**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION 218 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**

**AND**

**IN THE MATTER OF SECTION 4 AND 9 OF THE ACCESS TO INFORMATION ACT, 2016**

**AND**

**IN THE MATTER OF SECTION 5, 6 AND 10 OF THE HEALTH ACT, 2017**

**AND**

**IN THE MATTER OF SECTION 3 AND 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015.**

**BETWEEN**

**ERICK 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 ON 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 organization)**

**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 GOVERNORS.....4TH RESPONDENT**

**FRED OKENGO MATIANGI, CS INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT.....5TH RESPONDENT**

**HILARY NZIOKI MUTYAMBAI, INSPECTOR GENERAL OF THE POLICE, KENYA.....6TH RESPONDENT**

**JOSEPH WAKABA MUCHERU, CABINET SECRETARY FOR INFORMATION AND COMMUNICATIONS.....7TH RESPONDENT**

**THE COMMISSION ON ADMINISTRATIVE JUSTICE.....8TH RESPONDENT**

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

**AND**

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

## 1ST – 8TH , 10TH 12TH AND 13TH PETITIONERS' SUBMISSIONS

Your Lordship below are the Submissions for the 1st -8th, 10th, 12th and 13th Petitioners.

### A. BRIEF STATEMENT OF FACTS

1. The World Health Organization (WHO) declared the CoronaVirus (COVID-19) a global pandemic on 11th March, 2020. Kenya confirmed the first case of COVID-19 on 12th March, 2020. Following this, the state went ahead and developed guidelines to manage the spread of the virus. On 22 March, the government announced that all international flights except cargo flights had been suspended. Any travelers 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.

2. Subsequently, Kenya developed regulations to curb the spread of the virus such as the institution of national curfews, prevention and control regulations which granted the 1st Respondent the authority to designate 'any place' an infected area and to regulate activities within an infected area when deemed necessary. The guidelines further provided that persons within the infected area may be placed under 14-day observation.

3. The president further passed the COVID-19 Movement of Persons and Related Measures Rules 2020, restricting movements, banning public gatherings, establishing a curfew and regulations on transportation. The regulations also regulated the conduct of people in public places such as worship centers.

4. The guidelines also provided guidance on measures to be undertaken when handling dead bodies and how to ensure their protection, dignity and respect for the deceased individuals.

5. 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 included failure to maintain optimal social distance between persons; and the prescribed hygiene standards. On 19 April 2020, the Ministry of Health Chief Administrative Secretary (CAS) 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.

6. Subsequently, the Ministry of Health issued another press release stating that as a result of debates on people being held in quarantine, curfew breakers will no longer be held in government quarantine facilities and the Inspector General of Police was directed to designate a curfew breakers holding place.

7. Despite the notices and daily press briefings that were issued by the 1st Respondent on protocols regarding management of the virus, there was minimal information that was disseminated to the public and more so, the health care workers/providers with respect to how the government was responding to the virus. Many people were unaware of how to access health services in the event they were infected with the virus such as where to get tested; and health care workers were unaware of what steps the government was taking to protect them. There was no information on what the county government committees were doing to manage the virus, funding set aside due to the virus, designated health facilities, the provision of personal protective equipment (PPE) and whether the health care workers were trained.

8. Thus, due to lack of adequate information, the Petitioners, concerned for their lives, wrote a series of letters requesting for information.

9. Specifically, the Petitioners wrote the first letter dated 6th April, 2020 seeking information on implementation of Mandatory Quarantine in COVID-19 Response. The Petitioners did not receive any response from the Respondents.

10. The 9th through to the 13th Petitioners wrote the 2nd letter dated 17 April, 2020 requesting for information on which support was being given to health care workers in the COVID-19 response. The Petitioners did not receive any response from the Respondents following this.

11. The 9th Petitioner through to the 13th Petitioner wrote a 3rd letter to the Respondents, dated 22 April 2020, seeking information on import and distribution of personal protective equipment.

12. The 9th Petitioner through to the 13th Petitioner wrote a 4th letter dated 27 April, 2020, requesting for information on use of quarantine as a form of punishment and criminalization of COVID-19 response. The Petitioners did not receive any responses from the Respondents.

13. The Petitioners also wrote a letter to the 1st and 2nd Respondent, following the bizarre manner in which one James Oyugi was buried, following suspicions that he had succumbed to COVID-19 pandemic. The letter dated 15th May, 2020 protested the undignified manner in which the deceased had been buried and requested for information from the Respondents.

14. The 3rd Petitioner received a response on 20th May, 2021 from the County Secretary of the 3rd Respondent, providing that the questions raised in the letter will be answered after the taskforce conducted investigations and presented their

findings. The Petitioners did not receive any further communication or responses from the Respondents.

15. Moreover, the 4th Petitioner to the 8th Petitioner, upon their arrival in Kenya after the suspension of all flights were forced to go into quarantine, however they were not given information about how the government would manage the quarantine, why they were not being tested, why they stayed in mandatory quarantine between 7-21 days with no communication, who would incur the costs arising from quarantine.

16. Following the failure by the Respondents to respond, which has continued to date, to the Petitioners, they filed this Constitutional Petition on 1st July, 2020.

**B. PROCEDURAL HISTORY**

17. This Petition was filed under certificate of urgency on 1st July 2020. It was certified as urgent and came up for mention on 7 July 2020. At the mention directives were provided to the party. It was scheduled for mention on 23 July 2020, but this was unfortunately postponed to 31 July 2020 because Court was not in session. The 31 July 2020 mention was also postponed due to a public holiday.

18. The parties obtained a new date and the matter came up for mention on 2 December 2020. At this stage only the 3rd Respondent had responded to the Petition. The Court granted the remaining respondents extensions and the matter was scheduled for hearing on 19 January 2021. On the hearing date, (19 January 2021), the 4th and 9th Respondents filed their replies. The Court granted the 1st, 2nd, 5th,6th and 7th Respondents extensions to file their replies. The matter was scheduled for mention on 8 March 2021. At the mention date the 1st, 2nd, 5th, 6th and 7th Respondents had not complied and were provided an additional seven days to do so, further

directions were provided for filing submissions and the matter was scheduled for hearing on 15 June 2020. On 15 June 2020, the 1st, 2nd, 5th, 6th and 7th Respondents failed to comply with directives and were given an additional 10 days to do so, failing which they would be barred from proceedings. They failed to do so.

19. The 8th Respondent has to date not responded to the Petition or attended any of the proceedings.

## C. LEGAL ISSUES

20. The following issues are up for determination before this Honourable Court:

a. Whether the Court has Jurisdiction to determine this Petition;

b. Whether the 1st- 6th, and 9th Respondents violated the Petitioners Right to access information provided under Article 35(3) of the Constitution by the failure to proactively publish and publicise information about the pandemic;

c. Whether 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);

d. Whether the 1st- 6th, and 9th Respondents violated the Petitioners Right to health provided under Article 43(1) (a) and Section 5(1) of the Health Act, 2017 by the failure to proactively publish and publicise information about the pandemic;

e. Whether 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.

f. Whether 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.

g. Whether 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. Whether 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. Whether 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;

j. Whether 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; and

k. Whether the orders sought may be issued.

The 1st-8th, 10th, 12th and 13th Petitioners shall address the Court on the following issues: (a), (b), (d), (f), (h), (i), (j) and (k).

## D. ANALYSIS

### I. JURISDICTION

21. My Lord, the Court of Appeal in *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*[1] held per Nyarangi J:

> *"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

22. The Petitioners submit that this Court has the jurisdiction to determine this Petition by virtue of the powers afforded to the High Court of Kenya, through Article 163(3) (b) of the Constitution of Kenya, 2010.[2]

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[1] Civil Appeal No. 50 of 1989.
[2] "Subject to clause (5), the High Court shall have —

23. The 3rd and 9th Respondents have raised two *points in limine* in their responses indicating that this Court does not have jurisdiction on two grounds:

a. A failure by the Petitioners to exhaust an internal dispute resolution mechanism; and

b. The principle of *res judicata* as it pertains to the 3rd Respondent.

***Exhaustion of internal dispute mechanisms***

24. The 3rd Respondent is relying on dicta in *Charles Apudo Obare and another v Clerk, County Assembly of Siaya*[3] where the Court relied on the principle laid out in *Secretary, County Public Service Board and another v Hulbhai Gedi Abdille*:[4]

> *"Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."*

Relying on the above, the Court in *Charles Opudo Obare,* found that the petitioners in that case had failed to exhaust internal remedies by failing to subject their request to Section 14 of the Access to Information Act, 2016 read with Section 8 of the

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jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;".

[3] [2020] eKLR (Constitutional Petition No. 2A of 2020).

[4] [2017] eKLR (Civil Appeal No. 2020 of 2015).

Commission on Administrative Justice Act, 2011. The Court ultimately held that the matter was not ripe for determination.

25. The Petitioners submit that this Petition is distinguishable from that of *Charles Opudo Obare* and is thus not subject to the dictum therein.

26. This distinction is two-fold. Firstly, the Petitioners submit that internal remedies were not available. Secondly, we submit that the Commission of Administrative Justice, the 8th Respondent in this Petition has been included for the precise reason of its failure to exercise its mandate under the Access to Information Act, 2016.

27. In making this determination we ask this Court to be guided by the decision of African Commission on Human and Peoples' Rights in *Jawara v the Gambia*[5]. This case distils the Commission's approach to the rule on exhausting local or internal remedies. In this matter the Commission found that for the rule to be applicable the following criteria must be present namely that the remedy must be available, effective and sufficient.[6] In assessing availability the Commission held that: " A remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint."[7]

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[5] (2000) AHRLR 107 (ACHPR 2000).
[6] Supra at para 31.
[7] Supra at para 32.

28. The above principles are buttressed by the Fair Administrative Action Act, 2011 (FAA Act) which provides through Section 9(4):

> *"Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."*

29. The FAA Act recognises that exceptional circumstances may exist to warrant judicial intervention despite a failure to exhaust internal remedies. The High Court in *Republic v Firearms Licensing Board and another; Ex Parte Boniface Mwaura*[8] held that what constitutes exceptional circumstances depends on the facts of each case and the nature of administrative action.

30. We submit that the instant Petition is also a prosecution of the 8th Respondent's conduct or failure in exercising its mandate in terms of the Access to Information Act. The 8th Respondent was approached by the 12th Petitioner on 16 April 2020, who both telephonically and in writing requested that the 8th Respondent, address the continued failure of the 1st Respondent to respond to letters requesting information. The communication to the 8th Respondent explicitly sought a response on how it planned to address the wilful refusal to provide information, despite the timeline lapsing, in line with Part V of the Access to Information Act.[9]

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[8] [2019] eKLR (Judicial Review Miscellaneous Application No. 47 of 2018).
[9] Affidavit in support of the Petition filed on 1 July 2020 sworn by Sheila Masinde (Annexure SM-6).

31. Additionally, the Petitioners copied and dispatched to the 8th Respondent in letters of request issued on: 8 April 2020, 15 April 2020, 9 April 2020, 15 April 2020, 17 April 2020, and 27 April 2020.

32. In response to urgent requests for information necessary to protect health and life during, and a request to intervene and exercise its mandate the 8th Respondent:

a. On 8 April 2020 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; and on

b. On 5 June wrote to the 3rd Respondent, requesting that he consider the matter, identified in our letter of 17 April 2020, and revert to the office.

33. No further action was taken by the 8th Respondent. Additionally, despite consistent reminders and invitations to do so the 8th Respondent has refused to participate in this Petition, where both its conduct and exercise of its mandate have been called into question.

34. We therefore submit, by virtue of the 8th Respondent's failure to exercise its mandate- internal remedies are neither available nor are they effective. The 8th Respondent's actions have demonstrated that it seeks to exercise its mandate through reminders to State parties, despite being a constitutional commission mandated to protect the rights of citizens. The 8th Respondent has used the same tools that have been ignored, and decided to sit back and allow Kenyans to remain without a remedy. We submit that this is the exceptional circumstance envisioned by Section 9(4) of the FAA.

***Res Judicata***

35. The 3rd Respondent submits that the questions surrounding the burial of the late James Oyugi (underscored in the letter of 17 April 2020), has been dispensed with in the case of *Joan Akoth Ajuang and another v Michael Owour Osodo, the Chief of Ukwala Location and 3 others.*[10] The 3rd Respondent notes that the 3rd Petitioner had every opportunity to be enjoined in this matter.

36. The 3rd Respondent does not expressly state which principle of law he relies on in making this assertion. The 3rd and 10th Petitioners submit if he is relying on *red judicata,* this assertion should fail. Section 7 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya states:

> *No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

37. This principle has been distilled in *Independent Electoral and Boundaries Commission v Maina Kiai and 5 others*[11] by the Court of Appeal:

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[10] [2020] eKLR (Constitutional Petition No. 1 of 2020 at the High Court of Siaya).
[11] [2017] eKLR (Civil Appeal No. 150 of 2017).

*"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;*

*(a) The suit or issue was directly and substantially in issue in the former suit.*

*(b) That former suit was between the same parties or parties under whom they or any of them claim.*

*(c) Those parties were litigating under the same title.*

*(d) The issue was heard and finally determined in the former suit.*

*(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.*

38. The Petitioners submit from the criteria above, which must be met, the defence of *res judicata* will not be satisfied. Firstly, the issues are dissimilar – while both the instant Petition and the matter in *Joan Akoth Ajuang* make reference to the term information – the framing of the use of information is different. The *Joan Akoth Ajuang* case was hinged on issues of disclosure of medical information which is a component of the right to privacy under Article 33 of the Constitution of Kenya, 2010. This Petition is hinged on the provision of information to the public necessary

for the management of a Pandemic, the questions asked of the 3rd Respondent were neither asked nor considered in *Joan Akoth Ajuang.*

39. Further, the 3rd Petitioner was neither a party to the *Joan Akoth Ajuang* matter (another criterion), nor did he have an obligation to seek to be enjoined to a matter discussing different issues, framed on a dissimilar cause of action, and seeking dissimilar remedies. We would like to highlight that because the issues are substantively different the dictum in *George W Omondi v National Bank of Kenya Limited and 2 others*[12] would not be applicable:

> *"Parties cannot evade the doctrine of res judicata by merely adding other parties of causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments."*

40. We submit that the 3rd Respondent has failed to properly frame this objection, and has not provided any factual or legal basis for the submission and the Court should reject it.

## II. ACCESS TO INFORMATION

41. The Petitioners submit that the Respondents violated their right to access information by failing to proactively publish and publicize information pertaining to the state's management of the COVID-19 pandemic in Kenya; and by failure to respond to the Petitioner's letters seeking information relating to the pandemic.

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[12] [2001] eKLR (Civil Suite No. 958 of 2001).

42. Article 35 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 further provides that the State has an obligation to publicize important information to the nation. Article 35 (1) (a) of the Constitution grants a citizen the right to seek and have information from a State or State organ. This is further buttressed under Section 8 of the Access to Information Act which states that one may make an application for access to the information.

43. Moreover, the Constitution of Kenya must be read and interpreted as a whole, considering the relevant provisions. The same was held in in *Tinyefuze v Attorney General of Uganda*[13] the court put it thus:

> *"The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."*

44. Therefore, Article 35 ought to 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.*

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[13] [1997] UGCC3.

45. Article 2(5) and (6) of the Constitution further provide the recognition of international human rights law as 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 same is also provided under the Universal Declaration of Human Rights (UDHR) under Article 19.

46. It is under this backdrop that the petitioner submits, that the Constitution further places an obligation on all state organs and agents to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights- including access to information.[14] Thus, the Respondents had and have an obligation to fulfil the right to access information by firstly, proactively providing and publicizing essential information, and secondly, substantially responding to Access to Information Requests.

***Duty to proactively provide important information to the public***

47. Article 35(3) of the Constitution explicitly notes that the State shall publish and publicise any important information affecting the nation, that is necessary for the protection and promotion of human rights. The same was upheld by the Human Rights Committee that noted, States parties should proactively put into the public domain government information of public interest.[15] As United Nations and regional experts stated in 2004 in a joint declaration on freedom of expression:

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[14] The Constitution of Kenya (2010), Article 21(1).
[15] Human Rights Committee, General Comment No 34: Article 19: Freedoms of opinion and expression, 102nd Session, Geneva, 11-29 July, 2011 (CCPR/C/GC/34).

*"Public authorities should be required to publish proactively, even in the absence of a request, a range of information of public interest."*

48. States are under a positive obligation to disclose on a *proactive basis* key *emergency-related health*, budgetary, policy-making, procurement, economic, benefits-related and other information. Moreover, the UN Committee on Economic, Social and Cultural Rights has called on States to provide "access to information concerning the main health problems in the community, including methods of preventing and controlling them", as part of the core obligation to protect the right to health.''[16]

49. The Respondents, being state agents and bodies, are thereby bound by the Constitution, Section 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 the management of the Pandemic to the nation, but failed to do so and subsequently violated the Petitioner's rights to access information. Further, due to the interconnectedness, inalienability and indivisibility of human rights, by failure to publicise and provide information, the Respondents thereby led to the violation of other rights including the right to health, right to life and freedom of expression as was held by this Court in *Katiba Institute v President's Delivery Unit & 3 other.*[17]

*"In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And*

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[16] Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000, para. 44.
[17] [2017] eKLR (Petition No 468 of 2017), para 28.

*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"*

50. The same position has been previously set out by the Court in the case of *Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission*[18] whereby the Judge held that:

*"Article 35(1) (a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in The Public's Right to Know: Principles on Freedom of Information Legislation –Article 19 at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information".*

[18] [2016] eKLR (Petition No 314 of 2016).

51. The High Court of Kenya has also previously held that access to information ensures transparency, good governance and public participation. In *Katiba Institute* the Court relied on *Brummer v Minister of Social Development and Others*:

> *"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*
>
> *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]

52. Considering the above, the following principles on the State's positive obligation to proactively publish information can be distilled from the Constitution, international law, the Access to Information Act and jurisprudence:

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[19] 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).

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 and responsive society.

b. The State has an obligation to proactively provide key *emergency-related health*, 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 and this may be overcome in very limited circumstances.

53. In consideration of the foregoing, despite providing notices and daily press briefings, information by the 1st, 2nd, 4th, 5th and 6th Respondents failed to provide information that could meaningfully instruct and aid citizens and residents in securing their rights and protecting their health and rights. Affidavits from the 1st-8th, 10th, 12th and 13th Petitioners indicate that the following significant gaps in information were experienced on/for:

a. Mandatory quarantine and its implementation which resulted in a breakdown in the rule of law, with the 4th and 6th Respondents introducing a use for these facilities other than a public health objective;[20] as well as haphazard and negligent implementation of mandatory quarantine to the detriment of the 4th-_8th Petitioners.[21]

b. The justification as well as mode of implementation of other measures, especially the curfew order, resulted in the 4th and 6th respondents

[20] Para 10 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by Allan Maleche.
[21] Affidavits in support of the Petition filed on 1 July 2020 by CM, FA, KB, MO, and EL.

violating fundamental rights of people with reports that police were brutalizing, maiming and killing innocent people while enforcing the curfew order;[22]

c. Access to health services for all people including the vulnerable and marginalized. In this case, information on continuity of health services, emergency access, as well as information on prevention, treatment and care for the COVID-19 would be critical.[23]

d. Pertaining to the resources that were allocated by the national and county governments towards the COVID-19 Pandemic, as well as tracking of how the amount was being spent in the Pandemic period.[24]

e. Health workers including steps the State was taking to ensure their safety as they tend to people being treated for COVID-19, the provision of personal protective equipment (PPE) and whether they would be given special training as to how to handle COVID-19 patients, or how to protect themselves as they engaged in their work.[25]

54. Taking into account the principles distilled above, the 1st, 2nd, 4th, 5th and 6th Respondents demonstrably failed to proactively publish and publicise information in accordance with Article 35(3) of the Constitution of Kenya. This failure has undermined the Petitioners' and the people of Kenya's ability to exercise their

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[22] Para 11 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by Allan Maleche; and Paras 8-11 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by Esther Nelima.
[23] Para 12 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by Allan Maleche; Para 7 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by Erick Okioma; and Paras 4-7 the Affidavit in support of the Petition filed on 1 July 2020 sworn by Esther Nelima..
[24] Para 5 and 6 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by Sheila Masinde.
[25] Para 7 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by Allan Maleche.

fundamental rights; as well as violated the principles of accountability, transparency and openness that are crucial to the functioning of our democracy.

***Duty to respond to access to information requests***

55. The Petitioners submit that the State is under a responsibility to respond substantially to requests for information within a reasonable period of time. Article 35(1)(a) of the Constitution stipulates that every citizen has a right to information, and the Respondents as public bodies are bound by Article 35(1)(a) to disclose information sought in terms of section 4 of Access to information Act, 2016.

56. Section 8 of the Access to Information Act provides that a citizen who wants to access information should do so in writing with sufficient details and particulars to enable the public officer to understand what information is being requested. The Act is also sufficiently clear that the information should be given without delay and at no fee, notwithstanding why the citizen wants to access information. Section 9 further states that a decision on the request to access information should be made and communicated within 21 days. The communication should include whether the public entity has the information and whether it will provide access to the information.

57. The 1st – 13th Petitioners wrote letters to the Respondents requesting information on the efforts that they had made to combat the pandemic. The letters requested the Respondents provide information as highlighted below:

| **Date** | **Request Made** | **Response Given** |
|---|---|---|
| 30th March, 2020 | Letter of Petition to the 1st Respondent seeking information on why those | None |

| | | |
|---|---|---|
| | held in state quarantine were not getting tested; for those who had been tested, why the results were not being released expeditiously and finally, why those who had tested positive were still forced to stay in state quarantine as opposed to being allowed to undertake self-quarantine. | |
| 6th April, 2020 | Letter to the 1st Respondent seeking information on implementation of the mandatory quarantine in the COVID-19 response in Kenya. | None |
| 9th April, 2020 | Letter to the 1st Respondent requesting for information on why the quarantine period was extended beyond the WHO recommended 14-day period. | None |
| 10th April, 2020 | Letter to the 1st Respondent requesting for financial assistance following the exorbitant amounts charged by the accommodation venue during state mandated quarantine. | None |
| 15th April, 2020 | Letter to the 1st and 2nd Respondents seeking information pertaining to the undignified manner in which | 20th May, 2020: Response form the County Secretary stating that further |

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|---|---|---|
| | one, James Oyugi had been buried after suspicion of succumbing to the virus | information would be provided after investigations were carried out.<br>No other response given. |
| 17th April, 2020 | Letter to the 1st Respondent seeking information on the support being given to health workers. | None |
| 27th April, 2020 | Letter to the 1st and 3rd Respondent seeking information on why Quarantine was being used as a mode of punishment and Criminalization of COVID-19 Response. | None |

58. As highlighted above, the Petitioners followed the guidelines provided under Section 8 of the Access to Information Act (the requests were made by Kenyan citizens, in writing and elaborately indicating the information being sought from specific state agents/ agency) and the Respondents deliberately failed to respond to the Access to Information requests, violating their rights to access essential and crucial information.

59. Up to date, the Respondents have failed to provide the information sought by the Petitioners, contrary to the Access to Information Act which provides that the information pertaining to life and liberty must be provided within 48 hours.

60. The court assessed similar circumstances in the *Katiba Institute* case and noted:

> *"In the present petition, although the letter seeking information was written on 17th August 2017 and delivered immediately thereafter, no response was received from the respondents, either giving access to information, or declining to disclosure and giving reasons for that. Section 9 of the Act states in no uncertain terms that the state or state organs should give information within 21 days or respond to the request within that period. This clear legal provision notwithstanding, no access to information was given or reason given; either that the respondents did not have the information or that they would not disclose the information and give justification for it."*

61. In its decision, the Court held that:

> *"From the facts of this petition precedents and the law, it is uncontroverted that the petitioner sought information in exercise of its constitutional right under Article 35. It is also clear that even though the law requires the public entity to respond to the request within twenty one (21) days on whether or not it is in possession of*

*the information and will or will disclose, the respondents ignored the law.*

*The respondents were under both a constitutional and legal obligation to allow the petitioner to access information in their possession and held on behalf of the public. This is an inviolable constitutional right and that is clear from the language of Article 35 of the Constitution, and any limitation must meet the constitutional test and only then can one raise limitation as a ground for non-disclosure."*

62. The blatant refusal to provide the information requested by the Petitioners, not only violates and infringes on the Petitioners' right to access information, but also denies the public the ability to engage in open democracy pertaining to actions taken by the state as well as prevented the Petitioners, and the public at large from gaining essential information about protecting health and subsequently, how to protect their lives.

63. In the event the Respondents fail to provide information requested, as is the case herein, the burden then shifts to them to show the Court, why the information sought was not provided and moreover, why there was no information given to the Petitioners as to why they may not attain the information sought. The Supreme Court

in Philippines ruled the same in *Legaski v Civil Service Commission*,[26] by stating that:

> *"The Constitution requires government agencies to provide information upon request; if they do not want to disclose information, they carry the burden of proving that the information is not of public concern or, if it is of public concern, that the information has been specifically exempted by law. Moreover, a citizen does not need to show any legal or special interest in order to establish his or her right to information."*

64. Therefore, the Petitioners submit that the burden lies on the Respondents to demonstrate to the Court, why the information sought was not provided as required under the Constitution of Kenya, Access to Information Act as well as regional and international human rights instruments.

***Limitation of the right to access information***

65. The Petitioners acknowledge that the right to access information is not an absolute right, as it does not fall under the collection of rights indicated under Article 25 of the Constitution. Nonetheless, Article 24 of the Constitution as read together with Section 6 of the Access to Information Act, provide the legal parameters upon which the said right can be limited.

66. The right to access information shall only be limited by law, and only to the extent that the limitation is reasonable and justifiable in an open and democratic

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[26] *Legaski v Civil Service Commission*, G.R. No. 72119. May 29, 1987.

society based on human dignity, equality and freedom, taking into account the importance of this right in the citizens' quest for public participation in the democratic governance of our country.[27]

67. Under international human rights law, the limitation must be prescribed by law, legitimate and proportionate, and justifiable in an open and democratic society.[28] Further, the limitation must ensure that the essence of the right is not infringed and this was further analysed in *Trusted Society of Human Rights Alliance* the Court held:

> *"The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions... The access to information law should, to the extent of any inconsistency, prevail over other legislation... National authorities should take active steps to address the culture of secrecy that still prevails in many countries within the*

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[27] The Constitution of Kenya (2010), Article 24.

[28] Siracusa Principles on the Limitation and Derogation Principles of the ICCPR; CCPR/C/GC/34, UN Human Rights Committee, General Comment No. 34, 12 September 2011, note 4, para. 25.

*public sector. This should include provision for sanctions for those who willfully obstruct access to information..."*

68. Finally, the onus lies on the Respondents to justify that the limitation was not arbitrary and in line with the principles stated above. This was yet again noted in *Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission:*

*"It was however emphasised that the onus to satisfy the Court that a limitation is justifiable rests on the person seeking to justify the limitation (Article 24(3)) and in the present case that onus is on the Commission. Moreover, the onus has to be demonstrated through reference to credible evidence and law. Where, the party bearing the onus fails to provide evidence or legal justification for the limitation then the Court must conclude that the limitation is unjustified."*

69. Section 6 of the Access to Information Act stipulates instances where the right captured in Article 35 may be limited. However, as submitted above the onus rests on the Respondents to assert why this Section would apply. In fact, other than the 3rd Respondent who acknowledged receipt but neither provided the information, nor a reason for not providing the information, none of the other respondents have responded to requests for information. Thus even if they claimed a limitation would be applicable, their failure to even communicate is a violation of the right to access information. The blatant refusal to engage with citizens and residents, seeking for assistance is contrary to the principles of good governance and to the democratic society we are seeking to build.

## III. RIGHT TO HEALTH

70. The right to the highest attainable standard of health, including reproductive health is guaranteed in Article 43(1) (a) of the Constitution. Additionally, 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."*

71. The right to health has been subject to judicial interpretation in Kenya in *P.A.O. and 2 others v the Attorney General* where the Court held:[29]

> *"In my view, the right to health, life and human dignity are inextricably bound. There can be no argument that without health, the right to life is in jeopardy . . . one's inherent dignity as a human being with the sense of self-worth and ability to take care of oneself is compromised."*

72. In light of the judicial interpretation that rights are both interdependent and indivisible, access to information is an integrally tried to the right to health as seen in In *Brummer v Minister of Social Development and Others* the Constitutional Court of South Africa held:

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[29] [2014] eKLR, (Petition 409 of 2009).

*"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."*[30]

73. Kenya has ratified 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); which guarantee the right to health in Article 12, and Article 16 for respectively and specifically for the reproductive health of women and girls in Article 14 of the Maputo Protocol.

74. Ngugi J (as she then was) in *MAO and another v Attorney General and 4 others*[31] both relies on and adopts the Committee on Economic and Social and Cultural Rights (CESCR) General Comment No. 14: The Right to the highest attainable standard of health (art 12) through the following dictum:

*"In this regard, the CESCR states that ICESCR requires state parties to ensure that health services are available, accessible, acceptable, and of good quality."*

75. General Comment No. 14 states that the right to health is "closely related to and dependent upon the realisation of other human rights (Including)...access to

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[30] *Brummer* at para 63
[31] [2015] eKLR (Petition No. 562 of 2012).

information" the Committee went further to interpret the right to health ". . . as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinant of health such as access to health-related education and information."[32]

76. Access to information does not exist in a vacuum, it is intrinsically linked to other rights enshrined in the Bill of Rights, many of which can be rendered meaningless by a lack of information.

77. The right to the highest attainable standard of health contains four inter-related elements: availability; accessibility; acceptability; and quality.[33] Of significance to this discussion is accountability which obliges a duty bearer to justify that resources are being used in the interest of rights holders. *Transparency*, *answerabiliy* (the obligation to provide answers and justify actions), and *controllability* (the potential application of sanctions if the performance or justifications are found lacking) are fundamental elements of accountability relations.[34]

78. The right to health speaks to more than just accessing health services; this right can impact on one's life and dignity because your quality of life is dependent on your health. Human dignity is tied to the self-worth of a person being alive is one thing but having a life worth living is another.

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[32] General Comment No. 14, UN Doc E/C.12 /2000/4 Para 3.

[33] H. Potts "Accountability and the Right to the Highest Attainable Standard of Health" (2008), University of Essex, Human Rights Centre available at http://repository.essex.ac.uk/9717/1/accountability-right-highest-attainable-standard-health.pdf. Also see P. Hunt and G. Blackman "Health Systems and the Highest Attainable Standard of Health" *Health and Human Rights* Vol. 10, No. 1 (2008), pp. 81-92.

[34] . S. Gloppen "Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health" Health and Human Rights, Vol. 10, No. 2 (2008), pp. 21-36 at 22.

79. The right to health involves the right to participate, the basic right of people to have a say in how decisions that affect their lives are made. In discussing participation Leary stated "Democracy and human rights are frequently linked in current rights discourse - and democracy means more than merely voting: it requires provision of information and informed participation."[35] To meaningfully seek to hold a duty bearer accountable for the provision of health care services that are respectful of human rights it is necessary that citizens have information on health made readily available. Transparency is fundamental for governments to justify the use of resources by providing information available and utilizing information held in a manner that is respectful of human rights.

80. The inter-connectedness of these rights is recognised by the Health Act, 2017 which states in Section 10:

> *"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(1)(b) of the Constitution, which must include—*
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> *(a) the types, availability and cost if any of health services;*
>
> *(b)the organization of health services;*

[35] V. Leary, "The right to health in international human rights law," *Health and Human Rights An International Journal* (1994), p. 32.

*(c) operating schedules and timetables of visit;*

*(d) procedures for access to the health services;*

*(e) procedures for laying complaints;*

*(f) the rights and duties of users and health care providers under this Act and as provided for in the applicable service charters; and*

*(g) management of environmental risk factors to safeguard public health."*

81. The Health Act goes further in elucidating this obligation through Section 17 when stating the functions of the Director General on Health which include:

a. Preparing and publishing reports and statistical or other information relative to the public health; and

b. obtaining and publishsing periodically information on infectious diseases and other health matters and such procurable information regarding epidemic diseases in territories adjacent to Kenya or in other Countries as the interests of public health may require.

This function is also placed on the County Director for health under Section 19(5) of the Health Act.

82. In addition to the obligations articulated by the Health Act, General Comment No. 14 provided that States are under a positive obligation to disclose on a *proactive basis* key *emergency-related health*, budgetary, policy-making, procurement, economic, benefits-related and other information. Moreover, CESCR has called on States to provide "access to information concerning the main health problems in the community, including methods of preventing and controlling them", as part of the core obligation to protect the right to health.''[36]

83. The African Commission on Human and Peoples' Rights has buttressed this and noted that:[37]

> *"In times of public health emergencies, members of the public have the right to receive factual, regular, intelligible and science-based information on the threat COVID19 poses to their health, the role and impact of the measures adopted for preventing and containing the virus, the precautionary measures that members of the public should take, and on the scale of the spread.''*

84. Information that ought to be released during a health crisis, including a health pandemic include:[38]

a. the progression of the disease, broken down as granularly as possible;

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[36] Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000, para. 44.
[37] Press Statement on Human Rights Based Effective Response to the Novel COVID-19 Virus in Africa, 24 March 2020, available at: https://www.achpr.org/ pressrelease/detail?id=483.
[38] Ibid.

b. steps governments are taking to protect individuals and how to maximise the effectiveness of those steps;

c. decision-making around responding to the crisis;

d. allocation of emergency funding;

e. procurement of emergency equipment; the allocation of grants; and

f. how to access government programmes and benefits introduced in response to the pandemic

85. As illustrated above, despite daily or weekly press briefings by the 1st and 3rd Respondents there were significant gaps in information as underscored in paragraph 53. As seen in the affidavits of the 1st, 2nd, 3rd and 10th Respondents, these information gaps were causing concern in the communities they work with and were the cause of rising fears. Further, the affidavits of the 4th-8th Petitioners who travelled to Kenya, following an announcement that the borders would be closed, found themselves starved for information upon their arrival. They did not have accurate information on how mandatory quarantine would be applied, what would be expected from them, the financial burden they were expected to carry, as well as the protocols in place (particularly around testing) to protect them once they arrived. These gaps lead to letters sent to the 1st and 2nd Respondents, all of which went ignored while the 4th – 8th Petitioners were in quarantine and fearful for their health and lives.

86. Thus, due to lack of adequate information, the Petitioners, concerned for their health and those of their communities wrote a series of letters requesting for information. These letters to date have not been answered.

87. Health related information is fundamental to the realisation of the right to health. If citizens have access to information on preventing and treating ill-health they will be empowered to make informed decisions about their health. The flow of information freely about health is deemed essential for building evidence based health policies and laws. The 1st, 2nd and 3rd Respondents' failures to proactively provide accurate and timely health information necessary to secure the health and well-being of the Petitioners and the public and refusal to respond when such information was sought have violated the 4th- 8th Petitioners right to health and that of the public at large.

***The obligation of the State to ensure women and girls access their right to information.***

88. In times of emergency, the risks of violence to women and girls increase. As UN Women has noted, violence against women is "the most widespread human rights violation in the world."[39] The World Health Organization has described it as "a global public health problem of epidemic proportions.[40]" Staying home reduces the risk of catching COVID-19 however, for thousands and women and girls, staying home does not mean greater safety, but rather greater risk of violence, including sexual violence, when they are isolated with their abusers or potential abusers.[41] This is due to high rates of sexual violence, particularly by girls' family members or other people close to them, and lack of access to reproductive health services; a situation

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[39] UN Women, Ending Violence Against Women, available at https://www.unwomen.org/en/what-we-do/ending-violence-against-women

[40] WHO, Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner violence, 2018, available at https://www.who.int/publications/i/item/9789241564625

[41] Women's Link Worldwide et al, Guidelines for African States to protect the rights of women and girls during the Covid-19 Pandemic, April, 2020, available at https://www.womenslinkworldwide.org/en/files/3114/guidelines-for-african-states-to-protect-the-rights-of-women-and-girls-during-the-covid-19-pandemic.pdf

that is exacerbated by measures such as curfews and by the overwhelmed healthcare system.[42].

89. Violations of the rights to life, health and particularly the sexual and reproductive health and rights of women, including women in situations of heightened vulnerability due to circumstances such as humanitarian or health crises, are forms of gender violence that may constitute torture or cruel, inhuman, or degrading treatment. Failure to provide these essential services is a form of discrimination against women and girls because it places their lives, health, and physical and psychological integrity at risk.[43]

90. Women's right of access to information on sexual and reproductive health requires a proactive obligation for the Respondents to provide reliable, complete, timely, and accessible information that allows them to exercise their rights or meet their needs. Considering the fact that women and girls in vulnerable situations face more barriers to access information—particularly those who are poor, rural, migrants, or lacking in education—States must make special and deliberate efforts to ensure information reaches them.

91. The right to information also intersects with other rights, such as the right to non-discrimination, as marginalized groups including women, migrants, ethnic minorities, and people living in rural areas often have less access to information that other sectors of society.

92. The right to information as stated in the Constitution obligates the State to provide information that is accurate, impartial and complete. In its decision *T-627/12*, the Constitutional Court of Colombia first determined that the right to

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[42] Ibid Note 3
[43] Ibid Note 4

information includes the right to receive accurate information and articulated a higher standard for public officials.[44] The Court affirmed the right to information requires that anyone providing information must ensure it is accurate, impartial and clearly distinguish opinion from fact. It went on to specify that, although these obligations apply to everyone, they are stronger for public officials in recognition of officials' highly influential position over the general population and prominence in the media. The Court explains that having high standing makes it easier for public officials to reach a wider population and, consequently, the information they provide is more likely to have an immediate impact[45] For those reasons, the Court imposes a higher standard of accuracy on them when providing information.

93. On a regional level, the Inter-American Commission[46] affirmed that when a State official provides inadequate or erroneous information, specifically referencing information regarding reproductive health, the State violates the right to information. Furthermore, it stated "public policies and programs on sexual and reproductive health should be based on scientific evidence that provides certainty."[47] According to the Commission, the right to information

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[44] Const. Court of Colombia, Decision T627/12 (Aug. 10, 2012) at Sect. II(4)(iii)a, *available at* http://www.corteconstitucional.gov.co/RELATORIA/2012/T-627-12.htm. (Original decision only available in Spanish. English summary available through the Women's Link Gender Justice Observatory at http://www2.womenslinkworldwide.org/wlw/new.php?modo=observatorio&id_decision=459).

[45] Ibid Paras. 13-16

[46] The Inter-American Commission on Human Rights (IACHR) monitors compliance with the American Convention in the Organization of American State's member states and the overall human rights situation in those countries. The Commission also prepares and publishes country-specific and thematic human rights reports. See "What is the IACHR?" (2011), available at http://www.oas.org/en/iachr/mandate/what.asp.

[47] Inter-American Commission on Human Rights, *Access to Information on Reproductive Health from a Human Rights Perspective* (2011) at 85-86, *available at* http://www.cidh.oas.org/pdf%20files/womenaccessinformationreproductivehealth.pdf

*"is closely linked to the attainment of other human rights; thus, a failure to respect and guarantee this right for women can lead to an infringement of other rights, such as their right to personal integrity, the right to privacy, rights of the family, and the right to be free from violence and discrimination."*

94. As evidenced by the dictum of the Colombian Court and the Inter-American Commission, the right to access to information is an essential part of guaranteeing women's right to health. The right to access to information is especially relevant in the area of health, as an individual's ability to make free and informed decisions with regard to their health is contingent upon their access to information. The right to information also intersects with other rights, such as the right to non-discrimination, as marginalized groups including many women, migrants, ethnic minorities, and people living in rural areas often have less access to information than other members of society.

95. The State has an obligation, pursuant to the respect and guarantee obligations imposed by regional and international law, and under the principles of equality and non-discrimination, to ensure that accurate information is available in a timely, complete, accessible, and reliable manner to all women and girls, and particularly to the poor, vulnerable, and those from marginalized communities.

96. The Respondents have an obligation of active transparency consistent with providing the public the maximum amount of information proactively—without a petition—particularly when the information in question is related to satisfying other rights. According to the Inter-American Commission's articulation of the obligation of "active transparency," States must proactively share as much information as

possible regarding topics of public interest[48]. This includes information related to human rights such as the right to health. The Commission has stated that the right to access to information,

> *"imposes on the State the obligation to provide the public with the maximum quantity of information proactively, at least in terms of a) the structure, function, and operating and investment budget of the State; b) the information needed for the exercise of other rights– for example, those pertaining to the requirements and procedures surrounding pensions, health, basic government services, etc.; c) the availability of services, benefits, subsidies, or contracts of any kind; and d) the procedure for filing complaints or requests, if it exists."*[49]

97. In relation to the specific needs of women and girls, the 10th and 13th Petitioners wrote to the 2nd Respondent wrote to the 1st Respondent in response to the publication of "Ministry of Health COVID-19 RMNH Guidelines: A Kenya Practical Guide for Continuity of Reproductive, Maternal, New-born and Family Planning Care and Services in the Background of COVID-19" (The RMNH Guidelines). The 10th and 13th Petitioners underscored in this letter that the RMNH Guidelines failed to provide for comprehensive sexual and reproductive health services. Given the urgency of the request, and the fact that curfew measures were already in place and the RMNH Guidelines were to be implemented, sought a

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[48] Inter-American Commission on Human Rights. *Access to information, Violence against Women, and the Administration of Justice*. (2015) at 52, *available at* https://www.oas.org/en/iachr/reports/pdfs/Access-information.pdf.
[49] Ibid at 53.

response within seven days. None was provided. Further the affidavit of the 3rd Respondent, a community health volunteer is indicative that because of the information gaps she was unable to meaningfully assist women and girls in her community who required reproductive health services, in her County she was not aware which services were still available and where they could be accessed.[50]

98. The failure to comply with the obligations of respecting and guaranteeing women's free access to information can be understood to lead to various violations of their rights to live free from violence and discrimination. As such, the 1st and 3rd Respondents' obligation to guarantee the right of access to information is essential in order for women to be able to fully exercise all of their rights, and in particular, their sexual and reproductive rights.

99. The failure of the Respondents to adhere to its obligation to guarantee the right to access information to women and girls continues to pose a threat to their attainment of the highest attainable standard of reproductive health and we implore this Honourable Court to grant the prayers sought in the Petition to uphold the right to access information for women and girls as outlined in the Constitution.

## IV. CRIMINAL LIABILITY OF THE 1ST-6TH AND 9TH RESPONDENTS FOR BREACH OF SECTIONS 28 (4)(B) OF THE ACCESS TO INFORMATION ACT

100. The 1st -6th, 8th and 9th Respondents have continuously failed to proactively publish and publicize information about the pandemic; despite several requests from the Petitioners. The 1st -6th and 9th Respondents (hereinafter

[50] Paras 8-11 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by Esther Nelima..

Respondents) actions may constitute an offence per Section 28 (4) (b) of the Access to Information Act.

101. Section 28 (4)(b) of the Access to Information Act is clear in its wording as follows: -

> *"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 both."*

102. From the above provision, it is clear that:-

a. The Section is applicable to any person;

b. The Section becomes applicable when one fails to respond to a request for information; and

c. Failure to respond to a request for information is a criminal offence.

103. The duties and obligations placed under a state office and/or corporation are expected to be exercised by the officers holding positions in such offices and/or corporations. That way, such officers have the individual responsibility to ensure that they carry out their functions diligently and per the law.

104. In terms of Section 8 of the Public Officers Ethics Act, every public officer is expected to "the best of his ability, carry out his duties and ensure that the services that he provides are provided efficiently and honestly."

105. Further, Section 10 of the same Act, a public officer is expected to carry out his duties and responsibilities in accordance with the law. The Respondents in their actions were in blatant breach of the provisions of the Constitution and the Access to Information Act.

106. No person regardless of status is above the law; and the interpretation of any law must not be for the protection of a certain class of people to the detriment of the other members of the society. Every citizen of Kenya is entitled to equal protection and equal benefit of the law.

107. Section 28 (4)(b) of the Access to Information Act is not in vain. An office holder can no longer hide behind the veil of office culpability. State officers who fail to provide information without reasonable cause are not only in breach of the Access to Information Act but also the constitutional right of access to information and must be held individually liable.

108. Such liability can be seen in Section 145 (1) of the Environmental Management and Coordination Act which states as follows:-

> *"When an offence against this Act, is committed by a body corporate the body corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act, shall be guilty of an offence."*

109. The above provision extends criminal liability to principal officers of a body corporate as was observed by Korir J. in *Republic v National Environment*

*Management Authority & another Ex-Parte Philip Kisia & City Council Of Nairobi.*[51]

110. Odunga J. in *Miguna Miguna Versus Fred Matiang'i, Cabinet Secretary of Interior and Coordination of National Government & 8 Others*[52] in delivering judgment on the individual liability of state officers stated as follows:

> *"It is therefore clear that there is nothing barring the Court in appropriate cases from holding an officer of the Government individually liable where the conduct of that officer give rise to circumstances under which it would be unjust and oppressive to subject the public to either pay the money decreed or the costs arising therefrom or both. In other words there is no immunity from impunity. This is what I would call lifting of the veil of the executive inscrutability and inoculation."*

111. Further, Odunga J. in *Republic v Cabinet Secretary, Ministry of Education & another Exparte Thadayo Obanda*[53] in delivering judgment in regard to a cabinet secretary's personal liability in the exercise of his mandate to appoint the Chairperson and the members of the University Council through an open report stated as follows:

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[51] [2013] eKLR (Judicial Review Case No. 251 of 2011).
[52] [2018] eKLR (Constitutional Petition No. 51 of 2018).
[53] [2017] eKLR (Miscellaneous Civil Application No. 46 of 2016).

*"In this case, despite the legal infrastructure at the disposal of the 1st Respondent, he keeps on catching the wrong end of the stick. That kind of conduct can only be explained on the basis of impunity. It is my view that the Lords of Impunity, however high and mighty must be made to carry their own crosses. I have no doubt in my mind that there are certain plain but well-defined cases, in which public officers employed to execute statutes are personally liable and this is expected of every other system in which the principles of jurisprudence are rightly understood, in damage and reparation to parties injured by the non-execution of the Acts. Such liability unquestionably attaches to statutory officers personally, who corruptly, or wilfully, and tortiously refuse to execute statutes properly, when any error or illegality in their previous proceedings has been pointed out, or found and declared by a court of law. When public officers thus wilfully refuse to execute duty imposed on them, they ought to held personally to account."*

112. The learned judge further cited the case of *Resley vs. The City Council of Nairobi* where the court held that:

*"The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches*

*of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed (sic)...If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed."*[54]

113. From the foregoing, it is evident that where a duty bearer fails in the delivery of their duties and that such failure breaches provisions of the law, it becomes necessary to lift off the veil of office protection and charge such office holders in their individual capacities.

114. The 1st, 2nd, 5th and 6th aRespondents have to date failed to respond to any requests for information and have additionally refused to participate in this Court process that would hold them accountable for that failure. The 3rd Respondent, did

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[54] [2006] 2 EA 311.

respond to the letter requesting information but failed to provide the information requested and failed to provide a reason as to why such information could not be provided.

115. While the 4th and 9th Respondents, failed to respond to requests for information, both have alleged in their responses that the information sought was publicly available. The Petitioners submit that they must prove this allegation, further that such an assertation does not negate a duty to respond to a request for information. In fact, the nonchalance with which the 4th and 9th Respondents have addressed these questions of them is precisely why the Section 28(4) of the Access to Information Act was enacted – to protect citizens from state agents that will willfully or negligently refuse or fail to discharge their duties. Specific requests were sought and they have not provided a reason as to why it was more effective to force the Petitioners to approach this Court for relief as opposed to responding to a request, one they are constitutionally bound to adhere to.

116. The Respondents' acts were so grievous that they not only led to breach of the Petitioner's right of access to information, but created a continuum of breach of several interconnected legal entitlements. For this reason and to address the continuing culture of impunity we urge this Court to make a declaration that they can be held criminally liable in their personal capacities for these failures.

## V. FAIR ADMINISTRATIVE ACTION

117. The 7th Petitioner and 8th Petitioner were adversely affected by the decision of the 1st and 2nd Respondent's decision to extend mandatory quarantine as communicated via circular by the 2nd Respondent.

118. The 7th Petitioner arrived in Kenya on 25 March 2020 through Jomo Kenyatta International Airport. On arrival he was informed that he was required to undergo mandatory quarantine, which he opted to do at Grace House Resort. He was then tested for COVID-19 on 2 April 2020 and his results, which were negative, were made available orally within 48 hours. On 7 April 2020, one day before he was to complete his mandatory quarantine, he was informed that there were three positive cases in facility. It was then communicated that because there were positive tests all residents within the facility would be required to undergo mandatory quarantine for an additional 14 days. This information was provided via an internal memorandum by the 2nd Respondent dated 7 April 2020.[55] Aggrieved by this decision the 7th Petitioner, on 9 April 2020, wrote a letter requesting information on the extended quarantine addressed to the 1st Respondent.[56] There was no response.

119. The 8th Petitioners daughter traveled to Kenya from Singapore on 23 March 2020 in Kenya through Jomo Kenyatta International Airport. Upon her daughter's arrival as she was waiting for her outside the airport, she was informed that she would have to undergo mandatory quarantine and she scrambled to secure accommodation for her at Pride Inn Azure. Given the State was slow to provide the residents with information she provided her daughter with the Ministry of Health's Quarantine Protocols.[57] He daughter was tested for COVID on the 8th day of her stay. On 2 April 2020, the 1st Respondent provided a media update indicating that two people within her daughter's facility had tested positive. In the same day her daughter confirmed that she had tested negative. On 4 April 2020, a day before she

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[55] Para 16 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by MO (Exhibit MO-1). Also see paras1 -16 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by MO detailing his experience.

[56] Para 17 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by MO (Exhibit MO-2).

[57] Para 7 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by EL (Exhibit EL-1). Also see paras1 -16 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by MO detailing his experience.

was scheduled to conclude her mandatory quarantine, it was announced by the 1st Respondent that quarantine would be extended for 14 days in facilities where there were positive cases.[58] Aggrieved by this decision the 8th Petitioner, wrote a letter requesting information, on 9 April 2020, on the extended quarantine addressed to the 1st Respondent.[59] There was no response.

120. The Ministry of Health developed COVID-19 Mandatory Quarantine Site Protocol: Interim Guidance. These Protocols included guidance on "Testing of COVID-19 among people in quarantine". The Protocols specify that: "Those who test negative will remain in quarantine till the 14 days is over".

121. Article 47(1) guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Fair Administrative Action Act, 2015 (FAA Act) was enacted to give effect to Article 47.

122. FAA Act defines administrative action to include: "(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) 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". A decision is defined as "means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be."

123. The FAA Act through Section 4(3) stipulates the steps that must be taken if a decision is likely to affect the rights or fundamental freedoms of a person:

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[58] Paras1 -10 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by EL detailing het experience.

[59] Para 18 of the Affidavit in support of the Petition filed on 1 July 2020 sworn by EL (Exhibit EL-3).

*"Where an administrative action is likely to adversely 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.oms of any person, the administrator shall give the person affected by the decision."*

124. The 1st and 2nd Respondents are state agents exercising state authority and therefore the decisions they take qualify as administrative actions. The 1st and

2nd Respondents took a decision that affected the 7th and 8th Petitioner's daughter fundamental rights including their freedom of movement (as they were in mandatory quarantine). This decision was taken without prior and adequate notice, and contrary to the provisions of the Ministry of Health's own guidance (the 8th Petitioner's daughter was informed a day before she was to be released and the 7th Petitioner two days before he was to complete quarantine). Secondly, when they sought the audience of the 1st and 2nd Respondents they were not given that audience, in fact the only recourse made available in the internal memorandum was in reference to the financial burden of the decision and an opportunity to question the decision was not availed.

125. While the 7th and 8th Petitioners accept that these are extraordinary circumstances, the manner in which this decision was taken was contrary to the Ministry's own guidelines. There was no mention in the guidelines that a positive result would affect the entire facility and the internal memorandum failed to explain why there was a deviation. Additionally, when the 1st and 2nd Respondent were offered an opportunity to provide reasons for their decisions, they opted not do so and ignored the 7th and 8th Petitioners. We therefore submit that the 1st and 2nd Respondent violated the 7th and 8th Petitioners right to fair administrative action in Article 47 of the Constitution, read with Section 4 of the FAA Act.

## VI. ORDERS SOUGHT

126. , the 1st-8th, 10th, 12th and 13th Petitioners would like to draw your attention to the following orders we seek:

1. 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.

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 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.

q. Costs of this Petition and any other just and expedient order the Court may deem fit to make.

127. Your Lordship, we underscore these and would like to make submissions to their effect specifically, but we do believe all orders sought have been addressed in the substance of these Submissions.

128. We submit that Article 23(3) is the guiding legal provision that guides the Court in determining what remedies to be granted to a party whose rights and fundamental freedoms have been threatened, infringed, denied or violated. 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.

***The 8th Respondent's Failure to execute its mandate***

129. Your Lordship, in the discussion on jurisdiction set out in paras 24-34 above, we alluded to the conduct of the 8th Respondent that has resulted in the Petitioners approaching this Court. The 8th Respondent is mandated with an oversight role over the enforcement of the Access to Information Act through Section 20 which states:

> *"(1) The Commission is hereby granted the powers of oversight and enforcement of this Act.*
>
> *(2) In the performance of its functions under this Act, the Commission shall be guided by the national values and principles of the Constitution.*
>
> *(3) The Commission shall designate one of the Commissioners as "Access to Information Commissioner" with specific responsibility of performing the functions assigned to the Commission under this Act."*

The "Commission" is defined in the same Act as the Commission on Administrative Justice established by the Commission on Administrative Justice Act, 2011.

130. The Act, goes further and specified how this role shall be played in Section 21(1):

> *"The functions of the Commission shall be to—*

*(a) investigate, on its initiative or upon complaint made by any person or group of persons, violation of the provisions of this Act;*

*(b) request for and receive reports from public entities with respect to the implementation of this Act and of the Act relating to data protection and to assess and act on those reports with a view to assessing and evaluating the use and disclosure of information and the protection of personal data;*

*(c) develop and facilitate public education awareness and develop programmes on right to access to information and right to protection of personal data;*

*(d) work with public entities to promote the right to access to information and work with other regulatory bodies on promotion and compliance with data protection measures in terms of legislation;*

*(e) monitor state compliance with international treaty obligations relating to freedom of and right of access to information and protection of personal data;*

*(f) hear and determine complaints and review decisions arising from violations of the right to access to information;*

*(g) promote protection of data as provided for under this Act or the Constitution; and*

*(h) perform such other functions as the Commission may consider necessary for the promotion of access to information and promotion of data protection."*

131. The 8th Respondent's role is clear, to oversee the enforcement of the Access to Information Act. It cannot be understated that the proper functioning of this role is significant for the exercise of Article 35 and by design, the realisation of all other fundamental rights.

132. The 8th Respondent is established by the Commission on Administrative Justice Act, 2011 (Section 3). The Commission on Administrative Justice Act, which provides that the 8th Respondent shall have the status and power of a commission established by Chapter 15 of the Constitution.

133. The objects of commissions established by Chapter 15 are elucidated in Article 249 of the Constitution as: (a) protecting the sovereignty of the people; (b) securing the observance of all State organs of democratic values and principles; and (c) promote constitutionalism.

134. The North Gauteng High Court (South Africa), in *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* held:[60]

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[60] (11311/2018; 13394/2018) [2019] ZAGPPHC 132; [2019] 3 All SA 127 (GP); 2019 (7) BCLR 882 (GP) (20 May 2019)

*"The PP must, like any public functionary, exercise her powers and functions lawfully in compliance with her constitutional and statutory mandate and duties. The proper and effective performance of the functions of the PP is of particular importance, given her constitutional mandate and the extraordinary powers that are vested in her office. When the PP fails to discharge her mandate and duties, the strength of South Africa's constitutional democracy is inevitably compromised and the public is left without the assistance of their constitutionally created guardian. It means that vital constitutional check against abuses of public power is lost."*

The Court went further stating that: "the public protector is subject to a higher duty and higher standards than ordinary administrators".

135. The 8th Respondent, has been conferred a duty higher than an ordinary administrator and this is demonstrated by Article 249 of the Constitution. We submit that the 8th Respondent failed in this obligation. As demonstrated above, the 8th Respondent was copied to all correspondence to the 1st-6th and 9th Respondents. Further, when it was brought to the 8th Respondents that continuous requests were being ignored despite the unique circumstances, no response was offered. In fact, rather tepidly and timidly the 8th Respondent only sent two letters as a follow up to state agents that were willfully ignoring citizens. The most damning demonstration of this failure is the 8th Respondents failure to respond to this Petition, despite several reminders, which calls into question its conduct.

136. Confronted with a similar question around the Commission on the Implementation of the Constitution, the High Court in *Centre for Rights Education and Awareness (CREAW) v Attorney General and another* which held:

> *"Clearly, there has been a lot of frenetic, but apparently not too productive, activity with regard to the realization of the two thirds gender principle in the last few months. However, such activity cannot be described as being "as soon as reasonably practicable". Indeed, it is difficult not to wonder about the apparent laxity demonstrated by all the parties involved in this matter with regard to enactment of legislation to effect the gender equity rule in compliance with the timeline set in the Supreme Court Advisory Opinion, which timeline accords with the timeline in the Fifth Schedule of the Constitution."*[61]

137. The 8th Respondent has demonstrated laxity in exercising its role, has disregarded the important function it plays in protecting the sovereignty of the people, and has failed in its obligation to promote constitutionalism. The 8th Respondent has failed in its mandate and it has failed the people of Kenya.

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[61] [2015[ eKLER (Petition No. 182 of 2015).

***An order to compel the 7th Respondent, in consultation with the 8th Respondent, to draft and publish regulation under the Access to Information Act***

138. My Lord in the matter *of Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others (Muthurwa Estate)*[62] Lenaola J ( as he then was) held:

> *"Before I do that, I must lament the widespread forced evictions that are occurring in the country coupled with a lack of adequate warning and compensation which are justified mainly by public demands for infrastructural developments such as road bypasses, power lines, airport expansion and other demands, Unfortunately there is an obvious lack of appropriate legislation to provide guidelines on these notorious evictions. . . . It is on this basis that it behoves upon me to direct the Government towards an appropriate legal framework for eviction based on internationally acceptable guidelines. These guidelines would tell those who are minded to carry out evictions what they must do in carrying out the evictions so as to observe the law and to do so in line with the internationally acceptable standards. To that end, I strongly urge Parliament to consider enacting a legislation that would permit the extent to which evictions*

[62] Petition No. 65 of 2010.

*maybe carried out. The legislation would also entail a comprehensive approach that would address the issue of forced evictions, security of tenure, legalization of informal settlements and slum upgrading. This, in my view, should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in Articles 9 and 10 of the Constitution."*

139. Justice Lenaola found that due to the widespread eviction it was necessary to direct the Government towards an appropriate legal framework based on internationally acceptable guidelines. Ngugi, J (as she then was) similarly relied on this in directing the Minister for Public Health and Sanitation to develop a policy on the isolation of tuberculosis patients in *Daniel Ng'etich and 2 others v Attorney General & 3 others*[63]

140. My Lord, we submit that this dicta is informative in this case, it is necessary that the 7th and 8th Respondents, be compelled to act because of the widespread impunity shown by the 1st-6th , 8th and 9th Respondents to the Bill of Rights and the Access to Information Act. Part VI {Section 25(1)}of the Access to Information Act provides the 7th Respondent with the power to make regulations, in consultation with the 8th Respondent, for the better carrying out of the Act. My Lord we submit that the failure to exercise these powers is precisely the vacuum created for a continued violation of the right to access information.

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[63] [2016] eKLR (Petition 329 of 2014).

***General damages***

141. Lord Macnaghten held: 'General damages' are such as the law will presume to be the direct natural or probable consequence of the tort or of the breach of contract in question.[64] On guiding principles for awarding general damages, Visram, Koome and Otieno-Ode k, JJA, as they then werein *Simon Taveta v Mercy Mutitu Njeru* noted: "On our part we note that award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable award for comparable injuries".[65]

142. General damages may be awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury occasioned by a constitutional violation.[66] In *J O O (also known as JM) v Attorney General & 6 others* considered the role damages plays in a asserting constitutional rights and noting that:[67]

> *"Based on the findings I find that the Petitioner's rights to maternal healthcare were infringed, there was equally a violation to her right to dignity as a woman and as a human being by the omission and commission of the nurses or the 5th Respondent facility.*
>
> *And redressing the injuries suffered by the Petitioner, I bear in mind that no amount of monetary compensation may redress the pain and*

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[64] *Ströms Bruks* Akt Bolag *v. Hutchison*, [*1905*] *A.C.* 515
[65] [2014] eKLR (Civil Appeal No. 26 of 2013).
[66] Halsbury's Laws of England 4th Ed, vol. 12(1) page 348 at para. 883
[67] [2018] eKLR (Petition Case No. 5 of 2014).

*suffering that the petitioner had to go [through]. It is merely an acknowledgement of the infringement of rights, and an attempt to make reparation. In this regard I considered the following Cases."*

143. In the above case the Petitioner was awarded an amount of Kenya Shillings 2.5 million for physical and emotional trauma caused by a violation of her rights.

144. This was also the position under the previous constitutional dispensation where the Court in *Harun Thungu Wakabata v Attorney General* where it held:[68]

*"Therefore, this court in exercise of its jurisdiction under Section 84 of the Constitution to provide redress for violation of fundamental rights and freedoms, has the powers to award damages to an individual whose fundamental rights and freedoms have been violated. However, it may not be possible to value or measure in monetary terms what an individual has undergone through violation of his fundamental rights. An award of damages merely serves to vindicate and restore his dignity and also send a clear message to the Executive that it will be held responsible for acts of impunity committed by its servants or agents"*

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[68] *[2010] Misc. Appl. No. 1411 (OS)* of 2004.

145. In the above cases, the parties who were all unlawfully detained and subjected to cruel and inhumane treatment suffered physical and psychological harm and were awarded varying sums between Kenya Shillings 1.5 and 3 million.

146. The 4th to 8th Petitioners, have demonstrated through their affidavits, the emotional and psychological stress they experienced while in mandatory quarantine. Being forced to travel home, in the midst of a global life threatening pandemic is a traumatic enough event with threats to your health and well-being. However, the 1st and 2nd Respondents conduct exacerbated this by failing to provide adequate information for the protection of health and life. Further, the 1st and 2nd Respondents willfully ignored requests for information needed to protect the health and well-being of the 4th to 8th Respondents causing them further despair during an already stressful situation. In light of the foregoing we ask this Court to award a sum of Kenya Shillings One million each to the 4th -8th Petitioners for psychological distress caused by the violation of the rights under Article 35, 43 (1) (a), and 47 of the Constitution. We ask for this award which is comparatively lower than other awards because our clients did not suffer physical harm, but we urge the Court to consider the mental and emotional distress inflicted on our clients.

***Costs***

147. My Lord, costs follow the event, however, this is a matter brought to Court in the Public Interest and we shall therefore rely on the decision of the Odunga, J in *Republic v Medical Practitioners and Dentist Board & 3 Others Ex*

*Parte Kenya Hospital Association*[69] while quoting his Majanja J in *Amoni Thomas Amfry and another v Minister for Lands and Another*[70] the court held:

> *"In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a cause that is beneficial to the public for fear of coats being imposed. . . . However, the vital factor in setting the preference, is the judiciously exercised discretion of the court accommodating the special circumstances of the case, while being guided by the ends of justice....."*

148. We submit that the Court exercises this discretion in deciding on the issue of costs.

In light of the analysis of the facts of the petition as well as the law and authority we have set out, we therefore submit that the petition be allowed as prayed.

These are our humble submissions

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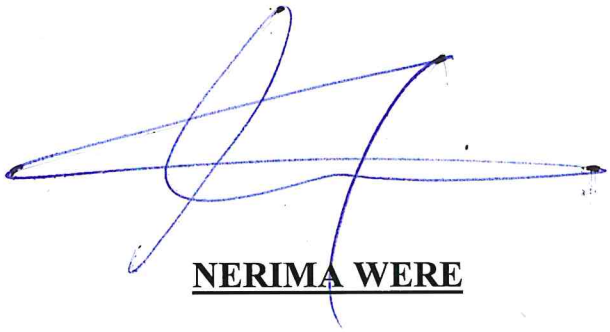
[69] [2014] eKLR (Misc. Civil Application No. 274 of 2013).
[70] [2013] eKLR (Petition No. 6 of 2013).

2. 

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