

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO E063 OF 2021

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20(1)-(4), 21, 22, 35, 201,
258 AND 259 OF THE CONSTITUTION**

BETWEEN

**KENYA LEGAL AND ETHICAL
ISSUES NETWORK ON HIV & AIDS (KELIN)..... PETITIONER**

AND

**CABINET SECRETARY, MINISTRY OF HEALTH.....1st RESPONDENT
THE ATTORNEY GENERAL.....2nd RESPONDENT**

AND

**THE COMMISSION ON
ADMINISTRATIVE JUSTICEINTERESTED PARTY**

PETITIONER’S WRITTEN SUBMISSIONS

I. INTRODUCTION

1. These are the Petitioner’s submissions in respect of the Petition dated 25th February 2021. The petition is supported by the Affidavit of Allan Achesa Maleche sworn on even date. As at the time of filing these submissions, despite repeated leave granted by this Court, the Respondents have not filed anything to oppose the Petition, while the Interested Party has responded through an affidavit sworn by Leonard Ngaluma on the 29th October 2021.

II. FACTS

2. This petition arises from misappropriation of funds by the 1st Respondent. Between 1st July 2009 and June 2015, the 1st Respondent, with the support

of various partners among them World Health Organization (WHO), the United Nations International Children’s Emergency Fund (UNICEF), the United States Agency for International Development (USAID) and Global Alliance for Vaccines Immunisation (GAVI), implemented the Kenyan Expanded Programme for Immunization (KEPI). As part of this support, GAVI provided financial and in-kind support and as at 30th September 2015, Kenya through the 1st Respondent, had received aid in the amount of USD 391,807,902. This comprised of cash grants in the sum of USD 26,178,992. This amount was given to cover operational costs for a campaign for the vaccination against measles rubella, and to support the introduction of new vaccines. Of the entire sum, the 1st Respondent received the sum of USD 14,663,680 directly.

3. At the end of the project, GAVI conducted an audit of KEPI between September 2015 and March 2016 in line with its transparency and accountability policy. The audit covered income received, expenditures incurred, procurement activities as well as supply management at the national, provincial and district level. That audit was to ensure that the funds released to the 1st Respondent were utilized in accordance with the agreed terms and conditions of the agreement. However, the audit revealed that there was non-compliance with the Government of Kenya’s and GAVI’s transparency and accountability policy. It also demonstrated that there were “*issues in relation to vaccine supply management, budgeting and financial management; expenditure and disbursements and procurement,*”¹ and that were the resources were not utilized for the intended purposes. In particular the audit showed that:

¹ See Memorandum in Kenya Programme Audit Report in the Final Audit Report dated 2nd May 2016 Annexure AAM3 in the Affidavit of Allan Maleche.

- a) There was expenditure that was unsupported or inadequately supported in the amount of USD 1.6 million;
 - b) GAVI funds in the amount of USD 0.25 million were not utilized and were not realigned or reprogrammed; and
 - c) There were 0.73 million doses of pneumococcal vaccine not accounted for.
4. The audit report was discussed by GAVI and the 1st Respondent during which the 1st respondent agreed to remedy the key issues set out. These included reconciling and accounting for the 0.73 million doses of pneumococcal vaccine, and in a letter dated 14th June 2016 the 1st Respondent agreed to remedy the problems identified in the audit as follows:
- a) Reimburse the questioned expenditures.
 - b) Repay the unused Programme funds held at the National Treasury as set at 3(a) and (b).
5. In the months of September and October 2016, the 1st respondent reimbursed GAVI the sum of USD 1.6 million in a single installment. It is unclear where the funds for this reimbursement were sourced from, but it is apparent that there was a loss of taxpayer funds, since missing money had to be repaid by the 1st Respondent, due to the lack of adherence to the processes and procedures in law that led to questioned expenditures. While audit was on four categories reviewed: vaccine supply management, budgeting and financial management, expenditure and disbursements and procurement. The latter two categories were given a rating of ‘unsatisfactory’.² In its findings, GAVI found that the 1st Respondent had

² See for example the audit rating at page 16 of the Annexure AAM in the affidavit of Allan Maleche. The Audit finding on expenditure and disbursements shows that the audit team identified significant

failed to detail procedures for stock taking of vaccines, there was inadequate oversight of tracking of balances of vaccines,³ that some of GAVI's funds "*were not available or may not have been used for the intended purposes*"⁴

6. This mismanagement of funds led to the Petitioner, together with other organizations and institutions drawn from the health and human rights and governance sector wrote to the 1st respondent, pursuant to their mandate and duty to defend the Constitution and in exercise of their right to access information under the Access to Information Act, 2016 access to the following information held by the 1st respondent:
 - a) A copy of the intergovernmental agreement on the retention of the immunization function 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 1st Respondent has referred the case to the 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 sum of USD 1.6 Million money from the Ministry of Health to GAVI;

departures from the government of Kenya's national guidelines for accounting. Supporting documentation for expenditures of USD 631,943 was not available and there was a lack of accountability on the purpose that the corresponding funds were used for. AS Such GAVI found that the funds were not used for the purpose they were intended.

³ See Page 8 of the GAVI report.

⁴ See Risks/Effects detailed at page 14 of the Audit report, showing how the 1st Respondent failed to monitor or account for funds disbursed to the districts.

- d) Information on the source of the money paid back to GAVI and in particular, the budget line the money came from;
 - e) Information on the measures the Ministry has put in place to ensure compliance with the audit report.⁵
7. This request for information was not acted upon, prompting the Petitioner to send a reminder on 29th November 2016.⁶ The 1st respondent still did not provide the information, prompting the Petitioner to seek the intervention of the Interested Party through a letter dated 23rd August 2017. This prompted the Interested Party to initiate an inquiry on the refusal by the 1st Respondent to provide the information that was required for the protection of the right to health.
8. Despite the intervention of the Interested Party, the 1st respondent persisted in its refusal to provide the information requested. It was only after the Interested Party invoked sections 2 and 24 of the Access to Information Act and required the Principal Secretary to show cause why he should not be included in a Register of Malfeasant Public Officers due to his non-responsiveness, that the 1st Respondent responded to the Interested Party.
9. In its response however, the Principal Secretary did not provide the information requested and instead provided the final audit report - which the Petitioner's had already referenced in their request for information. The information requested remained outstanding, and the Petitioner brought this to the attention of both the 1st Respondent and the Interested Party but to date, neither of this state entities, have provided the

⁵ See Annexure AAM4.

⁶ See Annexure AAM5.

information sought. This failure by the 1st Respondent continues to violate Articles 10, 35, 43(1) and 232 of the Constitution.

III. ISSUES FOR DETERMINATION

10. Two main issues arise for determination in this Petition:
 - a. Whether the 1st respondent's failure to provide the information requested by the Petitioner and other civil society actors was a violation of Articles 35, 201 and 232 of the Constitution.
 - b. What remedies this Court should give.

IV. ANALYSIS

Violations of the Right to access to information as enshrined under Article 35 of the Constitution of Kenya, 2010

11. Article 35(1)(a) and (b) of the Constitution of Kenya, 2010 recognizes that every citizen has a right to access any information held by the state; and information held by another person and required for the exercise or protection of any right or fundamental freedom. Article 35(3) puts an obligation on the state to publish and publicize important information affecting the nation. This Constitutional provision is given effect through the Access to Information Act which at Section 4 underscores the duty of disclosure of information by public entities. Section 5 of the Act requires public entities to facilitate access to information held by them, including *“guidelines used by the entity in its dealings with the public or with corporate bodies, including the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for*

discharging its functions;”⁷ Section 5(1)(c) of the Act requires that public entities:

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

12. The obligation on the 1st Respondent in relation to the right to access to information, under Section 5 (1)(c) of the Access to Information Act is to publish all relevant facts while formulating important policies or ***announcing the decisions which affect the public, and before initiating any project***, or formulating any policy, scheme, programme or law. The 1st Respondent is also required to publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles.
13. In violation of its obligation of proactive disclosure, the 1st Respondent ministry agreed to refund the sum of USD 1.6 million, which was the sum found after audit to have been lost, without making it known to the public why and how this was being done, yet this money was intended to support immunization of children under the Kenya Expanded Programme on Immunisation. This is an issue that directly affects the public as it raises

⁷ Section 5(1)(a)(vi) of the Access to Information Act.

questions on the ability of the 1st Respondent to provide life saving immunization to children. In fact, the 1st respondent has never published any information on the audit findings and any remedial measures it has since taken to ensure the prudent use of finances that have been donated for public health interventions. This is a violation of its duty of proactive disclosure under section 5(1)(c) of the Act.

14. Section 4(3) of the Access to Information Act stipulates that access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. Additionally, Section 9(1) of the Access to Information Act requires that the public entity to respond to the request within twenty-one (21) days, and section 9(6) of the Access to Information Act stipulates that where the applicant does not receive a response to an application within the period stated the application shall be deemed to have been rejected.
15. This position was affirmed in *Khalifa & another v Secretary, National Treasury & Planning & 4 others; Katiba Institute & another (Interested Party) (Constitutional Petition 032 of 2019) [2022] KEHC 368 (KLR) (13 May 2022) (Judgment)*, the court stated that the failure to take action, in the context of the Access to Information Act amounts to a refusal of the request. The Court held that:

“68. ... the Access to Information Act entails those public authorities are no longer permitted to 'play possum' with members of the public where the rights of the latter are at stake. Discovery procedures and common-law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution, as manifested in article 35 is to subordinate the organs of State to a new

regimen of openness and fair in dealing with the public.

73. The meaning of section 9(6) standing alone is plain enough. If the information is not supplied within the period of 21 days provided in section 9(1), then the request is as good as refused.

In this case, it is apparent therefore that the 1st Respondent has refused to give the information requested.

16. Article 35 must be read together with Article 10 of the Constitution which provides for national values and principles of governance including inclusiveness, human rights, good governance, integrity, transparency and accountability. Further, Article 232 of the Constitution provides the principles and values of public service, one of which is *transparency and provision to the public of timely, accurate information*. the right to information is the founding value of any democratic society. It allows citizens participate in governance and hold leadership accountable. It also gives effect to the national values contained in Article 10 of the Constitution as well as the values and principles of public service in Article 232 of the Constitution. As stated by the Court in *Katiba Institute v Presidents Delivery Unit & 3 Others (2017) eKLR*:

“The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen’s ability to access information held by public authorities. Where they don’t know what is happening in their government and or if actions of those in government

are hidden from them, they may not be able to take meaningful part in their country's governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.
(emphasis added)

17. In reaching this determination, the court quoted with approval the case of *President of the Republic of South Africa and Others v M & G Media Ltd (CCT 03/11) [2011] ZACC 32* in which it was stated that:

“[10]. The constitutional guarantee of the right of access to information held by the state gives effect to “accountability, responsiveness and openness” as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.”

18. The court was also persuaded by the decision in *Brummer v Minister for Social Development & Others (CCT 25/09) [2009] ZACC 21* where it was held that:

“[62] The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed, one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency “must be fostered by providing the public with timely, accessible and accurate information.””

[63] Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.”

19. The right of access to information is also a state obligation under international law which Article 2(5) and (6) of the Constitution is a source of law in Kenya. In this regard, Kenya is a party to the International Covenant on Civil and Political Rights (ICCPR) which protects the right to access information under Article 19(2). The right to access information is also provided under the Universal Declaration of Human Rights (UDHR) under Article 19. The Human Rights Committee, commenting on content of Article 19 of the ICCPR, has noted the obligation of disclosure of information in *General Comment No. 34 Article 19: Freedoms of opinion and expression* stating that:

“States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy,

prompt, effective and practical access to such information.”⁸

20. Paragraph 18 of that General Comment is instructive in breaking down what the obligation of public entities is. It states as follows;

“Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. ... The designation of such bodies may also include other entities when such entities are carrying out public functions.”

21. In the case of *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others* [2013] eKLR the court held a similar position as it stated that,

“... the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State.....The recognized international standards or principles on freedom of information, which should be included in legislation on freedom of information, include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited

⁸ General comment No. 34 Article 19: Freedoms of opinion and expression at para. 19. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/453/31/PDF/G1145331.pdf?OpenElement>

circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that ‘Information’ should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.”

22. The 1st Respondents, being a part of the State, is bound by the Constitution, Sections 4 and 5 of the Access to Information Act, as well as international human rights law through Article 2(5) and (6) to provide vital information regarding misappropriation of funds donated for much needed health services. Considering the above, the following principles on the State’s positive obligation to provide information can be distilled from the legal and human rights standards:
- a. The right to access information is a foundational human right from which other rights must flow. It is necessary to ensure the exercise of other rights and it is important in promoting an accountable, open, responsive and open society.
 - b. The State has an obligation to proactively provide budgetary, policy-making, procurement, economic, benefits-related and other information.
 - c. The principle of maximum disclosure is applicable to all information held by public bodies.
 - d. The State must provide information requested within a reasonable time, and where it fails to do so, then it should give reasons justifying the rejection of an application for access to information.

23. The facts demonstrate that the 1st Respondent refused to provide information requested to the Petitioners as well as to the public. This information was required, in the public interest for the protection of the right to the highest attainable standard of health and the promotion of the responsible financial management, and stemmed from the Petitioners concern that corruption in the 1st Respondent ministry was undermining the delivery of quality essential health care services. The failure to provide this information was a violation of the right to access to information.
24. The 1st respondent however failed, ignored and neglected to provide the information requested by the Petitioner. Even after the Petitioner applied for review to the Interested Party, the 1st respondent still did not provide the information, and instead neglected its constitutional obligation, and to date, seven years after the misappropriation of funds was discovered, the Petitioners, and other Kenyans remain in the dark as to the dealings within the Ministry that led to the loss of public funds, as well as the remedial measures, if any, taken by the 1st Respondent to ensure that another loss does not occur. This refusal is a continuing violation of the Act and article 35 of the Constitution.
25. The 1st Respondent so far have not communicated any reasons for not providing the information the petitioner requested. It has been six years since the findings on the misappropriation of funds at the 1st Respondent, and Petitioners requested the information, and no action was taken. It is on this basis that we submit that the 1st respondent's actions continue to violate Article 35 of the Constitution. This refusal has been unwarranted and unjustified, and does not meet the limitation test in Article 24 of the Constitution, and indeed, no explanation was offered by the Respondents.

The failure or refusal by the 1st respondents to provide information sought under Article 35 of the Constitution undermined the principles of public finance under Article 201 of the Constitution and the principles of public service under Article 232 of the Constitution of Kenya

26. The GAVI Audit report pointed to various shortcomings in the project implementation by the 1st Respondent had failed to utilize the resources donated in a prudent manner. At page 7 of the report, the audit finding is partially satisfactory, and it is mentioned that records for vaccine stocks were not properly maintained. The cause of this is identified as "insufficiency in the procedures for stock recording and reporting, inadequate oversight procedures, supervision and a general lack of awareness of existing procedures and rules to follow."⁹ It is thereafter noted that as a result of this, the 1st respondent reported inaccurate vaccine balances and was therefore unable to reliably forecast vaccine requirements. In the review of budgeting and financial management, the audit report revealed that 34% of the funds disbursed (USD 2,203,140.00) was not disbursed for programming because the 1st respondent *“failed to meet Gavi’s requirement’s, including providing audited financial statements on past expenditures.”*¹⁰ Further, there remained a question on some funds, since it appeared that money given by GAVI for the KEPI programme was lent, without consent from the donor, to other programmes.
27. The effect of this was that some of Gavi’s funds were not available or were not used for the intended purposes, and even after reconciliation of what had been lent and repaid to the 1st respondent, it appeared that the sum of USD 254,748 was in question.¹¹ the audit report also found that under the *“processes under government financial management regulations and*

⁹ See Page 8 of the Gavi Audit Report.

¹⁰ Page 13 of the Gavi Audit Report.

¹¹ Ibid.

procedures were not followed” and “the Ministry of Health did not effectively monitor budget execution to ensure that activities were undertaken when they were planned....¹²

28. In the audit on the expenditure and disbursements, the audit revealed ***“significant departures from the Government of Kenya’s national guidelines for accounting.”*** In making this finding, it is noted that supporting documentation for expenditures of USD 631,943 was not available and it was therefore unclear what these funds were used for. The cause for this was identified as improperly maintained and prepared financial records and as such, the sum of USD 631,943 remained questioned.¹³ In sum, the audit notes that while financial regulations in Kenya require the keeping of suitable accounting records, this was not done, for the period between June 2008 until June 2013 which led to a lack of accountability for how funding was used.¹⁴ In the management comment, the 1st respondent notes that ***“it is true that [some GAVI funds] were off budget and not subjected to the provisions of the Public Finance Management Act.”¹⁵***
29. The Audit report also pointed to lack of transparency in the procurement processes of the 1st respondent. It is noted that ***“procurement transactions were poorly documented. ... The Ministry of Health did not provide complete documentation for the procurement and delivery for up to Kshs 97,234,030 (USD 972,340). Procurement-related internal controls were ineffective and did not provide assurance on transparency and value for money¹⁶***. The audit further revealed that there were items that were frequently purchased without preparation of a procurement plan, as was

¹² Page 16 of the Gavi Audit Report.

¹³ Ibid.

¹⁴ Page 17 of the Audit report.

¹⁵ Page 18 of the Audit report.

¹⁶ Page 20 of the Audit report.

then required by section 26(1) of the Public Procurement and Disposals Act, 2005 (now repealed),¹⁷ leading to lost opportunities to obtain value for money. This is also conceded by the 1st respondent in the management comments.

30. These are some of the questioned expenditures that the 1st respondent agreed, in its letter dated 14th June 2016, to reimburse.
31. These failures by the 1st respondent and the various questioned expenditures demonstrate that it failed in its mandate under Articles 201 and 232 of the Constitution, In its request for information, the Petitioner sought clarity on how the sum of USD 1.6 million which had been questioned was reimbursed, and how this affected other mandates of the 1st Respondent. This is a question of public interest, and by violating the right to access this information, the 1st Respondent failed to be held to account in line with Articles 201 and 232 of the Constitution. In **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Higawa Enterprises Limited [2017] eKLR** this Court noted that the fundamental nature of Article 201 of the Constitution stating that:

“Article 201 demands openness and accountability in financial matters. Openness is an overarching concept that is characterized by an emphasis on transparency and free, unrestricted access to knowledge and information.”

32. The 1st Respondent’s failure and refusal to submit information to the Petitioners on the embezzlement of funds also violates Article 201 of the Constitution as it goes contrary to the principle that there shall be openness and accountability in public finance management, that public finances shall

¹⁷ This obligation is now contained in sections 4, 44 and 158 of the The Public Procurement and Disposal Act, 2015.

be used in a prudent and responsible way and that financial management should be responsible and reporting clear.¹⁸

33. The information requested by the Petitioners has to date, never been provide. The continued failure by the 1st respondent goes contrary to the values and principles that govern public service which include high standards of professional ethics, the efficient, effective and economic use of resources, responsive, prompt, effective, impartial and equitable provision of services, involvement of the people in the process of policy making, accountability for administrative acts transparency and provision to the public of timely, accurate information.¹⁹
34. Due to the interconnectedness, inalienability and indivisibility of human rights, by failure to publicise and provide information, the 1st Respondent further abrogated the right to other constitutional rights. As stated by the Supreme Court in *Re The Matter of Kenya National Human Rights Commission, (Supreme Court Advisory Opinion Ref. No.1 of 2012)*

“But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result.”

¹⁸ Article 201 (a), (d) and (e) of the Constitution of Kenya.

¹⁹ Article 232 of the Constitution of Kenya, 2010.

A holistic interpretation of the Constitution means that when the 1st respondent failed in its duty to provide information, it also violated other rights, particularly the right to the highest attainable standard of health, as well as its obligations with regard to prudent financial management.

35. The right to the highest attainable standard of health is enshrined under Article 43(1)(a) of the Constitution of Kenya, 2010. The state is under an obligation to ensure the full realization of the right to health, including by allocating the maximum resources available to ensure its full realization.²⁰ The obligation to ensure to promote the respect, protection and fulfillment of the right to health is also found in the International Covenant on Economic Social and Cultural Rights (ICESCR), the African Charter on Human and Peoples' Rights (ACHPR), as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol); all of which guarantee the right to health in Article 12, Article 16 respectively.
36. The centrality of transparency and accountability in regard to the right to health in relation to the realization of other health rights is underscored in ***General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*** where the Committee on Economic Social and Cultural Rights has noted in its that health is a fundamental human right indispensable for the exercise of other human rights. It has further noted that access to information is an integral component of the right to health.²¹ The Committee has further noted the

²⁰ Article 20(5) of the Constitution of Kenya, 2010.

²¹ ***CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*** at paragraph 3. Available at <https://www.refworld.org/pdfid/4538838d0.pdf>.

need for state parties to ensure that the national health strategy is based on the principles of accountability and transparency.²²

37. There was however a violation of the right to health by the 1st respondent who failed to prudently apply the sum of USD1.6 million to the Kenya Expanded Programme on Immunisation, leading to a loss of funds intended for health service delivery that the 1st respondent had to make good through reimbursement of funds that it had – this was a missapplication of the funds. Further, the 1st Respondent failed to utilize funds available to it, in the sum of USD 0.25 million which was unutilized, and which was returned to GAVI. This imprudent use was a failure to utilize to the maximum, the available resources it had at its disposal, towards the realization of the right to health.
38. In this regard, the refusal by the 1st Respondent to provide information means that it has refused to be held accountable for funds intended for health service provision is a violation of article 43(1)(a) of the Constitution. The violation of the right to the highest attainable standard of health is compounded by the fact that the continued refusal perpetuates impunity which undermines health service provision.

V. CONCLUSION

39. My Lord the petition outlines six prayers that are sought before the court. They are listed herein below for ease of reference:
- a) Declaration be issued that the failure by the 1st respondents to provide information sought under Article 35(1)(a) and also to publicise the

²² CESCR General Comment No 14 at para 55.

information in accordance with Article 35(3) on the basis of the petitioner's request violates the right to access to information.

- b) A declaration be issued that the failure by the 1st respondent to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) on the basis of the petitioner's request is a violation of Article 10 of the constitution and specifically the values of the rule of law, participation of the people, human rights, good governance, transparency and accountability.
 - c) A declaration be issued that the failure by the 1st respondent to provide information sought by the petitioner under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) is a violation of the obligations imposed on the 1st respondent to ensure public finance is utilized in an open and accountable manner and in a prudent and responsible manner as stipulated in Article 201(a) and (d) of the Constitution.
 - d) A mandatory order be issued compelling the 1st respondent to forthwith provide, at the respondents' cost, information sought by the petitioner in the letter dated 14 November 2016.
 - e) Costs of the Petition.
 - f) This Honourable Court be pleased to grant such further order or orders as may be just and appropriate.
40. These are appropriate and necessary to remedy the infringement of the petitioners' rights. Article 23(3) of the Constitution guides Court in determining what remedies ought to be granted in the face of the threat to, infringement or denial of, or violation of rights and fundamental freedoms. That constitutional provision uses the term 'including' when listing the six possible remedies that the court can grant. As such this Court has wide discretion in granting relief in claims of constitutional violations, and the

prayers by the petitioners herein are well within the provisions of Article 23(3) of the Constitution.

41. The Petitioner seeks declaratory orders in prayers (a), (b) and (c). On the basis of the evidence and authority outlined above, the Petitioner has proved that the 1st Respondent failed to abide by its constitutional obligation to abide by the provisions of Article 35, 43(1)(a) of the Constitution as well as the guiding principles in Articles 10, 201 and 232 of the Constitution. The Petitioner has therefore met the threshold for the grant of the declaratory orders as required under Article 23(3) of the Constitution of Kenya, 2010.

42. In prayer (d), the Petitioner seeks a mandatory order to compel the 1st Respondent to provide the information sought by the Petitioners. This order is necessary to ensure that the infringement by the 1st Respondent stops, but also to safeguard these rights. This Court can be guided by the Indian authority in *Prakash Singh & Ors v Union Of India And Ors the Supreme Court of India Writ Petition (Civil) 310 of 1996* where the Court outlined various practical mechanisms to kickstart police reform, where such reforms did not seem forthcoming due to inaction by the executive. The Court stated that

“Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of Rule of Law; (iii) pendency of even this petition for last over ten years; (iv) the fact that various Commissions and Committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the stage has come for issue of appropriate

directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the State Governments pass the requisite legislations.

43. The circumstances in this case possess the gravity and urgency described above and require intervention of this Court. the question of prudent financial management and accountability in the health sector continues to be one of utmost concern, and this Court’s intervention is needed to ensure that funds intended for health service provision are properly accounted for. This can start with the Court ordering the 1st Respondent providing information around the misappropriation of funds intended to support the immunization programme as requested by the Petitioner in its letter dated 14th November 2016.
44. The fifth prayer concerns costs of the litigation. In this regard, we urge the court to be guided by the direction taken by this Court in *Katiba Institute v Presidents Delivery Unit & 3 others (supra)* where the Court finding a violation of Article 35 of the Constitution, awarded costs to the Petitioner. The holding of the Constitutional court of South Africa in *Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14* is also instructive. In this case, the Court held that the general approach should be that:

“the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door - at the end of the day, it was the state that had control over its conduct.”

45. This court will note that this litigation would not have been necessary had it not been for the continued refusal of the 1st Respondent to respond to the requests for information. Costs should therefore be awarded in favour of the Petitioner.
46. In light of the analysis of the facts of the petition as well as the law and authority we have set out, we pray that the Petition be allowed as prayed.
47. These are the humble submissions of the Petitioner.

DATED at **NAIROBI** this 24th day of March 2023



NYOKABI NJOGU
ADVOCATE FOR THE PETITIONER

DRAWN AND FILED BY:

Nyokabi Njogu, Advocate, C/O KELIN Kuwinda Lane, off Langata Road, P.O
Box 112 - 00202 KNH **NAIROBI**
litigation@kelinkenya.org; 0790111578

TO BE SERVED UPON:

The Hon. Attorney General
State Law Office Harambee Avenue P.O BOX 40112-00100 **NAIROBI**
mwasaobetty@gmail.com mwasaobetty@gmail.com

The Commission on Administrative Justice, 2nd Floor, West end Towers,
Waiyaki Way, P.O BOX 20414-00200, **NAIROBI**
e.musembi@ombudsman.go.ke; 0700456880