

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 151 OF 2020**

**BETWEEN**

C.M (suing on her behalf and on behalf of PM (Minor)  
as parent.....1<sup>st</sup>  
PETITIONER  
M.O.A .....2<sup>ND</sup> PETITIONER  
M.O .....3<sup>RD</sup> PETITIONER  
M.W.M.....4<sup>TH</sup> PETITIONER  
K. F .....5<sup>TH</sup> PETITIONER  
F.A.....6<sup>TH</sup> PETITIONER  
K.B .....7<sup>TH</sup> PETITIONER  
KENYA LEGAL & ETHICAL ISSUES ON  
HIV & AIDS (KELIN) .....8<sup>TH</sup> PETITIONER  
KATIBA INSTITUTE .....9<sup>TH</sup> PETITIONER

**AND**

HON ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT  
THE CABINET SECRETARY, HEALTH .....2<sup>ND</sup> RESPONDENT  
THE CABINET SECRETARY, INTERIOR AND  
CORDINATION OF NATIONAL GOVERNMENT.....3<sup>RD</sup> RESPONDENT

**AND**

INDEPENDENT MEDICO-LEGAL UNIT ..... 1<sup>ST</sup> INTERESTED PARTY

**AND**

DR. MARGARET OTHIENO MAKANYENGO.....1<sup>ST</sup> AMICUS CURIAE  
INTERNATIONAL COMM ISSION OF JURIST (K).....2<sup>ND</sup> AMICUS CURIAE

**REPLYING AFFIDAVIT**

I **PETER KIAMA**, resident in Nairobi County and of P.O BOX 16035-00509, Galleria Nairobi within the Republic of Kenya do hereby solemnly make oath and state as follow;\_

1. **THAT** I am an adult male presently employed as the Executive Director at the Independent Medico-Legal Unit (IMLU), the Interested Party herein.

2. **THAT** I am well conversant with the contents of the Petition No.151 of 2020. I have read and understood the issues in the petition and where applicable been explained to by IMLU's advocate on record. I am therefore competent to swear this affidavit in response to the petition on behalf of IMLU and in support of the petition.
3. **THAT** following the global outbreak of the coronavirus disease (COVID - 19) pandemic and the reporting of the first case in Kenya on 12 March 2020, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents introduced measures aimed at containing the virus. Some of the measures introduced included *inter alia* travel restrictions, self -quarantine, mandatory quarantine, closure of schools and institutions of higher learning, imposition of a curfew from dawn to dusk and restrictions of movement in and out of Nairobi Metropolitan area, Kilifi County, Mombasa County and Kwale County.
4. **THAT** the 2<sup>nd</sup> respondent while following the advisory issued by the World Health Organisation imposed quarantine as a public health measure to prevent further spread of COVID – 19 to new areas and/or reduce human to human transmissions in areas where the virus was already circulating.
5. **THAT** on 22 March 2020, the 1<sup>st</sup> respondent, the Cabinet Secretary of Health issued new directives abolishing self quarantine and instituting mandatory quarantine for all individuals returning to the country between 22 and 25 March 2020 for a period of 14 days in designated places in order to monitor if the persons had developed COVID-19 related symptoms and prevent the further spread of COVID-19. This directive came into effect on the same day and so far over 2000 people are undergoing mandatory quarantine for a duration of 14 days at several government designated facilities. Whilst IMLU recognizes that mandatory quarantine was imposed for the public benefit, it must not result in cruel, inhuman and degrading treatment of those detained.

6. **THAT** Kenya had an obligation to put in place measures that were sufficient and appropriate to prevent inhuman and degrading treatment of those detained. Such measures would have included prevention of acts that would have the effect of stigmatizing the persons so detained including transparent communication to all persons so held in the mandatory quarantine, their families and the media concerning the measures being taken by the state and the reasons for them in order to avert psychological suffering.
7. **THAT** it is in public domain that the respondents held the petitioners and placed them in designated quarantine places without making any effort to learn their health background. Any person who had arrived in the country was held in mandatory quarantine irrespective of whether or not they had arrived from a country that had not reported any COVID-19 infection or countries that had reported infections. The actions of the respondents of holding the petitioners in self-paid mandatory quarantine facilities caused them physical and emotional distress and the actions of forcefully detaining the 2<sup>nd</sup> petitioner for failure to pay the bill for mandatory quarantine at a government facility amounted to cruel, inhuman and degrading treatment in violation of Article 29(f) of the constitution.
8. **THAT** accordingly, I believe that the manner in which the respondents implemented mandatory quarantine against 1<sup>st</sup> - 7<sup>th</sup> petitioners amounts to cruel, inhuman and degrading treatment due to the respondents deliberate and aggravated treatment that caused suffering, gross humiliation or degradation to the 1<sup>st</sup> to 7<sup>th</sup> petitioners.
9. **THAT** I am advised by my advocate on record, which advise I believe to be true that Article 29(f) and 25(a) of the constitution prohibits cruel and inhuman degrading treatment in absolute terms. It is neither subject to any limitation nor can the prohibition be derogated from even in time of pandemic like COVID-19. In view of the absolute nature of the prohibition

envisaged in Article 29(f) of the constitution, protection from cruel, inhuman and degrading treatment constitute one of the important values and principles of human rights protected under Article 10 of the constitution whose infringement amounts to a violation of the dignity of an individual. The non-derogable character of the protection from cruel, inhuman and degrading treatment constitutes part of *jus cogens* in the normative hierarchy of international law.

10. **THAT** Kenya is obligated under the Convention Against Torture (CAT) to prosecute acts of torture, cruel and degrading treatment occurring within its jurisdiction and provide the victims with an effective remedy. Kenya by enacting the Prevention of Torture Act of 2017 adopted the criminal prohibition against torture in the aforesaid statute in order to comply with CAT. Before Prevention of Torture Act was enacted into law, there were no laws in place which clearly defined and criminalized torture, cruel, inhuman and degrading treatment in Kenya. Further, there were no provisions for reparations and rehabilitation for victims. Accordingly, the Act addressed the following issues:

- (a) The Act provides a list of acts that constitute torture, cruel, inhumane and degrading treatment;
- (b) The Act provides for remedies available to a victim of torture which include compensation, rehabilitation and restitution. These remedies empower the court to provide the most effective relief to a victim.

11. **THAT** cruel and inhumane degrading treatment is applicable not only to physical injuries but also to mental or psychological suffering. Article 29(f) of the constitution covers acts that constitute psychological suffering that causes severe suffering that is mental or physical that was unjustifiable and grossly humiliating.

12. **THAT** the deplorable living conditions including poor hygiene, scarcity of water, poor ventilation, crowding and poor sanitation conditions that existed at some of the government mandatory quarantine facilities where some of the petitioners were held amount not only to physical but also mental form of degrading or inhuman treatment. Kenya had an obligation to ensure that since mandatory quarantine facilities are *de facto* a form of detention all those so held should be able to benefit from the fundamental safeguards against cruel, inhuman and degrading treatment, including information of the reasons for their being quarantined, the right of access to independent medical advice, to legal assistance and to ensure that third parties are notified of their being in quarantine, in a manner consonant with their status and situation.

13. **THAT** the respondents failed to put in place measures aimed at preventing and protecting women from abuse. In addition, they failed to consider the physiological needs of women that would require provision of adequate facilities aimed for maintaining hygiene. Women in mandatory quarantine were forced to share sanitation facilities and in some cases rooms without regard to their vulnerability and special status including maternity. These actions of the respondents implied inhuman and degrading treatment.

14. **THAT** it has now been recognized that the actions of the respondents to detain the petitioners who failed to pay their mandatory quarantine bills amount to cruel and degrading treatment. While the petitioners in mandatory quarantine were not held in prison so properly called, their situation was akin to that of prisoners, confined at the self-paid mandatory facilities, unable to leave at their own free will with guards stationed at the facilities who would not allow them to leave. To that extent therefore, the petitioners were subjected to cruel, inhuman and degrading treatment and humiliation for not being in a position to pay the bills incurred. Further, every single day they kept being detained at the mandatory facility for

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failure to pay bill, they were worried that the bill was escalating and this caused them psychological pain and suffering.

15. **THAT** through the work IMLU has undertaken over the last two decades in preventing torture, cruel and inhuman degrading treatment as well as supporting the victims of the same, we have established that the consequences of cruel and inhuman degrading treatment are varied and have long lasting ramifications to the victims and their families. Cognizant of the impact of the effects of cruel and inhuman degrading treatment on individuals and their families, IMLU pleads with this honourable court to provide effective remedies to the victims as provided for under the Prevention of Torture Act.
16. **THAT** I am aware that cruel and inhuman degrading treatment is traumatic and breaks the physical and psychological integrity of the victim with the aim of destroying his/her personality. I know out of my own experience owing to the work I have done with many victims and survivors of torture, cruel and inhuman degrading treatment that the process of seeking justice and reparation is a vital part of their recovery in that it allows them to regain their dignity and sense of control. It can also be a means of overcoming stigmatization. some of the internationally recognized effective remedies available for victims of torture, cruel and inhuman degrading treatment include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
17. **THAT** I believe that the actions of the respondents and the manner in which they implemented mandatory quarantine against 1<sup>st</sup> - 7<sup>th</sup> petitioners' amount to cruel, inhuman and degrading treatment in violation of Article 29(f) and 25 of the Constitution and their actions cannot be justified in any situation.
18. **THAT** I swear this Affidavit in support of IMLU's application to be admitted as an Interested Party to these proceedings.

19. THAT what is sworn to herein is true to the best of my knowledge, information and belief.

SWORN at NAIROBI by the said )  
PETER KIAMA )

This 27<sup>th</sup> day of November 2020 )

BEFORE ME ) Deponent  
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COMMISSIONER FOR OATHS

**DRAWN & FILED BY:**

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