

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION 218 OF 2020

ERIC OKIOMA & 12 OTHERS.....PETITIONERS

V

MUTAHI KAGWE, CS HEALTH & 8 OTHERS.....RESPONDENTS
KENYA NATIONAL COMMISSION
ON HUMAN RIGHTS.....INTERESTED PARTY

KATIBA INSTITUTE (9TH PETITIONER) SKELETON ARGUMENTS
SUPPORTING THE PETITION

1. Timely access to accurate information in a pandemic is a matter of life and death. Human health depends on readily accessible health care and access to accurate information about the nature of the threats and the means to protect oneself, family, and community. That is more the case in a pandemic.

Link Between Right to Health and Access to Information

2. In *Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR (Majanja J)* affirming the relation between right to health and access to information this court held:

the General Comment [Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 14] recognises that the right to health is closely related to the economic rights and is dependent on the realisation of the other rights including the rights to food, housing, water, work, education, human dignity, life, non-discrimination, equality, prohibition of torture, privacy, access to information and other freedoms

3. Accordingly, public health information during a pandemic is the object of Article 35(3) requiring the State to proactively “publish and publicise any important information affecting the nation”. No one had to request for this information.

Respondents Violated Petitioners' Right to Health and Life by Refusing to Supply Them with the Requested Information

4. In this case, in March and April 2020¹, Petitioners sent the Respondents several letters seeking information on specific issues concerning the Respondents COVID 19 pandemic response. However, the Respondents have refused to respond to those requests for information to this date.
5. Among others, the information sought concerned—
 - a. the implementation of mandatory quarantine;
 - b. Siaya County's burial of James Oyugi in the dead of the night - violating cultural norms, lacking dignity, and inconsistent with standards for burials during the pandemic;
 - c. support that the 1st Respondent is providing to health care workers risking their health to protect the community;
 - d. the 8th Respondent's obligation to enforce the Access to Information Act, 2016.
 - e. the rationale for extending quarantine beyond the initial 14-day period;
 - .f the rationale for mandatory quarantine as punishment for those who allegedly commit curfew offences; and
 - g. the guarantee on essential reproductive health services during the COVID-19 pandemic.
6. Under section 9(2) of the Access to Information Act, 2016 "where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application". Respondents were, therefore, obligated to supply this information within 48 hours but have refused to do so more than a year later.

¹ 30 March 2020, 6 April 2020, 9 April 2020, 10 April 2020, 15 April 2020, 16 April 2020, 17 April 2020, 18 April 2020, 27 April 2020, and 28 April 2020

7. When Petitioners filed this case, COVID-19 had caused more than 140 deaths in Kenya and over half a million deaths globally. Hence, the default violates the Petitioners right of access to information and threatens and violates their right to life as well as the highest attainable standard of health.
8. In that regard, Kenya is a state party to the International Covenant on Civil Economic Social and Cultural Rights (ICESCR) whose Article 12 guarantees the right to the highest attainable standard of health. To this end, General Comments issued under treaties “are tools or aids directed to states parties to help the latter in implementing the treaty or better fulfilment of their obligations there-under” [See, Supreme Court, *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR*].
9. Accordingly, Article 11 of *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (issued under Article 21 of the ICESCR treaty) interprets the right to health “as an inclusive right extending” to “timely and appropriate health care” as well as “the underlying determinants of health, such as access to health-related education and information”. The right also extends to the information-based “participation of the population in all health-related decision-making at the community, national and international levels”.
10. Also, Article 12 of the **General Comment** perceives that the “elements of the right to health” include “information accessibility” meaning the “right to seek,

- receive and impart information and ideas⁸ concerning health issues”. This is yet another element of the right to health violated by the Respondents in this case.
11. Under Article 21(1) of the Constitution like other rights, the right to health, invokes both positive and negative obligations: *respect*, *protect*, *promote*, and *fulfill*.
 12. First, the negative obligation to *respect* requires the State to refrain from “censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as preventing people’s participation in health-related matters”. [General Comment 4, para 34]
 13. On the other hand, the positive obligation to *fulfill* similarly requires the State to “take positive measures that enable and assist individuals and communities to enjoy the right to health”. The obligation to *fulfil* or *promote* the right to health requires States to undertake actions that create, maintain, and restore the health of the population, including:
 - (i) fostering recognition of factors favouring positive health results, e.g. research and provision of information;
 - (ii) ensuring that health services are culturally appropriate and that healthcare staff are trained to recognise and respond to the specific needs of vulnerable or marginalised groups;
 - (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services;
 - (iv) supporting people in making informed choices about their health.
 14. Overall, as part of the State’s *core obligation* to protect the right to health, Article 44 of the **General Comment** requires states to provide “access to information

concerning the main health problems in the community, including methods of preventing and controlling them”.

15. Kenya is also a state party to the UNESCO Constitution, 1945, establishing the United Nations Educational, Scientific, and Cultural Organization (UNESCO). UNESCO is the designated UN agency for monitoring and reporting on this target regarding guarantees for, and implementation of, the right to information across the world.

16. In this regard, on right to information in a pandemic, UNESCO states:

The COVID-19 pandemic has highlighted the heightened importance of information in times of crisis. Access to accurate and timely information helps people make safe choices, for themselves and their families, with governments having a corresponding obligation to disseminate widely public interest information and to address disinformation. Access to information also promotes accountability regarding the highly impactful decisions governments make during emergencies.

[See, UNESCO, *Right to Information in Times of Crisis: Access to Information – Saving Lives, Building Trust, Bringing Hope*]

17. The UNESCO notes that “the right to information” places a positive obligation on States to recognise the right and develop user-friendly systems to enable practical access to information, both by responding to requests for information and by disclosing information proactively.

18. Concerning Kenya’s Article 35(3) duty to proactively disseminate health information during a pandemic, UNESCO notes:

In terms of the proactive disclosure of information, States should generally disclose a “range of information of

public interest” and progressively increase the amount of information which is disclosed proactively over time. Such disclosure should not be confused with government communications such as media liaison or public health campaigns... Beyond these general obligations, it is clear that States need to disclose proactively a range of types of health information, for example as part of the rights to health and life. **Disseminating health information is of particular importance during a health emergency.** The Aarhus Convention sets clear standards for this, stating: In the event of any imminent threat to human health or the environment . . . **all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.**

India

19. In comparative perspective, in the Indian case of *Hillson v State of Manipur (PIL 20 of 2020)* decided July 16, 2020, the Indian High Court at Manipur ordered the state government, under the Right to Information Act, 2005, to share with the general public all information on any action taken by towards combating the COVID-19 crisis including spending of public money on the infrastructure, staffing, and facilities in the quarantine centers.
20. The petitioner, just like in this case, had submitted that there were insufficient quarantine centres in the districts to accommodate all the returning inhabitants such as students and migrant workers and that the facilities provided in those existing quarantine centres were poorly regulated and inadequate. Further, they did not follow the WHO guidelines or standard operating procedures from the National Centre for Disease Control.

21. The court in that case noted that much of the public outcry regarding the quarantine facilities could have been avoided if the necessary information about the available resources had been shared with the public. That is the same situation here.

CONCLUSION

22. All in all, the court should find and declare that the Respondents violated the petitioner's right to information, health, and life as pleaded in the petition.

Dated at Nairobi this 18th of *OchielJD* October 2021

OCHIEL J DUDLEY
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