

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

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

**BETWEEN**

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

**AND**

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

**AND**

**THE COMMISSION ON  
ADMNISTRATIVE JUSTICE .....INTERESTED PARTY**

**PETITION**

The humble Petition of the Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) whose address of service whose address of service is KELIN, Kuwinda Lane, off Lang'ata Road, Karen C, P.O. Box 112-00202, Nairobi is as follows:

**A. Description of the Parties:**

1. The Petitioner, KELIN is a non-partisan, non-profit and non-governmental organisation duly registered under the Non-Governmental Organizations Act working to protect and promote health-related human rights in Kenya by facilitating access to justice for those who have faced human rights violations, creating partnerships with key stakeholders,

building capacities of communities to know their rights, and analysing laws and policies to ensure they integrate human rights principles.

2. The 1<sup>st</sup> respondent, the Cabinet Secretary, Ministry of Health is constitutionally mandated to deal with policies relating to health including ensuring finances allocated to the ministry of health are utilized prudently, responsibly and in a transparent and accountable manner. He has been sued for his failure to provide the information sought by the petitioner in relation to financial and in kind support given to the Kenyan Expanded Programme of Immunisation (KEPI) on diverse dates.
3. The 2<sup>nd</sup> respondent is the Attorney General. He is the principal legal advisor to the government and is statutorily mandated by Article 156(4)(b) of the constitution to represent the national government in court and has been sued in that capacity.
4. The interested party, the Commission on Administration of Justice (CAJ), is an independent constitutional office established by the Commission on Administrative Justice Act pursuant to Article 59(4) of the Constitution. The CAJ has been mandated to address all forms of maladministration, promote good governance and efficient public service delivery by enforcing the right to fair administrative action. CAJ has the mandate to *inter alia* review the decision of a public entity in relation to a decision of refusal to grant information and a decision purporting to grant access to information but not actually granting the access.

## **B. Background information and Facts**

5. The Constitution of Kenya, 2010 devolved health service including immunisation services to the 47 counties established in the First Schedule

to the constitution. Under the Fourth Schedule to the Constitution, the national government has the mandate to provide an oversight role for standards and qualities through legal and policy development and enforcement.

6. Between 1 July 2009 and 30 June 2015, the Ministry of Health with the support of various partners including World Health Organisation (WHO), United Nations International Children's' Emergency Fund (UNICEF), United States Agency for International Development (USAID) and Global Alliance for Vaccines Immunisation (GAVI) for implementation of the Kenyan Expanded Programme of Immunisation (KEPI).
7. GAVI provided significant financial and in-kind vaccine support to KEPI. As at 30 September 2015, Kenya had received USD 391,807,902 of support of which cash grants amounted to USD 26,178,992, out of this amount USD 11,515,312 was paid through the partners and the 1<sup>st</sup> respondent received USD 14,663,680. GAVI and the 1<sup>st</sup> respondent had agreed that the amount of USD 26,178,992 was to cover the operational costs for a measles-rubella campaign and support the introduction of new vaccines – pentavalent, yellow fever, pneumococcal conjugate vaccine, rotavirus and injectable polio vaccine and the human papilloma virus demonstration project.
8. At the end of the project and in line with the programme legal agreements and GAVI's transparency and accountability policy, GAVI conducted an audit of the KEPI between September 2015 and March 2016. The main objective of the programme audit was to ensure that the funds released to the 1<sup>st</sup> respondent were utilized in accordance with the agreed terms and conditions and that resources were used for the intended purposes. In

addition, the programme audit also assessed the adequacy of the control processes regarding the reliability and integrity of financial, managerial and operational information, effectiveness of operations, the safeguards of assets and compliance with respective national policies and procedures.

9. The audit covered income received, expenditures incurred, procurement activities as well as supply management at national, provincial and district level. The following are the key findings made at the end of the audit:
  - (a) There were questioned expenditures (relating to unsupported or inadequately supported expenditure) of USD 1.6 million.
  - (b) There were balances held of GAVI funds not utilised and not reprogrammed of USD 0.25 million.
  - (c) There were 0.73 million doses of pneumococcal vaccine not accounted for.
  
10. The results of the programme audit were discussed and agreed with the 1<sup>st</sup> respondent who agreed to remedy the identified issues. Specifically, in a letter dated 14 June 2016, the 1<sup>st</sup> respondent agreed that:
  - (a) The questioned expenditures (as set at 9 (a) above) will be reimbursed.
  - (b) The unused programme funds held at the National Treasury (as set at 9 (b) above) will be repaid.
  - (c) KEPI was able to reconcile and account for the unaccounted 0.73 doses of pneumococcal vaccine (as set at 9 (c) above).
  
11. The 1<sup>st</sup> respondent reimbursed GAVI the sum of USD 1.6 million in a single installment in the months of September and October 2016. This

therefore cost the Kenyan taxpayer a loss of over Ksh. 160 million, a loss that could have been avoided if there had been adherence to processes, procedures and guidelines in the law.

12. On 14 November 2016, the petitioner together with other organisations' and institutions drawn from the health, human rights and governance sector wrote to the 1<sup>st</sup> respondent on 14 November 2016, pursuant to their mandate and duty to defend the constitution and in exercise of their right to access information requesting to access the following documents and information held by the 1<sup>st</sup> respondent:

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

13. On 29 November 2016, the petitioner together with other organizations and associations sent a reminder on its request for information to the 1<sup>st</sup>

respondent. The 1<sup>st</sup> respondent has ignored these requests, and declined to provide the requested information.

14. On 23 August 2017, as a result of the failure of the 1<sup>st</sup> respondent to provide the information requested for by the petitioner, the petitioner applied for review of the decision to deny the aforesaid request for information to the Commission of Administrative Justice (CAJ), the interested party in terms of Section 14 of the Access to information Act. The petitioner informed CAJ that it required the information held by the 1<sup>st</sup> respondent for the purposes of enforcing the right to health as a representative of different interest groups in Kenya and also in public interest.
15. CAJ utilized its statutory mandate and on diverse dates requested the 1<sup>st</sup> respondent to provide the information requested for by the petitioner. To date, the 1<sup>st</sup> respondent has failed, ignored and neglected to provide access to the information requested by the petitioner. No information or response has been received by the Petitioner from the 1<sup>st</sup> respondent.

### **C. Constitutional and statutory foundation of the petition**

16. Article 1 of the Constitution states that all sovereign power belongs to the people and shall be exercised only in accordance with the Constitution. Article 2(4) states in part that any act or omission in contravention of the Constitution is invalid. Article 3 obligates every Kenyan to respect, uphold and defend the Constitution.
17. Article 10 of the Constitution establishes the national values and principles of governance and which binds all state organs and anyone when interpreting or applying the constitution. They include the rule of

law, participation of the people, democracy, human rights, good governance, transparency and accountability.

18. Article 19(1) of the Constitution provides that the Bill of Rights is an integral part of Kenya's democratic state and the framework for social, economic and cultural policies. Article 20(1) states that the Bill of Rights binds all state organs. Article 20(2) provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. Article 20(4) requires Courts in interpreting the Bill of Rights to promote its spirit, purport and objects.
19. Article 21(1) is explicit on the duty of state organs regarding rights. It states:

*21. (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.*
20. Article 35 of the Constitution is the substantive provision on access to information and states that every citizen has right of access to information held by the State and further requires the State to publish and publicise any important information affecting the nation.
21. Parliament passed the Access to Information Act, 2016 Act No.31 of 2016 which provides further elaboration on Article 35 rights and while setting timelines within which information must be disclosed provides at Section 9 that a; *"public officer shall make a decision on an application as soon as possible, but in any event, within 21 days of receipt of the application."*

22. Section 14 of the Access to Information Act mandates the CAJ to review decisions of a public entity in relation to access to information on a decision refusing to grant access to the information applied for.
23. Moreover, the Fair Administrative Action Act 2015 obligates public officers to discharge their duties to the public in an expeditious, efficient, lawful, reasonable and procedurally fair manner.
24. The 1<sup>st</sup> respondent is part of the national government's executive. Article 129 decrees the principles of executive authority and provides:
- 129. (1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.*
- (2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.*
25. Article 201 of the Constitution establishes the principles on public finance. Article 201(a) states that “*there shall be openness and accountability including public participation in financial matters*”. Article 201(b) stipulates that the public finance system shall promote an equitable system and in particular “*public money shall be used in a prudent and responsible way*”.
26. Article 232 of the Constitution of Kenya, 2010 provides for the principles of public service. These include accountability for administrative acts as provided under Article 232(e), and transparency and provision to the public of timely and accurate information under Article 232(f).



**D. Particulars of violations**

27. To the extent that the 1<sup>st</sup> respondent has failed and/or refused to provide the petitioner with the information sought under Article 35(1) of the constitution and has failed to publicise that information as required by Article 35(3) of the constitution, it is in violation of Article 10 of the constitution and specifically the values and principles on the rule of law, participation of the people, human rights, good governance, transparency and accountability.
28. To the extent that the 1<sup>st</sup> respondent has failed to provide the petitioner with the information sought under Article 35(1) and to publicise that information in accordance with Article 35(3), the 1<sup>st</sup> respondent has violated the petitioner's right to information under the said article and the Access to Information Act.
29. The failure by the 1<sup>st</sup> respondent to provide the petitioner with the information sought under Article 35 effectively gives rise to a breach of the petitioner's right to enforce the right to health under Article 43(1) of the constitution. It also hampers the petitioner's obligation under Article 3 to defend the Constitution.
30. The failure of the 1<sup>st</sup> respondent to provide the information sought by the Petitioner is in breach of its obligations to ensure that financial management is undertaken in a responsible manner, and that fiscal reporting is clear under Article 201(e) of the Constitution of Kenya, 2010.
31. The refusal of the 1<sup>st</sup> respondent to provide the information sought is a violation of its obligations to be accountable for its actions, and to transparency and to provide timely and accurate information to the public.


**E. Your petitioner therefore humbly prays for the following orders that:**


- a) A Declaration be issued that the failure by the 1<sup>st</sup> respondents to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) on the basis of the petitioner's request violates the right to access to information.
- b) A declaration be issued that the failure by the 1<sup>st</sup> respondent to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) on the basis of the petitioner's request is a violation of Article 10 of the constitution and specifically the values of the rule of law, participation of the people, human rights, good governance, transparency and accountability.
- c) A declaration be issued that the failure by the 1<sup>st</sup> respondent to provide information sought by the petitioner under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) is a violation of the obligations imposed on the 1<sup>st</sup> respondent to ensure public finance is utilized in an open and accountable manner and in a prudent and responsible manner as stipulated in Article 201(a) and (d) of the Constitution.
- d) A mandatory order be issued compelling the 1<sup>st</sup> respondent to forthwith provide, at the respondents' cost, information sought by the petitioner in the letter dated 14 November 2016.
- e) Costs of the Petition.

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f) This Honourable Court be pleased to grant such further order or orders as may be just and appropriate.

**DATED** at **NAIROBI** this.....<sup>25<sup>th</sup></sup>.....day of <sup>February</sup>.....2021

  
**NYOKABI NJOGU**  
**ADVOCATE FOR THE PETITIONER**

  
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