, for the use of mandatory quarantine as a punishment; and actions being taken to ensure that public health measures are in line with human rights.
 - b. To the 4th Respondent: the number of people being held in mandatory quarantine in each county; the number of people that have been tested

in various facilities in the counties; the testing schedule for persons being held in quarantine; and the number of people in quarantine for breach of COVID-19 regulations and rules.

- c. To the 5th and 6th Respondents: Whether the police are being used to screen and decide who is suspected to have contracted COVID-19 , and if so, what training the officers have been given; what infection, prevention and control protocols the police are using; and whether police officers have access to personal protective equipment.
 - d. To the 9th Respondent: The criteria that were used to select hotels and facilities as quarantine centres; a checklist for the approval of the facilities as quarantine facilities; a list of places certified as quarantine facilities as at the date of the letter; approved standard operating procedures at quarantine facilities; and designated medical personnel responsible for oversight at each centre.
60. The 13th Petitioner works with Women’s Link Worldwide, an organisation which promotes the rights of women and girls, especially those facing multiple forms of discrimination. The organisation advocates for domestic implementation of international human rights law and the use of comparative law by national courts.
61. In April 2020, the 1st Respondent launched the RMNH Guidelines. On 28 April 2020, the 13th Petitioner, and 12 other organisations that promote access to sexual and reproductive health rights, wrote a joint letter, raising concerns around the comprehensive nature of the guidelines, to the 1st Respondent seeking clarity and provision of supplementary information on securing sexual and reproductive health and rights; and the provision of services for women and girls in the country in a manner that is comprehensive and accessible to all.
62. As at the date of filing this Petition, none of the Respondents, save for the 3rd Respondent who has acknowledged receipt of the request but not provided the information requested, have responded to any of the letters of request for information. The 4th-7th Petitioners, who were being held in mandatory quarantine at the time of their requests have since been released and have still not received responses

to their time-bound queries. The 1st-3rd and 9th-13th Petitioners, who are acting on their own behalves and on behalf of the public, have also not received responses to queries.

C. CONSTITUTIONAL, INTERNATIONAL LAW AND STATUTORY BASIS FOR THE PETITION

a. Constitutional Foundation of the Petition

63. Article 1 of the Constitution states that all sovereign power belongs to the people and shall be exercised only per the Constitution. Article 2(1) states that the Constitution is the supreme law of Kenya and it binds all persons and state organs at both levels. Article 2(4) states in part that any act or omission in contravention of the Constitution is invalid.
64. Article 3(1) obliges every Kenyan to respect, uphold and defend the Constitution.
65. Article 10 of the Constitution establishes the national values and principles of governance. These values and principles are binding on all State organs and people whenever they interpret or apply the Constitution, enact, apply, or interpret any law, or make or implement public policy. The values and principles include the rule of law, human rights, human dignity, good governance, transparency and accountability.
66. Article 19(1) of the Constitution provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic, and cultural policies. Article 20(1) states that the Bill of Rights binds all state organs. Article 20(2) provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent possible consistent with the nature of the right or fundamental freedom. Article 20(4) requires Courts, when in interpreting the Bill of Rights, to promote its spirit, purport, and objects.
67. Article 21(1) establishes that the State and all State organs have a 'fundamental duty' to 'observe, respect, protect, promote and fulfil those rights and fundamental freedoms in the Bill of Rights'.
68. Article 26(1) establishes that every person has the right to life.

69. Article 27 states that all people are equal and that every person ‘has the right to equal protection and equal benefit of the law’, including the ‘full and equal enjoyment of all rights and fundamental freedoms’.¹⁷ Neither the State nor any person may discriminate (whether directly or indirectly) against any person on any ground.¹⁸
70. Article 28 provides for every person’s inherent dignity and the right to have that dignity respected and protected.
71. Article 29 guarantees the right of every person not to be deprived of their freedom and security arbitrarily without just cause. A person may not be detained without trial unless a state of emergency has been declared, may not be subjected to torture; or treated or punished in a cruel, inhuman, or degrading manner.
72. Article 33 guarantees everyone the right to freedom of expression, including the freedom to seek, receive, or impart information and ideas.
73. The right of access to information is guaranteed under Article 35 of the Constitution, which states that ‘[e]very citizen has the right of access to information held by the State’. Article 35(3) requires that the State ‘publish and publicize any important information affecting the nation’. The State has a duty not only to proactively publish information in the public interest but also publicize such information’.¹⁹
74. The right to the highest attainable standard of health including reproductive health care is guaranteed under Article 43(1)(a) of the Constitution.
75. Article 47 also entitles everyone to fair administrative action which, among other things, is expeditious and lawful.
76. Article 232 outlines the following values and principles of public service: *responsive* provision of services; *involvement* of the people in the process of policymaking; and *transparency and provision to the public of timely, accurate information*.

¹⁷ Constitution of Kenya 2010 arts 27(1) & (2).

¹⁸ *ibid* art 27(2).

¹⁹ *Manase Guyo & 260 others v Kenya Forest Services* High Court Const Pet 22 of 2014, [2016] eKLR [76]; citing *Nairobi Law Monthly Co Ltd v Kenya Electricity Generating Company & 2 Others* [2013] High Court Pet 278 of 2011, eKLR [34].

b. International and Regional Law Foundations of the Petition

77. Under Article 2(6) of the Constitution, any treaty or convention ratified by Kenya is a part of Kenyan law. Kenya is a party to a number of international treaties and conventions that guarantee the right of access to information and other rights and fundamental freedoms that are relevant to this Petition.
78. Article 3 of the Universal Declaration of Human Rights (UDHR) guarantees that: *'Everyone has the right to life, liberty and security of the person'*. The International Covenant on Civil and Political Rights (ICCPR) provides that: *'Every human being has the inherent right to life . . .'*²⁰ The right to life is also guaranteed in the African Charter on Human and Peoples' Rights (the Banjul Charter) which states: *"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."*²¹
79. Article 19 of the ICCPR entitles everyone *'the right to freedom of expression; including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print'*. This is also guaranteed in Article 19 of the UDHR. The Banjul Charter guarantees the right to receive information.²²
80. Article 12 of the International Covenant of Economic, Social and Cultural Rights recognizes the right of everyone to enjoy the highest attainable standard of physical and mental health. This provision is reiterated in Article 16 of the Banjul Charter.
81. The right to equality and non-discrimination is guaranteed in Article 7 of the UDHR; Article 26 of the ICCPR; and Article 2 and 3 of the Banjul Charter. Article 2 of the Convention on All Forms of Discrimination Against Women (CEDAW) places a positive obligation on states to eliminate discrimination against women.
82. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), protects health and reproductive rights, including access to adequate, affordable and accessible health services.²³ Article 12 of

²⁰ Article 6 of the ICCPR.

²¹ Article 4 of the Banjul Charter.

²² Article 9 of the Banjul Charter.

²³ Article 14 of the Maputo Protocol.

CEDAW obliges states to take all appropriate measures to eliminate discrimination against women in the field of health care.

c. Statutory Foundations of the Petition

83. Parliament enacted the Access to Information Act, 2016 to give effect to the rights provided under Article 35. It establishes a framework for responding to information requests and disseminating information to the public. The Act reaffirms the rights established under Article 35.

84. Section 4(1) guarantees the right of access to information and 4(3) stipulates how the information must be provided:

“(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.

...

(3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

85. The Access to Information Act stipulates that, generally speaking, information shall be provided expeditiously. An exception, however, is set forth in Section 9(2) which provides that:

“Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.”

86. The 8th Respondent has the power to oversee the State’s compliance with the Access to Information Act.²⁴ The 8th Respondent has the mandate to investigate possible violations of the Act, either on its own volition or in response to a complaint.²⁵

87. The power to make regulations under the Access to Information Act is derived from Section 25(1) and (2) which states that:

²⁴ Section 20 of the Access to Information Act, 2016.

²⁵ Section 21(1) (a) of the Access to Information Act, 2016.

“(1) The Cabinet Secretary may, in consultation with the Commission, make regulations, prescribing anything required by this Act to be prescribed or generally for the better carrying into effect the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the regulations may provide for—

- (a) the manner in which applications under this Act shall be made;*
- (b) the form in which information requested under this Act shall be supplied;*
- (c) the making of an application for personal information by representatives of the person to whom the information relates;*
- (d) the measures to be taken by public entities to facilitate the exercise by persons of their rights under this Act;*
- (e) the measures to be taken by public entities to ensure that adequate records are created and maintained by the entities;*
- (f) the procedures for the making of an application by a complainant for the review by the Commission, of a decision made by a public entity relating to access to information;*
- (g) the procedure to be followed by a public entity in consulting with a third party before giving access to information obtained by it from that party;*
- (h) the procedures requiring a public entity to ensure that personal information is accurate;*
- (i) compensation to be sought by an individual who has suffered damage as a result of the holding of inaccurate information about the individual's personal affairs by a public entity;*
- (j) the records that public entities shall be required to keep; or*
- (k) such matters as are contemplated by or necessary for giving full effect to this Act and for its due administration.”*

88. Section 28(4) of the Access to Information Act provides that “ *Any person who . . . fails to respond to a request for information required for the exercise or protection of a right in accordance with the requirements of this Act . . . commits an offence and is liable, on conviction, to a fine not*

exceeding one hundred thousand shillings, or imprisonment for a term not exceeding six months, or both²⁶

89. Section 5(1) of the Health Act, 2017 guarantees and further codifies the right to health, stating that:

‘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.’

90. Section 10 of the Health Act, 2017 requires national and county governments to proactively provide health-related information, stating that:

‘The national government, county governments and every organ having a role or responsibility within the National Health System, shall ensure that appropriate, adequate and comprehensive information is disseminated on the health functions for which they are responsible being cognizant of the provisions of Article 35(l)(b) of the Constitution, which must include:

- (a) the types, availability and cost of any of health services;*
- (b) the organisation of health services; operating schedules and timetables of visits;*
- (c) procedures for access to the health services;*
- (d) procedures for laying complaints; the rights and duties of users and health care providers under this Act and as provided for in the applicable service charters; and*
- (e) management of environmental risk factors to safeguard public health.’*

91. The Fair Administrative Action Act, 2015 defines administrative action as including:
“the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or 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.”²⁶

92. In terms of the Fair Administrative Action Act, every person has a right to administrative action that is ‘expeditious, efficient, lawful, reasonable and procedurally fair’.²⁷ This right also entitles persons to receive written reasons for any administrative action taken against them.²⁸

²⁶ Section 2 of the Fair Administrative Action Act, 2015 (4 of 2015).

²⁷ Section 4(1) of the Fair Administrative Action Act 2015 (4 of 2015).

²⁸ Section 4(2) of the Fair Administrative Action Act 2015 (4 of 2015).

93. Section 4(3) of the Fair Administrative Action Act provides that where administrative action is likely to affect the rights or fundamental freedoms of any person, the administrator shall give 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.

D. PARTICULARS OF CONSTITUTIONAL VIOLATIONS

a. Right of access to information

94. Article 35(3) of the Constitution places an affirmative duty on the State to publish and publicize important information affecting the public. There can be no doubt that the coronavirus pandemic has, in the President’s words, presented Kenya with an ‘extraordinary emergency’ and required it to confront ‘the greatest health challenges our country has ever faced’.²⁹ In response to this challenge, the State has made a number of decisions to secure public health, including implementing a 7:00 pm-5:00 am curfew, restricting movement, and requiring people to wear a mask while in public.

95. The 1st, 5th and 6th Respondents have taken two pertinent decision: first that people alleged to have violated curfew shall be assumed to have been exposed to the coronavirus; and second that alleged curfew violators should be held in mandatory

²⁹ H.E. Uhuru Kenyatta, CGH, President and Commander-in-Chief of Kenya Defence Forces (n 6) paras 4, 33.

quarantine and, later, in 'curfew breakers holding places'. The 1st, 5th and 6th Respondent failed to provide information on:

- a. The justification, both scientifically and legally, for assuming that alleged curfew violators had been exposed to the coronavirus;
- b. The justification for holding persons alleged to have breached the law in mandatory quarantine or 'curfew breakers holding places' without access to courts; and
- c. The legal framework under which a 'curfew breakers holding place' can be established, including the power to establish such a facility.

96. This failure is a breach of the affirmative duty to provide information that is affecting the nation. The criminalisation of a public health emergency has stigmatised COVID-19 and driven fear into the public. The people required to rely on this information find themselves confused, afraid and without an understanding of the government actions. While the Public Order Act stipulates that breaching a curfew order is an offence, the actions of the 1st, 5th and 6th Respondents are contrary to the established process that ought to be followed when an offence is committed.³⁰ The failure to provide clear and concise information around the criminal offences and procedures instill fear in the public and delegitimises existing legal systems.
97. The failure to provide information about mandatory quarantine and its implementation also violated the constitutional and statutory right to information.
98. The 1st Respondent failed to provide the 4th-7th Petitioners, who were held in mandatory quarantine; and the 8th Petitioner, whose daughter was in mandatory quarantine, with the information necessary to guarantee their safety and well-being while in quarantine.
99. The 1st Respondent has a duty to ensure that the information relevant for the proper implementation of mandatory quarantine was made available before the measures

³⁰ Section 8(6) of the Public Order Act stipulates that it is an offence to breach the provisions of a curfew order.

were rolled out. He breached that duty when he failed to provide the 4th-7th Petitioners with information necessary to protect their safety and inform them of their rights and fundamental freedoms.

100. The 1st Respondent's conduct also violates the reciprocal privilege under Article 33 to 'seek' and 'receive' information.
101. The 1st-6th and 9th Respondents failure to affirmatively publish and publicise information affecting the nation has been exacerbated by their failure to respond to requests for information.
102. The Petitioners', who have a constitutional and statutory right to access information held by the State have sought information from 1st-6th and 9th Respondents on 30 March 2020, 6 April 2020, 9 April 2020, 10 April 2020, 15 April 2020, 17 April 2020, 18 April 2020, 27 April 2020 and 28 April 2020. All these requests have been ignored and over 8 weeks have passed since the most recent request.
103. Despite a shared understanding that it is necessary to provide the public with information that will help them stay safe and minimise the risk of transmission the 1st-6th and 9th Respondents have failed to do this. They did not affirmatively provide critical information that would help Kenyans protect their health and mitigate the spread of the virus. As the experiences of the 1st, 3rd, 9th, and 12th Petitioners demonstrate, the government failed to provide accurate and timely information that would not only inform the public but could be further disseminated by community-based workers, health advocates, and civil society organizations.
104. By violating Article 35, the 1st-6th and 9th Respondents have also breached the values and principles of rule of law, human rights, good governance, transparency and accountability, and the provision to the public of timely and accurate information that are required of them under Articles 10 and 232(1)(f) of the Constitution.

d. Right to life

105. At the date of filing this petition, there have been more than half a million deaths as a result of COVID-19 globally and more than 140 deaths in Kenya. The continued

spread of COVID-19 poses a threat to the lives of everyone, including Kenyans. And it is undisputed that the proper management of the pandemic is key to curbing its spread.

106. The 1st and 4th Respondents have endangered the lives of Kenya by failing to provide timely and accurate lifesaving information on the spread and management of the virus. The 1st-3rd Petitioners' have noted that the lack of information has inhibited their ability to provide information on necessary health services, has instilled fear in their communities, and has increased the stigmatization of those who may have the virus..
107. In light of the extensive threat imposed by the coronavirus, the Respondents violated Article 26 of the Constitution by a) failing to affirmatively provide the Petitioners and the public with the critical information necessary to protect their health and safety, and b) by failing to respond to the Petitioners requests for access to information.

e. Right to health

108. As at the time of filing this petition, there are more than 10 million confirmed COVID-19 cases globally; and over 6,000 in Kenya. The continued spread of COVID-19 poses a threat to the health and well-being of every person, including Kenyans. Kenya's first COVID-19 case was confirmed on 12th March 2020 and in the three months since we have recorded an amore than 6,000 cases, with the numbers rising daily.
109. The right to the highest attainable standard of health which includes reproductive health care requires access to information to prevent and promote good health and well-being for all including that of women and girls. By failing to affirmatively provide information to the Petitioners and the public and by failing to respond to the Petitioners' requests for information, the Respondents' violated the Petitioners and the public's right under Article 43(1) to the highest attainable standards of health.

f. Right to freedom and security of the person

110. The experiences of the 4th-8th Petitioners are illustrative that despite opting for mandatory quarantine to curb the spread of COVID-19, little to no information was

provided in its implementation. From the experiences of 1st-3rd Petitioners, communities are both afraid of and confused about mandatory quarantine. From the work of 9th-12th Petitioners, the derogation of the right to freedom and security of the person through mandatory quarantine and 'curfew breakers holding places' without due process of the law is a violation of said right.

111. The Respondents' failure to provide the Petitioners with the information sought under Article 35(1) and to publicise that information under Article 35(3) during the pandemic, has resulted in a concomitant violation of the Petitioners and the public's rights under Article 29 of freedom and security of the person.

g. Right to equality and non-discrimination

112. The 2nd, 10th and 13th Petitioners have noted concerns around the disproportionate effect of the pandemic on women and girls and other marginalised communities. The 2nd Petitioner, has noted a decrease in access to reproductive and maternal health services as a result of the lack of information occasioned by failures on the part of the 1st Respondent.

113. The 1st Respondent by failing to ensure the dissemination of accurate and timely information to the most marginalised and vulnerable of the population, majority being women and girls, has failed to ensure the enjoyment of the right to equality and non-discrimination. Further, this failure by the government led to the violation of other rights inextricably linked to the right to equality and non-discrimination such as the right to health, life and dignity.

h. Right to fair administrative action

114. The 1st and 2nd Respondents took a decision to extend the period for those held in mandatory quarantine and this was communicated through two memorandums on 3 and 7 April 2020. The 7th and 8th Petitioners were adversely affected by this decision and sought clarification from the 1st and 2nd Respondent through writing.

115. The 1st and 2nd Respondent violated Article 47 by failing to adhere to the principles of lawfulness, reasonableness or procedural fairness. The decision taken to extend the

mandatory quarantine was contrary to the provisions of the COVID-19 Quarantine protocols which state that if a person is found to be negative, they shall be released to self-quarantine after 14-days. Both the 7th Petitioner and the daughter of the 8th Petitioner tested negative for COVID-19. The decision was not reasonable as it provided a blanket statement that all persons who were in facilities where a person had tested positive would continue to be held despite their own negative test. Finally, the decision was taken without taking into account the views of those it affected and was thus procedurally unfair.

116. When the 7th and 8th Petitioners, sought to get clarification for the decision taken highlighting specific concerns, the 1st and 2nd Respondent failed to address these concerns or even respond to the letters heightening the egregiousness of their actions.

E. PARTICULARS OF STATUTORY VIOLATIONS

a. Access to Information Act, 2016

117. The 1st-6th and 9th Respondents violated Section 4(1) of the Access to Information Act, by failing or refusing to respond to letters requesting information from the Petitioners. As at the date of filing this Petition, none of the Petitioners, save for the 3rd Petitioner who has received an acknowledgment of his letter, has received a response to their requests for information.

118. The 1st-6th and 9th Respondents also violated Section 9(2) of the Access to Information Act, which requires them to provide information relating to the life or liberty of a person within 48 hours of receiving the request. As noted by the President and demonstrated above, the coronavirus presents a threat to the life and liberty of each person in Kenya. Information relating to the Pandemic, in turn, concerns the life of all persons in Kenya, including the lives of the Petitioners.

119. The 1st-6th and 9th violated Section 9(2) of the Access to Information Act by failing to provide information regarding the detention of those in quarantine who, because they were unlawfully detention with those who may be infected with the coronavirus, had their lives and liberty directly threatened.

120. The 1st-6th and 9th Respondents have violated Section 9(1) of the Access to Information Act because they have failed to respond to eight separate requests for information (submitted on 6 April 2020, 9 April 2020, 10 April 2020, 15 April 2020, 17 April 2020, 18 April, 27 April 2020 and 28 April 2020) within 48 hours of receipt of the requests. They have further violated Section 4(3) of the Access to Information Act by failing to expeditiously provide information sought, with an 8-week period having passed since the information was sought.
121. The 8th Respondent has violated Sections 20 and 21 of the Access to Information Act, by failing to exercise its mandate and provide oversight into the enforcement of the Act. After being made aware of the failure of the 1st Respondent to respond to an urgent request, the 8th Respondent, despite its obligation to enforce the Access to Information Act opted not to act and failed to exercise its statutory mandate.
122. The 7th and 8th Respondents, have jointly violated Section 25, by failing to enact regulations that would guide the manner and form on which requests to access information can be made, and the measures to be taken by public entities to facilitate access to information.
123. It has been four years since the Access to Information Act was enacted to give effect to Article 35 of the Constitution and the 7th and 8th Respondents have failed to enact regulations that would facilitate the realisation of this right. The impact of this failure is perhaps demonstrated by the letter of 16 April 2020, in which the 12th Petitioner noted that they would consider “other measures including litigation to safeguard the lives of Kenyans if a response was not received”. However, what is critical is that none of the Petitioners understand what process they should take to safeguard their rights, and those of Kenyans as a result of the non-responsiveness of the 1st-6th and 9th Respondents. The Access to Information Act provides a framework to facilitate access to information and also authorises the 7th and 8th Respondent to work collaboratively in ensuring that the manner and form in which information is sought is provided in regulations.
124. Due to the failure of the 7th and 8th Respondents to enact regulations – the Petitioners and Kenyans do not know:

- a. What ‘expeditiously’ means in the context of the Access to Information Act;
- b. What costs one can reasonably expect to incur when seeking information;
- c. How a decision on whether information concerns life and liberty of a person shall be taken;
- d. When a decision on whether or not information concerns the life and liberty of a person must be communicated;
- e. The form and manner in which to seek information; and
- f. The procedure to be followed in the case of non-responsiveness.

125. The Petitioners have not received any information they have sought and because of the lack of regulations the only process available to them in vindicating their right of access to information is through judicial intervention.

126. As a result of this failure, public entities such as the 1st-6th and 9th Respondents can, and have, willfully ignored access to information requests with no meaningful intervention from the 7th and 8th Respondents.

i. Health Act, 2017

127. The 1st and 4th Respondents, by failing to respond to requests for information and to proactively provide information, have violated Section 5(1) of the Health Act, which guarantees the right to the highest attainable standard of health, including promotive and preventive health services. By repeatedly failing to provide information on the country’s preparedness—either proactively or in response to requests—the 1st and 4th Respondents violated Section 5(1) of the Health Act. This has been illustrated in Mombasa County by the 2nd Petitioner who has witnessed the challenges to accessing health services created by the lack of information about the Pandemic and the Petitioners’ response.

128. The 1st and 4th Respondents have violated their obligation under Section 10 to ensure that appropriate, adequate and comprehensive information is disseminated per Article 35(1) (b) of the Constitution, including information on the management of environmental risk factors to safeguard public health. The 1st and 4th Respondents have failed to proactively provide information on the management of the pandemic in Kenya and have breached this Section and acted to the detriment of the Petitioners and Kenyans.
129. The 1st, 2nd and 4th Respondents have received and failed to respond to letters requesting for information on seven separate occasions (6 April 2020, 9 April 2020, 10 April 2020, 15 April 2020, 17 April 2020, 18 April 2020 and 27 April 2020); information that is critical for an understanding of the pandemic and the government's response, and that would guide the public on what steps they can take to not only minimise their health risks but also continue to access health services.
130. The 1st Respondent's failure to provide information and respond to requests seeking such information violated Section 6(1) of the Health Act which provides for every person's right to be informed about their reproductive health and to have access to reproductive health services. This includes the right to emergency medical treatment as shown in Section 7 of the Health Act. The impact of the 1st Respondent's failure to provide information to women has been demonstrated by the 2nd and 13th Petitioners who through their work have been monitoring the experiences of women in accessing such services.

j. Fair Administrative Action Act, 2015

131. The 1st and 2nd Respondents breached the provisions of Section 4(1) of the Fair Administrative Action Act by taking a decision to extend mandatory quarantine that was unlawful, unreasonable and not procedurally fair against the 7th and 8th Petitioners.
132. The 1st and 2nd Respondents breached Section 4(3) of the Fair Administrative Action Act through the decision to extend mandatory quarantine. Firstly, prior and adequate notice of the nature and reasons for the decision is required, however the 7th Petitioner was informed on the day he was to be released that his period in quarantine shall be

extended and the 8th Petitioner learned of the decision in a press briefing two-days before her daughter was to be released. Secondly, they were not given an opportunity to be heard before the decision was taken, and when they sought to query the decision the 1st and 2nd Respondent were non-responsive. The non-responsiveness of the 1st and 2nd Respondent was indicative that there was no right of review or appeal and neither of the memorandums issued by the 2nd Respondent communicated what the procedure for appeal or review was. Finally, the 7th and 8th Petitioners were not provided with any information, materials or evidence that had been utilised in taking the decision despite asking for it.

F. PRAYERS FOR RELIEF

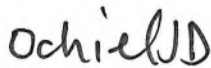
133. Based on the Constitutional and statutory violations noted above, the Petitioners request that this court provides the following relief:


- a. A declaration be issued that the 1st-6th and 9th Respondents' failure to proactively publish and publicise important information about the pandemic and the State's response violates the right of access to information as guaranteed under Article 35(3).
- b. A declaration be issued that the 1st and 4th Respondents' failure to affirmatively provide information about the COVID-19 pandemic and the government's response violates the right to life as guaranteed under Article 26(1).
- c. A declaration be issued that the 1st and 4th Respondents' failure to affirmatively provide information about the COVID-19 pandemic and the government's response violates the right to health as guaranteed under Article 43(1)(a) and the Health Act, 2017.
- d. A declaration be issued that the 1st-6th and 9th Respondents' failure to affirmatively provide information regarding the pandemic and the State's response violates Articles 10 and 232 of the Constitution.
- e. A declaration be issued that the 1st-6th and 9th Respondents' failure to provide the information sought by the Petitioners violates their right of access to

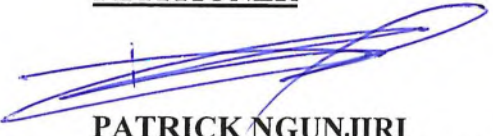
information as guaranteed under Article 35(1) and the Access to Information Act.

- f. A declaration be issued that the 1st-6th and 9th Respondents' failure to provide the information sought by the Petitioners violates their right to freedom of expression as guaranteed under Article 33(1) (a).
- g. A declaration be issued that the 1st and 4th Respondents' failure to provide the information sought by the Petitioners violates their right to life as guaranteed under Article 26(1).
- h. A declaration be issued that the 1st and 4th Respondents' failure to provide the information sought by the Petitioners violates their right to health as guaranteed under Article 43(1)(a) and the Health Act, 2017.
- i. A declaration be issued that the 1st-6th and 9th Respondents can be held criminally liable in their individual capacities for breach of Sections 28(4)(b) of the Access to Information Act, 2016.
- j. A declaration be issued that the 1st and 2nd Respondent's decision to extend mandatory quarantine as communicated via circular by the 2nd Respondent violated the 7th and 8th Petitioners' rights to fair administrative action as guaranteed in Article 47 and the Fair Administrative Action Act, 2015.
- k. A declaration be issued that the 8th Respondent has failed to exercise its mandate to provide oversight and ensure the enforcement of the Access to Information Act, 2016 and has resultantly violated Article 35 of the Constitution.
- l. An order of mandamus be issued compelling the 1st-6th and 9th Respondents to provide the Petitioners with the information sought in the letters dated 30 March 2020, 6 April 2020, 9 April 2020, 10 April 2020, 15 April 2020, 17 April 2020, 18 April 2020, 27 April 2020 and 28 April 2020 within 48 hours of this order.
- m. An order of mandamus compelling the 8th Respondent to exercise its statutory mandate under Section 21(1)(a) of the Access to Information Act, 2016 to investigate the alleged violations of the Act.

- n. An order of mandamus compelling the 7th Respondent, in consultation with the 8th Respondent, to draft and publish regulations within 90 days of this order on:
 - i. The manner in which applications under the Access to Information Act, 2016 may be made;
 - ii. The form in which information requested under the Access to Information Act, 2016 may be supplied; and
 - iii. The measures to be taken by public entities to facilitate the exercise of the right under Article 35 of the Constitution and the implementation of the Access to Information Act, 2016.
- o. An order of mandamus compelling the 7th Respondent, in consultation with the 8th Respondent, to draft and publish regulations on the procedures for requesting and supplying information that concerns the life and liberty of a person within 90 days of this order (under Section 9 of the Access to Information Act, 2016).
- p. An order of mandamus compelling the 1st Respondent in consultation with the 4th Respondent, and other relevant stakeholders, to update and re-publish the Reproductive Maternal and Newborn Health Guidelines: A Kenya Practical Guide for Continuity of Reproductive, Maternal, Newborn and Family Planning Care and Services in the Background of COVID 19 Pandemic, to include comprehensive information to health care workers, women and girls on the provision of essential services which includes access to all sexual and reproductive health and rights.
- q. An order that the 1st Respondent pays general damages to the 4th-8th Petitioners for the emotional distress these Petitioners underwent as a result of the inadequate information received during the mandatory quarantine period.
- r. That the Respondents, within twenty-one (21) days from the date the order, file affidavits with the Court detailing their compliance with these orders.
- s. Costs of this Petition and any other just and expedient order the Court may deem fit to make.


OCHIEL J. DUDLEY
ADVOCATE FOR THE 10TH
PETITIONER


NERIMA WERE
ADVOCATE FOR THE 1ST-8TH
AND 10TH, 12TH AND 13TH
PETITIONERS


PATRICK NGUNJIRI
ADVOCATE FOR THE 11TH
PETITIONER

DRAWN AND FILED BY:

Ochiel J. Dudley, Advocate,
C/o Katiba Institute,
House No. 5, The Crescent Ave, off Parklands Road,
P.O. Box 26586-00100,
Nairobi.
ochieljd@katibainstitute.org
0731 740 766

AND

Nerima Were
C/o KELIN
Kuwind Lane, off Lang'ata Road, Karen C
P.O. Box 112 - 00202 KNH Nairobi
Tel: +254 020 2515790
Office Mobile: +254 710 261408 / +254 751 292 520
Fax: 020 386 1390
nwere@kelinkenya.org
Admission Number: P105/13954/17
Practice Number: LSK/2020/07699

AND

Patrick Ngunjiri
Patrick's Law Associates (Plass Advocates),
Old Mutual Building, 4th Floor,
Kimathi Street, Suite 401,
P.O. Box 16727 – 00100 GPO,
Nairobi.
patrick@plasslaw.com
+254 700 753 748 / 020 3341574