

---

# COMMUNIQUE

---

## KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV AND AIDS (KELIN) v THE ATTORNEY GENERAL & MINISTRY OF HEALTH; COMMISSION ON ADMINISTRATIVE JUSTICE (PETITION E063 OF 2021)

---

### INTRODUCTION

On Friday, 26th February 2021, KELIN filed a petition seeking to hold the State, through the Ministry of Health, accountable for funds received from the Global Alliance for Vaccines Immunization (GAVI) to support the Kenya Expanded Programme of Immunisation (KEPI) in the period 1st July 2009 and 30th June 2015. In an audit conducted in 2016, GAVI found that the funds given to the Ministry of Health were not applied to their intended purpose. The audit report questioned how the sum of Kshs 161 200 000 (USD 1.6 million) was used, and indicated that there was a balance of Kshs 25 000 000 (USD 0.25 million) that remained unutilized and unprogrammed. In addition, there were 0.73 million doses of pneumococcal vaccine that remained unaccounted for. In June 2016, the Ministry of Health agreed to reimburse the amount of Kshs 161 200 000 (USD 1.6 million) to GAVI.

### WHAT IS THE PETITION ABOUT?

The sum of approximately Kshs 161 200 000 (USD 1.6 million) was paid back to GAVI in a single installment. It is not known where the Ministry of Health sourced these funds from. The funds misappropriated were intended to ensure that the Ministry of Health carries out its **constitutional mandate** in ensuring **the right to health for Kenyans**. In particular, these funds were intended to be applied towards the **vaccination of children**. This reimbursement ended up costing the tax payer, a loss which could have been avoided had there been adherence to the law and if the Ministry of Health had been transparent and accountable to Kenyans.

In 2016, various civil society organisations, including KELIN, pursuant to their collective mandates in ensuring good governance and human rights, sought information on the circumstances surrounding the misappropriation of funds at the Ministry. In particular, it sought the following information:

- a. A copy of the intergovernmental agreement on the retention of this function (immunization) by the national government pursuant to Article 187 of the Constitution and Section 26 of the Intergovernmental Relations Act.
- b. A report on the action taken against the persons adversely mentioned in the audit report including whether the Ministry has referred this case to relevant authorities for investigations and possible prosecution and whether any funds have been collected from those responsible in line with the law.
- c. Copies of documentation showing transfer of payment of the above money from the Ministry of Health and GAVI.
- d. Information on the source of the money paid back to GAVI; in particular, the budget line the money came from.
- e. Information on the measures the Ministry put in place to ensure compliance with the audit report.

The Ministry of Health, has since 2016 neglected to provide this information. This information is required by the civil society, the affected communities as well as members of the public to ensure that the right to health is respected and protected, and also to ensure that public funds are utilized in line with constitutional edicts.

The refusal of the Ministry of Health to provide information about the misappropriation of funds speaks to a lack of transparency and accountability in the utilization of public funds; it should be noted that these funds were repaid to the donor out of tax payer money, yet the beneficiaries of the funds did not get the vaccines that they needed which jeopardized their right to health.

## **WHO IS INVOLVED?**

There is only one Petitioner, KELIN, which is a non-profit organization that works for access to justice and the promotion of health-related human rights in Kenya. The Petitioner brought this case in the interest of the public.

There are two Respondents in the case: The Cabinet Secretary, Ministry of Health; and the Attorney General. The Cabinet Secretary, Ministry of Health is constitutionally mandated to deal with policies relating to health, including ensuring finances allocated to the ministry of health are utilized prudently, responsibly and in a transparent and accountable manner. The Attorney General is sued as the legal representative of the State.

The Commission on Administrative Justice has been joined in the petition as an interested party. It is the statutory body that has the mandate of overseeing and enforcing the implementation of the Access to Information Act, 2016.

## **WHAT DOES THE PETITIONER WANT FROM THE COURT?**

The Petitioner seeks various orders from the Court. These are:

- A declaration that the failure by the Ministry of Health to provide and publish information that the Petitioner sought is a violation of the values of the rule of law, participation of the people, human rights, good governance, transparency and accountability.
- A declaration that the failure by the Ministry of Health to provide and publish the information sought is a violation of the obligations imposed on the State by the Constitution, and in particular the obligation to ensure public finance is utilized in an open, accountable, prudent and responsible manner.
- An order to compel the Ministry of Health to provide, at its costs, information sought by the Petitioner in relation to the GAVI audit.