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CONSTITUTIONAL & HUMAN RIGHTS DIVISION

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION 1318 OF 2020**

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20(1)(4), 21, 22, 23, 24, 25, 26(1),  
27, 28, 29, 35, 43(1)(A), 47, 165, 232(1), 258 AND 259 OF THE CONSTITUTION  
OF KENYA, 2010

And

IN THE MATTER OF SECTIONS 13, 17, 21, 25, 26, 27 and 33 OF THE PUBLIC  
HEALTH ACT, CHAPTER 242 OF THE LAWS OF KENYA

And

IN THE MATTER OF SECTIONS 4, 5, 8, 10, 12, 14, 15 OF THE HEALTH ACT,  
2017

And

IN THE MATTER OF SECTIONS 3, 15 AND 16 OF THE PERSONS  
DEPRIVED OF LIBERTY ACT, 2014

BETWEEN

JMK.....1<sup>ST</sup> PETITIONER  
AJ.....2<sup>ND</sup> PETITIONER  
KENYA LEGAL AND ETHICAL  
ISSUES NETWORK ON HIV/AIDS (KELIN).....3<sup>RD</sup> PETITIONER  
KATIBA INSTITUTE.....4<sup>TH</sup> PETITIONER

VERSUS

KENYATTA UNIVERSITY TEACHING,  
REFERRAL & RESEARCH HOSPITAL (KUTRRH) .....1<sup>ST</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT  
MUTAHI KAGWE,  
CABINET SECRETARY FOR HEALTH.....3<sup>RD</sup> RESPONDENT  
PATRICK AMOTH,  
AG DIRECTOR GENERAL OF HEALTH.....4<sup>TH</sup> RESPONDENT

## NOTICE OF MOTION

*(Under Articles 27, 28, 29 and 31 of the Constitution of Kenya, 2010, and Rules 3, 4(1), 10(2)(a), 13 and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and all other enabling provisions of the law)*

**TAKE NOTICE** that this Honourable Court shall be moved on the        day of                    2020 at 9.00 A.M., or soon thereafter as Counsel for the Petitioners can be heard on an Application **FOR ORDERS THAT:**

1. This Application be certified urgent and service be dispensed with in the first instance because the object of this Application will be defeated unless the Application is heard expeditiously.
2. Pending hearing and determination of this application, this Court order that the 1<sup>st</sup> and 2<sup>nd</sup> applicants/petitioners be granted leave to prosecute the application and the Petition using their initials instead of their full names as prescribed in Rule 10(2)(a) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
3. During these proceedings, the identities of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners be concealed in all pleadings, rulings, judgments, court processes, notices as well as in open Court.
4. The identities will only be revealed to the respondents on them entering a signed undertaking to protect the petitioners, which will be filed in Court.
5. Pending hearing and determination of this application and the Petition, the Court issue orders of prohibition restraining the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents from unlawfully detaining individuals because they are unable to pay the

costs of testing, isolation and treatment of COVID-19 incurred in public health facilities.

6. Further to the prayers above, the Court issue such further directions and orders as may be necessary to give effect to its orders.
7. The costs of the application be in the cause.

**WHICH APPLICATION IS BASED ON THE GROUNDS THAT:**

1. The 1<sup>st</sup> respondent has been designated as a facility for isolation and treatment of persons who have tested positive for the COVID-19 disease; where patients who were unable to meet the costs of isolation and treatment, had been unlawfully detained.
2. The 3<sup>rd</sup> and 4<sup>th</sup> respondents have also placed people in the 1<sup>st</sup> respondent's isolation facility even though they have not tested positive for the coronavirus. Placing people who have tested negative for the coronavirus in isolation with those who are positive dramatically increases the risk that they will contract the disease. It violates basic standards of medical practice, government guidelines, the law, and the Constitution.
3. The 1<sup>st</sup> petitioner was taken to a government-designated quarantine facility after he arrived at Jomo Kenyatta International Airport on 25 March 2020. On April 2020 he tested positive for COVID-19 while at that facility. The 1<sup>st</sup> petitioner was taken to a government-designated quarantine facility after he returned to Kenya on 25<sup>th</sup> March 2020. On April 2020 he tested positive for COVID-19 in April 2020 while at a government designated quarantine facility that facility he had been taken to upon his arrival back in the country

on 25<sup>th</sup> March 2020. He was informed by Public health officials from the 3<sup>rd</sup> respondent that if he chose to isolate and be treated at the 1<sup>st</sup> respondent facility he would not be required pay for services there.

4. On the other hand, on 10 April 2020, public health officials from the 3<sup>rd</sup> respondent forcefully detained the 2<sup>nd</sup> petitioner, who suffers from asthma, because they suspected that he had been infected with the coronavirus. He was therefore taken for testing and treatment at the 1<sup>st</sup> respondent's hospital.
5. However, the 1<sup>st</sup> and 2<sup>nd</sup> petitioners were not able to pay for testing, isolation, and treatment and they were illegally detained and told that they would be released once they paid their bills.
6. Although on 2 May 2020, the government announced that it would waive the bills for some patients who were being held in isolation in public facilities, this did not happen. As a result, people like the 1<sup>st</sup> and 2<sup>nd</sup> petitioners who were held in isolation for the treatment of COVID-19 were told that they would not be released until they paid for their stay at the 1<sup>st</sup> respondent's facility.
7. The 1<sup>st</sup> respondent continues to unlawfully detain patients in its facility who have undergone isolation and treatment for COVID-19 even though:
  - a. Forceful detention in health facilities for failure to pay for treatment has been declared unconstitutional by this Court because it is an unjustifiable limitation of the human rights of patients;

- b. Patients in public health facilities have been told by the 3<sup>rd</sup> and 4<sup>th</sup> respondents that the State would pay the cost for COVID-19-related isolation and treatment in public health facilities.
8. As a result of their forced detention, the 1<sup>st</sup> and 2<sup>nd</sup> petitioners have faced extraordinary social stigma; first from personnel at the isolation centres who did not want to attend to them and then from members of the public who believed that they had contracted COVID-19 and were unable to pay for their testing, isolation, and treatment.
  9. They are filing this petition because the 1<sup>st</sup> respondent deprived them of their constitutional rights.
  10. The petitioners continue to face victimization and social stigma because of their treatment. If their identity is disclosed, it will lead to further stigma and will result in an undue infringement on their constitutional right to privacy.
  11. The applicants are willing to disclose their identities to this Court and the respondents by providing copies of their national identification cards if the respondents file with the Court a written undertaking that they will keep their names and identifying information confidential.
  12. It is in the interests of justice that the orders sought are granted as no parties will be prejudiced.

**WHICH APPLICATION** is further supported by the affidavits sworn by JMK, AJ and Allan Maleche as well as by the Petition and accompanying affidavits sworn

by JMK, AJ, Allan Maleche and Christine Nkonge, and on such other or further grounds as may be adduced at the hearing.

Dated at Nairobi this                      day of    2020

**NYOKABI NJOGU**  
**ADVOCATES FOR THE 1<sup>st</sup> to 3<sup>rd</sup> PETITIONERS**

**And**

**EMILY KINAMA**  
**ADVOCATE FOR THE 4<sup>TH</sup> PETITIONER**

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## PETITION

### **A. INTRODUCTION**

1. This humble Petition is filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners, whose address of service is Nyokabi Njogu, Advocate, C/O KELIN, Kuwinda Lane, off Lang'ata Road, Karen C, P.O. Box 112-00202, Nairobi; and the 4<sup>th</sup> Petitioner, whose address of service is Emily Kinama Advocate, C/O Katiba Institute, 5 The Crescent, Off Parklands Road, Westlands, P.O. Box 26586-00100, Nairobi.

### **THE PARTIES**

2. The 1<sup>st</sup> petitioner, JMK is a Kenyan adult male. He arrived in Kenya on 25 March 2020 and was taken into mandatory quarantine. While there, he tested positive for COVID-19 and was taken to the 1<sup>st</sup> respondent's for isolation and treatment. He was subsequently detained because he was unable to pay for his isolation and treatment at the 1<sup>st</sup> respondent.
3. The 2<sup>nd</sup> petitioner, AJ, is a Kenyan adult male. Until April 2020, he worked as a car wash attendant in Nairobi County. On 10 April 2020, he was picked up in an ambulance and forced into mandatory isolation at the 1<sup>st</sup> respondent's hospital. While there, he tested negative but was detained there because he could not pay for the costs of testing and isolation.
4. The 3<sup>rd</sup> petitioner, Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), is a non-partisan, non-profit and non-governmental organisation duly registered under the Non-Governmental Organisations Act, working to protect and promote health-related human rights in Kenya
5. The 4<sup>th</sup> petitioner, Katiba Institute, is a constitutional research, policy and litigation institute established to promote the Constitution of Kenya, 2010 and to develop a culture of constitutionalism in Kenya.
6. The 1<sup>st</sup> respondent is the Kenyatta University Teaching and Referral Hospital, a body corporate established under the Kenyatta University



Teaching, Referral and Research Hospital Order, 2019. It is sued as a government healthcare facility that illegally and unlawfully detained the 1<sup>st</sup> and 2<sup>nd</sup> petitioners because they could not pay for treatment and isolation costs at the facility. It is also sued because it is unlawfully detaining people who have been mandatorily isolated at its facility because they cannot pay the costs of their isolation.

7. The 2<sup>nd</sup> respondent is the Principal Legal Adviser to the Government and the person authorized by Article 156(4)(b) of the Constitution of Kenya to represent the Government in proceedings to which it is a party and named in that capacity.
8. The 3<sup>rd</sup> respondent is the Cabinet Secretary in charge of the Ministry of Health. He is sued in his official capacity and for his role in publishing regulations under which the payment for the cost of isolation and treatment was implemented. He is also the Chairperson of the National Emergency Response Committee, which was created by Executive Order No 2 of 2020. This Committee is responsible for coordinating Kenya's preparedness, prevention, and response to the coronavirus pandemic.
9. The 4<sup>th</sup> respondent is the Acting Director-General at the Ministry of Health. He is as a member of the National Emergency Response Committee, the technical advisor to the government responsible for the promotion of public health interventions and the limitation and suppression of infectious diseases in Kenya. He is also the controller of Medical Department, which promotes the public health and the prevention, limitation or suppression of infectious, communicable or preventable disease within Kenya and advises local authorities about matters affecting the public health. He is sued in his official capacities.

## FACTS

### a. The national and international response to the COVID-19 pandemic

10. On 12 March 2020, the 3<sup>rd</sup> Respondent announced Kenya's first case of COVID-19. The government then took steps to contain and curb the spread of the disease, including closing borders on 22 March 2020 and passing protocols and regulations on different issues.
11. On 14 April 2020, the 3<sup>rd</sup> and 4<sup>th</sup> petitioners, among other civil society organizations, concerned with reports on the implementation of protocols, set up a legal aid support system to provide *pro bono* legal advice to those who were facing human rights violations during the COVID-19 period. As a result of this system, the 3<sup>rd</sup> petitioner received complaints from the 1<sup>st</sup> and 2<sup>nd</sup> petitioners that they had been forcefully taken into isolation for treatment of COVID-19 at the 1<sup>st</sup> respondent where they were detained because they could not pay for their treatment.
12. In a bid to curb the spread of COVID-19 and to ensure that those infected with the disease receive adequate, accessible, and acceptable treatment, various donor partners have announced funding initiatives to aid Kenya's response to the pandemic. These include:
  - a. In April 2020: \$50 Million World Bank Group Support to Address COVID-19 Pandemic earmarked for emergency funding for medical diagnostic services, surveillance and response, capacity building, quarantine, isolation and treatment centres, medical waste disposal, risk communications and community engagement as well as for strengthening the country's capacity to provide safe blood services<sup>1</sup>.

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<sup>1</sup> See the Press release at: <https://www.worldbank.org/en/news/press-release/2020/04/02/kenya-receives-50-million-world-bank-group-support-to-address-covid-19-pandemic>

- b. April 2020: U.S. Center for Disease Control and Prevention (CDC) committed US \$6.6 million (705 million Kshs) for COVID-19 activities in Kenya to support prevention, preparedness, and response<sup>2</sup>.
  - c. In April 2020, a donation of Kshs 1.1 billion from Equity Group Foundation (EGF), with support from the Mastercard Foundation, to provide Personal Protective Equipment (PPE) to frontline medical staff dealing with COVID-19 patients in public hospitals in Kenya.<sup>3</sup>
  - d. May 2020: the International Monetary Fund approved the disbursement of US \$739 million to Kenya to address the impact of the COVID-19 pandemic and to provide much-needed resources for fiscal interventions to safeguard public health and support households and firms affected by the crisis.<sup>4</sup>
  - e. July 2020: the EU Civil Protection Mechanism, in response to a request from Kenya, Slovakia has sent 20,000 protective face masks, 50,000 coronavirus test kits, hand disinfectant and laboratory supplies.<sup>5</sup>
  - f. July 2020: the U.S. Agency for International Development donated US\$ 50 million to support Kenya's response and recovery efforts to meet the immediate and longer-term challenges that COVID-19 is posing<sup>6</sup>;
13. To raise funds to pay for the pandemic response, the Cabinet Secretary for Finance established the COVID-19 Emergency Response Fund pursuant to section 24 of the Public Finance Management Act. The Public Finance

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<sup>2</sup> See the press release at: <https://ke.usembassy.gov/u-s-government-to-provide-additional-705-million-kes-to-kenyas-covid-19-response/>

<sup>3</sup> See the Press release at <https://equitygroupholdings.com/equity-group-foundation-partners-with-mastercard-foundation-on-covid-19-response-in-kenya/>

<sup>4</sup> See the press release at <https://www.imf.org/en/News/Articles/2020/05/06/pr20208-kenya-imf-executive-board-approves-us-million-disbursement-address-impact-covid-19-pandemic>.

<sup>5</sup> See press release at [https://ec.europa.eu/echo/news/coronavirus-global-response-eu-sends-assistance-kenya-bangladesh-ecuador-and-el-salvador\\_en](https://ec.europa.eu/echo/news/coronavirus-global-response-eu-sends-assistance-kenya-bangladesh-ecuador-and-el-salvador_en).

<sup>6</sup> See the press release at <https://www.usaid.gov/kenya/press-releases/united-states-providing-ksh-5-billion-support-health-and>

Management (COVID-19 Emergency Response Fund) Regulations, 2020 indicated that the money in the Fund would be used

- a. to fund the purchase of essential supplies for public hospitals and other related institutions, health professionals and frontline workers, as need arises; and
  - b. to fund programmes and initiatives towards cushioning and provision of emergency relief to the most vulnerable, older and poor persons in urban informal settlements.
14. As of July 2020, Kenya was reported to have raised Kshs 2.8 billion to combat the coronavirus. An additional Kshs 3.8 billion was donated by well-wishers, including individuals and companies in Kenya.<sup>7</sup>
  15. As at 4<sup>th</sup> September 2020, the Global Fund had provided USD 6,909,404 to support Kenya's national response to COVID-19, and this amount was specifically earmarked for COVID-19 diagnostic tests.<sup>8</sup>
  16. The 3<sup>rd</sup> and 4<sup>th</sup> respondents have yet to explain how these funds have been used, including those funds donated for public health interventions such as isolation and treatment of COVID-19 patients.
  17. As of 21 September 2020, there were 36,981 confirmed cases of COVID-19 in Kenya. The continued spread of COVID-19 poses a threat to the health and well-being of every person in Kenya.
  18. Because of that threat, the 3<sup>rd</sup> and 4<sup>th</sup> respondents continue to take measures to suppress the spread of COVID-19 and to ensure that those who are infected get treatment. However, these measures have led to the violations of the constitutional and human rights of those affected.

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<sup>7</sup> See <https://www.nation.co.ke/kenya/news/covid-19-billions-jane-karuku-private-sector-spent-1444316>

<sup>8</sup> See <https://www.theglobalfund.org/en/covid-19/>

**b. The 1<sup>st</sup> petitioner's forced detention following isolation and treatment**

19. The 1<sup>st</sup> petitioner arrived at Jomo Kenyatta International Airport (JKIA) on 25 March 2020. On arrival, he was informed that there were mandatory quarantine protocols in place and was asked to choose between going into quarantine at a public facility where there would be no cost, or at a private facility where he would be required to pay for his stay. He chose to be taken to a government facility because he could not pay for a private facility. He went into quarantine at a public school based on the understanding that the government would pay the costs.
20. While at the public quarantine center, the 1<sup>st</sup> petitioner tested positive for COVID-19 and was told that he would be transferred to a hospital for treatment and isolation. He was given a choice between going to a public health facility, which would be at government expense, or a private health facility where he would be required to pay for his treatment and isolation.
21. The 1<sup>st</sup> petitioner requested to be taken to a public health facility because he could not pay for his isolation and treatment. He was subsequently taken to the 1<sup>st</sup> respondent on 2 April 2020.
22. When he arrived at the 1<sup>st</sup> respondent's facility, there were no health personnel there to receive him, and he was not provided with any information. The patients had to fend for themselves and even had to find beds and allocate them amongst themselves. When the nurses finally arrived, they were afraid to go near those who had tested positive for COVID-19.
23. A doctor finally came to talk to the 1<sup>st</sup> petitioner on 3 April 2020. The doctor told him that he would be retested regularly. He was tested four times while at the hospital, and in each case, he was given the results four days after the test.
24. The 1<sup>st</sup> petitioner was informed that he tested negative for COVID-19 on 1 May 2020. He was to be discharged the next day.

25. That did not happen. Instead, he was given a hospital bill of Kshs 93,150.00 and told that he would not be discharged until he had cleared the bill. He was also told that he would have to pay the hospital through an Mpesa paybill number and that the National Hospital Insurance Fund (NHIF) would not pay for the costs of treatment.
26. The 1<sup>st</sup> respondent had the 1<sup>st</sup> petitioner moved to a 'holding room' for those who had not paid their bills. He was not allowed to leave that room.
27. The 1<sup>st</sup> petitioner asked the Chief Executive Officer (CEO) of the 1<sup>st</sup> respondent to intervene and allow him to be released from the hospital, but he was informed that no waiver of the hospital bill could be granted unless communication was received from either the 3<sup>rd</sup> or 4<sup>th</sup> respondent.
28. He then wrote a letter to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents seeking assistance and information. In this letter, he asked them to address various issues regarding the government's responsibility to cater for the costs of isolation and treatment of patients who test positive for COVID-19.
29. The 1<sup>st</sup> petitioner also asked what role the National Hospital Insurance Fund (NHIF) was playing in settling the bills for patients admitted for treatment in public health facilities.
30. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents did not respond to this letter and did not give the 1<sup>st</sup> petitioner any information about who would pay for the treatment of COVID-19 or whether the NHIF would cover the costs of treatment at a public facility.
31. While trying to get information, the 1<sup>st</sup> respondent remained in the holding room with other patients. Eventually, some of those patients were released from the hospital, but the 1<sup>st</sup> petitioner was not. He was told that he would not be released because he had written a letter requesting information and a waiver of the hospital bill.

32. The 1<sup>st</sup> petitioner continued to be anxious, stressed, and frustrated. At one point the 1<sup>st</sup> petitioner went on a hunger strike because he believed that consuming the food at the facility was only increasing his bill.
33. The 1<sup>st</sup> petitioner eventually went to the reception at the 1<sup>st</sup> respondent and demanded to speak to someone who could give him information as to when he would be released. His requested was denied but following this confrontation he received a call and was told he could leave the hospital.
34. The 1<sup>st</sup> petitioner spent a total number of 32 days in the isolation facility. 3 of those days were in the holding area.

**c. The 2<sup>nd</sup> petitioner's unlawful isolation and detention**

35. On 10 April 2020, public health officials from the 3<sup>rd</sup> respondent forcefully detained the 2<sup>nd</sup> petitioner. The 3<sup>rd</sup> respondent responded to a call from someone who stated that the 2<sup>nd</sup> petitioner had symptoms consistent with COVID-19.
36. In fact, the 2<sup>nd</sup> respondent did not have COVID-19; he has asthma, and he was picked up because he had earlier on had an asthma attack.
37. Because he showed symptoms of COVID-19 but had not been tested, the 2<sup>nd</sup> petitioner should have been taken to a quarantine facility. That did not happen. Instead, he was taken to the 1<sup>st</sup> respondent's isolation facility.
38. He got tested for COVID-19 on 13 April 2020 and received his test results on 16 April 2020, which turned out to be negative. During that four-day wait, he was placed in a room with patients who had tested positive for COVID-19. No social distancing measures were put in place, and he was not given any protective equipment or otherwise allowed to insulate himself from infection.
39. Once his test came back negative, he was presented with a bill of Kshs 15,269.00 and told that he could leave once he paid it. The bill was presumably for the costs of testing and his stay at the isolation facility. He

was given an Mpesa paybill number of the 1<sup>st</sup> respondent and was detained pending his payment of the medical bill.

40. The 2<sup>nd</sup> petitioner was unable to pay the bill, however, and the 1<sup>st</sup> respondent refused to release him.
41. The 2<sup>nd</sup> petitioner was held from 16 April 2020 until 28 April 2020. During that time, he tried to get information from the 1<sup>st</sup> respondent, but no one would talk to him.
42. This lack of information caused 2<sup>nd</sup> petitioner to be so anxious and frustrated that, on 27 April 2020, he tried to escape the facility by jumping from a window in his room. Other patients, however, persuaded him not to jump.
43. When personnel at the 1<sup>st</sup> respondent learnt of his attempt to jump out a window, they decided to release him from unlawful detention. He was discharged on 28 April 2020.
44. That same day, after walking home because he had no money for a matatu, he found that all his belongings had been stolen during his detention. He was forced to seek basic commodities such as clothing from well-wishers.

#### A. CONSTITUTIONAL, INTERNATIONAL LAW AND STATUTORY BASIS FOR THE PETITION

##### **Constitutional Foundation of the Petition**

45. Article 1 of the Constitution states that all sovereign power belongs to the people and shall be exercised only per the Constitution. Article 2(1) states that the Constitution is the supreme law of Kenya and binds all persons and state organs. Article 2(4) states, in part, that any act or omission in contravention of the Constitution is invalid.
46. Article 3(1) obliges every Kenyan to respect, uphold and defend the Constitution.



47. Article 10 establishes the national values and principles of governance. They are binding on all State organs and people whenever they interpret or apply the Constitution, enact, apply, or interpret any law, or make or implement public policy. The values and principles include the rule of law, human rights, human dignity, good governance, transparency, and accountability.
48. Article 19(1) provides that the Bill of Rights is an integral part of Kenya's democratic state and is 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 possible consistent with the nature of the right or fundamental freedom. Article 20(4) requires Courts, when in interpreting the Bill of Rights, to promote its spirit, purport, and objects.
49. Article 21(1) establishes that the State and all State organs have a 'fundamental duty' to 'observe, respect, protect, promote and fulfil those rights and fundamental freedoms in the Bill of Rights'.
50. Articles 23 and 165 give this Court jurisdiction to hear and determine matters for the redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Article 23(2) allows this Court to grant appropriate relief arising from the exercise of its jurisdiction.
51. Article 24 provides for the limitation of rights and fundamental freedoms contained in the Bill of Rights. Rights and fundamental freedoms can only be limited to the extent that it is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom and taking into account various factors, including, among others, whether the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
52. Article 25 of the Constitution sets out various rights and freedoms that cannot be limited; among them is the freedom from torture and cruel, inhuman, or degrading treatment.

53. Article 27 states that all people are equal and that every person 'has the right to equal protection and equal benefit of the law', including the 'full and equal enjoyment of all rights and fundamental freedoms'. Neither the State nor any person may discriminate (whether directly or indirectly) against any person on any ground.
54. Article 28 provides for every person's inherent dignity and the right to have that dignity respected and protected.
55. Article 29 guarantees the right of every person not to be deprived of their freedom and security arbitrarily or without just cause. This includes the right not to be subjected to any form of violence or torture; or treated or punished in a cruel, inhuman, or degrading manner.
56. Article 35 of the Constitution of Kenya provides that every citizen has the right of access to information held by the State or held by another person that is required for the protection of any right or fundamental freedom. Moreover, Article 35(3) requires the State to publish and publicise any important information affecting the nation.
57. The right to the highest attainable standard of health including reproductive health care is guaranteed under Article 43(1)(a) of the Constitution.
58. Article 43(2) also enjoins the state to put in place measures for the provision of appropriate social security to persons who are unable to support themselves or their dependents.
59. Article 47 also entitles everyone to fair administrative action which, among other things, is expeditious and lawful.
60. Article 232 outlines the following values and principles of public service: responsive provision of services; involvement of the people in the process of policymaking; and transparency and provision to the public of timely, accurate information.

## International and Regional Treaties and Covenants Relevant to the Petition

61. Under Article 2(6) of the Constitution, any treaty or convention ratified by Kenya is a part of Kenyan law. Kenya is a party to several international treaties and conventions that guarantee the right to human dignity, the right to the highest attainable standard of health, the right to freedom and security of the person, the right of access to information and other rights and fundamental freedoms that are relevant to this Petition.
62. The actions and inactions of the Respondents and the circumstances under which the 1<sup>st</sup> and 2<sup>nd</sup> petitioners found themselves in mandatory isolation and were later required to pay for the costs of testing and treatment for COVID-19 resulted in a violation of their rights contrary to the international covenants and treaties to which Kenya is a party. These rights are contained in various regional and international treaties to which Kenya is a party, and include, but are not limited to:

### **a) The right to the highest attainable standard of health**

63. Article 16 of the African Charter on Human and Peoples' Right (Banjul Charter) sets out the right of every individual to enjoy the best attainable state of physical and mental health. In this regard, Article 16(2) requires state parties to the Charter to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.
64. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), state parties recognize 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. State parties are further required to take measures necessary to achieve this right, including the prevention, treatment, and control of epidemic, endemic, occupational, and other diseases. Article 16 of the Banjul Charter reiterates the right to health as it is contained in Article 12 of the ICESCR. It

also requires state parties to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

65. Article 25 of the Universal Declaration of Human Rights (UDHR) establishes for everyone the right to a standard of living adequate for the health and wellbeing of himself and of his family.

**b) The right to integrity of the person**

66. The right to integrity of the person is guaranteed at Article 4 in the Banjul Charter which provides that every human being is entitled to respect for his life and integrity of his person, and further that no one should be arbitrarily deprived of this right.”

**c) The right to respect and dignity**

67. Article 5 of The Banjul Charter provides that every person shall have the right to respect and dignity inherent in a human being, and further prohibits all forms of exploitation and degradation of man, particularly cruel, inhuman, or degrading punishment and treatment.
68. The preambles of the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR recognize the inherent dignity of the human person.
69. Article 1 of the UDHR declares that All human beings are born free and equal in dignity and rights.

**d) The right to liberty and security of the person**

70. Article 6 of the Banjul Charter provides that every individual has the right to liberty and security of the person and that no one may be deprived of this freedom, except for reasons and conditions previously laid down by law. There is a prohibition on arbitrary arrest and detention.

71. Article 9 of the ICCPR provides that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
72. Article 3 of the Universal Declaration of Human Rights (UDHR) guarantees that: 'Everyone has the right to life, liberty and security of the person'.

**e) The Right to Information**

73. Article 9 of the Banjul Charter provides the right of every individual to receive information.
74. Article 19(2), ICCPR: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally in writing or in print, in the form of art, or through any other media of his choice."
75. Article 19 of the UDHR sets out the right of freedom of opinion and expression, which includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

**f) The right to equality and non-discrimination**

76. The right to equality and non-discrimination is guaranteed in Article 7 of the UDHR; Article 26 of the ICCPR; and Article 2 and 3 of the Banjul Charter.
77. Article 7 of the UDHR provides that all are equal before the law and are entitled without any discrimination to equal protection of the law. Moreover, all are entitled to equal protection against any discrimination.

**g) Freedom from cruel, inhuman, and degrading treatment**

78. Article 5 of the Banjul Charter prohibits all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”
79. Article 7 of the ICCPR states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation
80. Article 5 of the UDHR declares that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

**h) Freedom from discrimination and the right to equality**

81. Article 2 of the Banjul Charter provides for every individual the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.
82. Article 2, UDHR; Article 2(1), ICCPR; Article 2(2) ICESCR all guarantee the rights therein for all individuals without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
83. Article 26 of the ICCPR states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law” and the law is to prohibit any discrimination on the above-mentioned grounds.

## The Statutory Foundation for the Petition

### **The Health Act, 2017**

84. Section 5(1) of the Health Act, 2017 guarantees the right to health in the following terms:

*“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.”*

85. Section 10 of the Health Act, 2017 requires national and county governments to proactively provide health-related information, stating that:

*“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:*

- (a) the types, availability, and cost if any of health services;*
- (b) the organisation of health services; operating schedules and timetables of visits;*
- (c) procedures for access to the health services;*
- (d) procedures for laying complaints; the rights and duties of users and health care providers under this Act and as provided for in the applicable service charters; and*
- (e) management of environmental risk factors to safeguard public health.”*

86. Section 14 (1) of the Health Act gives every person the right to register a complaint about the way they are treated at any health facility, and to have that complaint investigated appropriately.

## **The Public Health Act, Chapter 242 of the Laws of Kenya**

87. The Public Health Act provides for securing and maintaining health. Section 2 of the act defines “isolation” as “the segregation and the separation from and interdiction of communication with others, of persons who are or are suspected of being infected.” Isolation, therefore, is targeted at those persons who are taken to facilities after being infected with COVID-19.
88. Section 27 of the Public Health Act provides for the isolation of persons who may have been exposed to infection. It provides that *“where any person has recently been exposed to the infection, and may be in the incubation stage, of any notifiable infectious disease and is not accommodated in such manner as adequately to guard against the spread of the disease, such person may, on a certificate signed by the medical officer of health, be removed, by order of a magistrate and at the cost of the local authority of the district where such persons found, to a place of isolation and there detained until, in the opinion of the medical officer of health, he is free from infection or able to be discharged without danger to the public health, or until the magistrate cancels the order”*.
89. Section 33 of the Public Health Act contemplates the isolation of persons who may be infected with infectious disease and provides that any expenses incurred by a municipal council in maintaining in a hospital, or in a temporary place for the reception of the sick (whether or not belonging to such hospital), **a patient who is not a pauper** shall be deemed to be a debt due from such patient to the municipal council, and **may be recovered** from him after his discharge from such hospital or place of reception, or from his estate in the event of his dying in such hospital or place.

## **The Persons Deprived of Liberty Act, 2014**

90. The Persons Deprived of Liberty Act gives effect to Articles 29(f) and 51 of the Constitution of Kenya. It provides that a person who is deprived of liberty is entitled to the protection of all fundamental rights and freedoms



and limited, only in the terms permissible under Article 24 of the Constitution. In addition, section 5 of the Act states that every person who is deprived of liberty must be treated humanely and with dignity.

91. Section 15 of the Act a person detained, held in custody, or imprisoned is, on the recommendation of a medical officer of health, entitled to medical examination, treatment, and healthcare, including preventive healthcare.
92. Section 18 (1) further provides that persons deprived of liberty shall be entitled to access to information, and every authority under whose charge a person deprived of liberty is placed shall take all practical and reasonable measures possible to facilitate the enjoyment of the right to education and access to information.

### **The Fair Administrative Action Act, 2015**

93. The Fair Administrative Action Act, 2015 gives effect to the provisions of Article 47 of the Constitution of Kenya, 2010. In that Act, the term 'administrative action' is defined to mean any power, function or duty exercised by authorities, or 'any act, omission or decision of any person or authority that affects the legal rights or interests of any person to whom such action relates'.
94. The Fair Administrative Action Act gives every person the right to administrative action that is 'expeditious, efficient, lawful, reasonable and procedurally fair'. This right also entitles persons to receive written reasons for any administrative action taken against them.
95. Section 4(3) of the Fair Administrative Action Act provides that where administrative action is likely to 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.

## B. PARTICULARS OF VIOLATIONS

### **Violation of the Right to Health as enshrined under Article 43(1) of the Constitution and the Health Act**

- 96. The treatment of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners by the respondents as described above interfered with their rights to access the highest attainable standard of health in violation of Article 43(1) of the Constitution.
- 97. By failing to provide information on the cost of testing, isolation, and treatment the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents violated Section 5(1) of the Health Act.
- 98. The 1<sup>st</sup> respondent violated section 14(1) of the Health Act by failing to give the 1<sup>st</sup> and 2<sup>nd</sup> petitioners an opportunity to be heard even and refusing to speak with them before deciding to detain them.
- 99. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents violated section 14(4) of the Health Act when they failed to respond to inquiries from the 1<sup>st</sup> petitioner.

## **Violation of the Right to Information**

### **(a) Failure to respond to requests for information to which the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners were entitled**

100. The 1<sup>st</sup> respondent violated the 1<sup>st</sup> petitioner's right of access to information by refusing to respond to requests for information about why he was being asked to pay for isolation even though he had chosen to go to a government-run facility.
101. The 3<sup>rd</sup> and 4<sup>th</sup> respondents violated the 1<sup>st</sup> petitioner right of access to information by failing to respond to letters written to them on 1<sup>st</sup> and 3<sup>rd</sup> May 2020. These letters requested information about the modalities for payment for treatment and isolation for COVID-19, including whether he could use his NHIF benefits.
102. The 1<sup>st</sup> respondent violated the 1<sup>st</sup> and 2<sup>nd</sup> petitioners right of access to information by denying them information about they were being detained for non-payment of medical bills at the public health facility.

### **(b) Failure to proactively provide information to the 1st and 2nd Petitioners**

103. The 3<sup>rd</sup> and 4<sup>th</sup> respondents violated the 1<sup>st</sup> and 2<sup>nd</sup> petitioners right to access to information under Article 35 by refusing to provide information as to how long testing would take.
104. The failure of the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents to provide access to health-related information was a direct violation of section 8 of the Health Act. It also meant that the 1<sup>st</sup> respondent was not providing adequate health care services as required under Article 43(1)(a) of the Constitution of Kenya.
105. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners were denied information by the 3<sup>rd</sup> and 4<sup>th</sup> respondents, who are representatives of the State, on who should bear the costs of isolation, testing, and treatment during the pandemic. Moreover, the 3<sup>rd</sup> and 4<sup>th</sup> respondents failed to respond to requests for information on how the costs of treatment for COVID-19 was being covered.

106. The 1<sup>st</sup> respondent also violated the rights of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners by failing to provide them adequate information on the manner which they could get redress, and thus prevented them from exercising their other rights, such as the right to health, dignity and freedom from cruel, degrading and inhuman treatment.

**Violation of the Right to equal protection, equal benefit of the law and the freedom from non-discrimination**

107. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners are people of modest means and could not afford to pay the costs testing or isolation and treatment of COVID-19. Conversely, some could afford to pay the costs of the hospital stay who were not subjected to the violations that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners experienced. This means that there is a disproportionate effect on the decision of the respondents to charge for quarantine facilities on vulnerable people and on those who find themselves requiring treatment or management of COVID-19 at public health facilities.
108. The 3<sup>rd</sup> and 4<sup>th</sup> Petitioners have noted concerns around the disproportionate effect of the pandemic on vulnerable people, particularly those who cannot pay for, testing or isolation, whether in government health facilities or not, and therefore end up being detained for non-payment of medical bills which constitutes a violation of their rights to health as well as an unlawful deprivation of liberty that amounts to discrimination on the grounds of socio-economic status.
109. The 3<sup>rd</sup> and 4<sup>th</sup> respondents have failed to give guidance on who should bear the cost of isolation, treatment and testing for COVID-19. This failure has led to the interference of the right to equality and non-discrimination as guaranteed under Article 27 of the Constitution. Further, this failure by the government led to the violation of other rights inextricably linked to the right to equality and non-discrimination such as the right to health, life, and dignity.

### **Violation of the right to fair administrative action**

110. The 1<sup>st</sup> respondent elected to detain the 1<sup>st</sup> and 2<sup>nd</sup> petitioners claiming they were unable to pay their hospital bills incurred during the period of isolation and refused to:
  - a. Give them the written reasons for their detention, which caused them serious psychological stress and anxiety;
  - b. Allow them to seek redress with the 1<sup>st</sup> respondent's management as to the grant them a hearing before deciding to detain them.
111. Both the 1<sup>st</sup> and 2<sup>nd</sup> petitioners repeatedly informed personnel at the 1<sup>st</sup> respondent's facility that they were unable to pay for testing, isolation, and treatment. They had a legitimate expectation that after testing negative for COVID-19, they would be released from the 1<sup>st</sup> respondent hospital without being asked to cater for the costs associated with their stay there.
112. Without affording either the 1<sup>st</sup> or 2<sup>nd</sup> petitioners an audience to determine what steps could be taken to ensure they were not unduly and unlawfully deprived of their freedom to liberty, the 1<sup>st</sup> respondent elected to simply detain them at the hospital.
113. The 1<sup>st</sup> petitioner also wrote letters to the 3<sup>rd</sup> and 4<sup>th</sup> respondents seeking guidance on the matter of payment. This letter went unanswered, and it only prompted the 1<sup>st</sup> respondent to punish him further, by detaining him for a longer period.
114. It is only when the 2<sup>nd</sup> petitioner attempted to jump out of a window of the 1<sup>st</sup> respondent's facility that he was released.
115. The 1<sup>st</sup> and 2<sup>nd</sup> respondents, therefore, violated Article 47 of the Constitution and the Fair Administrative Action Act by failing to adhere to the principles of lawfulness, reasonableness, and procedural fairness. The decision taken to detain the petitioners for failing to pay for the costs of their stay in the isolation facility was unlawful and was taken arbitrarily. The fact that

neither the 1<sup>st</sup> nor 2<sup>nd</sup> petitioner had an opportunity to have their concerns addressed was a further violation of their right to fair administrative action.

116. When the 1<sup>st</sup> and 2<sup>nd</sup> petitioners, sought to get clarification for the decision taken highlighting specific concerns, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent failed to address these concerns or even respond to the letters heightening the egregiousness of their actions.
117. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents breached the provisions of Section 4(1) of the Fair Administrative Action Act by deciding to detain the 1<sup>st</sup> and 2<sup>nd</sup> petitioners for failing to pay for the costs of isolation, testing and treatment, particularly where it had not been communicated that they would be required to pay for it in the first place. This action was unlawful, was unreasonable and was procedurally unfair.
118. The 1<sup>st</sup> petitioner's right to fair administrative action was breached because he was not informed about the reason he was being taken away into isolation. There was no inquiry undertaken to determine if he had been exposed to COVID-19 or if his symptoms were because of his underlying asthmatic condition.
119. There was a violation of both the 1<sup>st</sup> and 2<sup>nd</sup> petitioners' rights to fair administrative action under section 4(3) of the Act as they were not informed of the decision to detain them for non-payment of the isolation and treatment fees. When they queried their continued detention, they were denied an opportunity to be heard or a duty to make representations to the 1<sup>st</sup> respondent.
120. Secondly, the 1<sup>st</sup> and 2<sup>nd</sup> petitioners were not allowed to be heard before the decision to detain them was taken, and when they sought to query the decision the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were non-responsive. The non-responsiveness of the respondents is an indication that there was no right to review the decision that had been made. It is this that caused the petitioners such extreme anxiety which was further detrimental to their health.

### **Violations of the right to freedom and security of the person**

121. The experiences of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners show that once they were informed that they would require testing for COVID-19, they immediately communicated to the respondents about their inability to cater for the costs of isolation and treatment.
122. In violation of Article 29(a) of the Constitution of Kenya, the 1<sup>st</sup> respondent unlawfully and arbitrarily detained the 1<sup>st</sup> and 2<sup>nd</sup> petitioners, against their will, for their inability to pay the costs of testing, isolation and treatment of COVID-19. The decision to detain the 1<sup>st</sup> and 2<sup>nd</sup> petitioners was taken without informing them, was contrary to their expectation to be released and was a violation of their right not to be deprived of freedom arbitrarily and without just cause.
123. The decision to forcefully detain them was completely unjustified, given that the 3<sup>rd</sup> and 4<sup>th</sup> respondents, through the State, have received various sums of money meant to aid in the measures to curb the spread of COVID-19, which includes the testing and treatment of those found to be infected.
124. The 1<sup>st</sup> respondent continues to violate Article 29(a) of the Constitution of Kenya by continually detaining patients who are unable to pay for their treatment at its facility, which is an unjustified and disproportionate limitation of this right, despite the knowledge that this action is unlawful and a violation of the Constitution.

### **Violations of the Right to Dignity and Freedom from Cruel, Inhuman and Degrading Treatment**

125. In the case of the 1<sup>st</sup> petitioner, he specifically asked to go to a government hospital for treatment of COVID 19, and this request was granted because he did not have the means to cater for the costs of isolation, and treatment. However, the 1<sup>st</sup> respondent reneged and asked him to pay the costs associated with his isolation and treatment.

126. Because the 1<sup>st</sup> petitioner did not have the money to pay, he was detained by the 1<sup>st</sup> respondent and was unable to speak to the management of the 1<sup>st</sup> respondent.
127. When others around him were being released from the 1<sup>st</sup> respondent's facility, the 1<sup>st</sup> petitioner was not allowed to leave and he was told that it was because he had written letters seeking a waiver and information, meaning that he was being punished for trying to seek assistance and information from the respondents which led to a further violation of his dignity.
128. In the case of the 2<sup>nd</sup> petitioner, he was picked up in the middle of the night, by ambulances with blaring sirens, and by public health officials who were dressed in all white. He was bundled into the vehicle without being told what was going on and was only informed of the fact that he was suspected of having COVID-19 when he got to the 1<sup>st</sup> respondent's facility. This treatment caused him great fear and exacerbated the stigma he was already suffering as members of the public began to shun him for having COVID-19.
129. While at the 1<sup>st</sup> respondent hospital, the 2<sup>nd</sup> petitioner was repeatedly asked to pay the medical bill, and when he stated that he could not afford to, he was detained in a room where he was not allowed to step out, even for sunshine. This degrading treatment meted out on him by the 1<sup>st</sup> respondent was intended to punish him for being unable to pay his medical bill.
130. The 2<sup>nd</sup> petitioner repeatedly asked to speak with the 1<sup>st</sup> respondent's officials, but instead, all they were concerned about was with him paying for the costs of isolation and treatment that he had incurred.
131. Moreover, the 2<sup>nd</sup> petitioner was forced to observe those who he was isolated with and who could afford to pay to be released, which caused him further shame, distress, and stigma.



132. When he was denied an audience with the officials of the 1<sup>st</sup> respondent, the 2<sup>nd</sup> petitioner became very distressed at the degrading treatment that he was undergoing, and eventually opted to attempt to jump out of a window.
133. These circumstances came about because of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents' actions and policies led to the 1<sup>st</sup> respondent being picked up hurriedly, being detained in the hospital for non-payment of the isolation and testing costs (even though he had tested negative for COVID-19) and drove him to such distress that he tried to jump out of a window.
134. In the time that he was procedurally and illegally detained at the 1<sup>st</sup> respondent's facility, the 1<sup>st</sup> petitioner's home was broken into and he lost all his belongings.
135. When he was eventually released following his attempt to jump out of a window, but he had no money, so he had to walk from the 1<sup>st</sup> respondent's facility to his home in Muthurwa.
136. Following that his house had been robbed, and as a person of limited means, he had to ask for assistance from well-wishers, yet, before his being taken to the 1<sup>st</sup> respondent's facility and his unlawful detention, he had been providing for himself.
137. The actions by the respondents led to an erosion of the 1<sup>st</sup> petitioner's constitutionally guaranteed right to dignity.
138. In addition to violating the 1<sup>st</sup> and 2<sup>nd</sup> petitioners' rights to dignity, the above actions amounted to cruel, inhuman, and degrading treatment, constitutional rights which cannot be limited.
139. The treatment of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners has also meant that the stigma associated with having COVID-19 has been heightened which has undermined their enjoyment of other constitutionally guaranteed rights.

### C. PRAYERS FOR RELIEF

140. Based on the Constitutional and statutory violations suffered, the Petitioners humbly pray for the following reliefs:

- a. A declaration be issued that detaining the 1<sup>st</sup> and 2<sup>nd</sup> petitioners because they could not pay for their isolation, treatment and testing violated of Articles 27, 28, 29, 35, 43(1)(a) and 47 of the Constitution of Kenya, 2010.
- b. A declaration be issued that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents violated Articles 27, 28, 29 and 43(1)(a) of the Constitution by requiring patients to pay for COVID-19 related isolation and treatment costs at public health facilities.
- c. A declaration be issued that the respondents violated the right of access to information under Article 35 of the Constitution and the right to health as guaranteed under Article 43(1)(a) of the Constitution and section 8 of the Health Act, 2017 by failing to proactively provide information to the public about the modalities of the costs of isolation, testing, and treatment in public health facilities during the COVID-19 pandemic.
- d. A declaration be issued that the respondents violated Articles 35 of the Constitution, sections 4 and 5 of the Access to Information Act, and section 8 of the Health Act, 2017 by failing to provide the 2<sup>nd</sup> petitioner information on the reasons as to why he was being detained by the 1<sup>st</sup> respondent.
- e. An order of mandamus compelling the 3<sup>rd</sup> and 4<sup>th</sup> respondents to draft and publish within 90 days of this order, information on:
  - i. The measures to be taken by government-run facilities to ensure that confinement of persons in isolation facilities for treatment of an infectious disease does not go beyond what is medically necessary.
  - ii. The funds that the State has received to curb the COVID-19 pandemic and an account of how these funds have been used.
  - iii. The responsibility of the government to ensure that the costs of isolation and treatment of infectious diseases in public health facilities should be borne by the government whenever there is a pandemic;

- f. An order that the 1<sup>st</sup> respondent pays general damages to the 1<sup>st</sup> and 2<sup>nd</sup> petitioners for the psychological and mental distress suffered as a result of the violations of their constitutional rights during their isolation and unlawful detention at the 1st respondent's facility.
- g. An order that the 1<sup>st</sup> respondent pay punitive damages to the 1<sup>st</sup> and 2<sup>nd</sup> petitioners for unlawfully detaining them because they were unable to pay the medical bills incurred during their isolation and treatment;
- h. That the Respondents, within ninety days from the date the order, file affidavits with the Court detailing their progress in compliance with these orders.
- i. Costs of this Petition
- j. Any other just and expedient order the Court may deem fit to make.

DATED at NAIROBI this                      day of    2020

**NYOKABI NJOGU**  
**ADVOCATE FOR THE 1<sup>ST</sup> TO 3<sup>RD</sup> PETITIONERS**

**AND**

**EMILY KINAMA**  
**ADVOCATE FOR THE 4<sup>TH</sup> PETITIONER**

**DRAWN AND FILED BY:**

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Practice No: LSK/2020/04771

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**NAIROBI**

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Practice No: LSK/2020/03864

**TO BE SERVED UPON**

1. Kenyatta University Teaching, Referral & Research Hospital
2. The Cabinet Secretary, Ministry of Health,
3. The Ag Director-General for Health.

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION OF 2020**

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20(1)(4), 21, 22, 23, 24, 25, 26(1),  
27, 28, 29, 35, 43(1)(A), 47, 165, 232(1), 258 AND 259 OF THE CONSTITUTION  
OF KENYA, 2010

And

IN THE MATTER OF SECTIONS 13, 17, 21, 25, 26, 27 and 33 OF THE PUBLIC  
HEALTH ACT, CHAPTER 242 OF THE LAWS OF KENYA

And

IN THE MATTER OF SECTIONS 4, 5, 8, 10, 12, 14, 15 OF THE HEALTH ACT,  
2017

And

IN THE MATTER OF SECTIONS 3, 15 AND 16 OF THE PERSONS  
DEPRIVED OF LIBERTY ACT, 2014

BETWEEN

JMK.....1<sup>ST</sup> PETITIONER  
AJ.....2<sup>ND</sup> PETITIONER  
KENYA LEGAL AND ETHICAL  
ISSUES NETWORK ON HIV/AIDS (KELIN).....3<sup>RD</sup> PETITIONER  
KATIBA INSTITUTE.....4<sup>TH</sup> PETITIONER

VERSUS

KENYATTA UNIVERSITY TEACHING,  
REFERRAL & RESEARCH HOSPITAL (KUTRRH) ..... 1<sup>ST</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT  
MUTAH KAGWE,  
CABINET SECRETARY FOR HEALTH.....3<sup>RD</sup> RESPONDENT  
PATRICK AMOTH,  
AG DIRECTOR GENERAL OF HEALTH . .....4<sup>TH</sup> RESPONDENT

## AFFIDAVIT OF ALLAN MALECHE IN SUPPORT OF THE PETITION

I, **ALLAN ACHESA MALECHE**, of **P.O.BOX 112 – 00202, Nairobi**, a male adult Kenyan of sound mind residing and working for gain in Nairobi County within the Republic of Kenya do hereby make oath and state as follows;

1. **THAT** I am an advocate of the High Court of Kenya and the Executive Director of the Kenya Legal and Ethical Issues Network of HIV and AIDS (KELIN), the 4<sup>th</sup> petitioner and thus competent to swear this Affidavit.
2. **THAT** I have the authority of the Board of Directors to swear this Affidavit on behalf of KELIN herein.
3. **THAT** I am conversant with the contents of the Petition, I have interacted with the Petitioners, I fully understand the issues in question and I further adopt the contents of the Petition filed herein as if the same were set out *seriatim*.
4. **THAT** KELIN is a non- partisan, non-profit making, and non- governmental organization duly registered under the Non-Governmental Organizations Act, working to protect and promote health-related human rights in Kenya. **(Annexed and Marked “AM-001” is a copy of KELIN’s registration certificate).**
5. **THAT** the mandate of KELIN is achieved 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.

6. **THAT** KELIN's vision is the full enjoyment of health-related human rights for all while its mission is to promote and protect health-related rights for all.
7. **THAT** following the global outbreak of the coronavirus disease ("COVID-19") pandemic, and the reporting of the first person with COVID-19 in Kenya on 12<sup>th</sup> March 2020, KELIN in exercise of its mandate, and in partnership with other non-governmental, civil society and community-based organisations, has been monitoring the government's response to the pandemic, especially how the government was fulfilling its constitutional and statutory obligation to protect the right to health of Kenyans.
8. **THAT** in this regard, KELIN, in partnership with the 4<sup>th</sup> Petitioner and other organizations, set up a legal aid support system to provide *pro bono* legal advice to people facing human rights violations during the pandemic period (**Annexed and Marked "AM-002" is a copy of the legal aid poster**).
9. **THAT**, KELIN with other stakeholders has written advisories to government representatives (including the respondents herein) calling for a rights-based and transparent COVID-19 response that safeguards the health and rights of all including vulnerable and underserved populations. (**Annexed and Marked "AM-003" is the Multi-Stakeholder Advisory Note dated 28<sup>th</sup> March 2020**).
10. **THAT** as an organisation, we understand the public health objective of isolation as provided under section 2 of the Public Health Act. However, such isolation cannot be undertaken in a manner that violates the right to health as enshrined in the Constitution of Kenya.

11. **THAT** given that isolation involves limitation of rights for the purpose of treatment, the government must ensure that the limitation is taken in the least restrictive form necessary.
  
12. **THAT** in this advisory dated 28<sup>th</sup> March 2020, the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners, amongst other organisations called on the 3<sup>rd</sup> and 4<sup>th</sup> respondents to provide guidance on various critical areas that were necessary to the implementation of measures to curb the spread of COVID-19. This included:
  - a. The responsibility of the 3<sup>rd</sup> and 4<sup>th</sup> respondents to provide accurate, timely and lifesaving information that is necessary for the right to access information;
  - b. The need for the 3<sup>rd</sup> and 4<sup>th</sup> respondents to provide information on how resources allocated to COVID-19 response were being utilized;
  - c. Clarity on the COVID-19 response plan, including clarity on the goals of isolation and testing.
  
13. **THAT** the 3<sup>rd</sup> and 4<sup>th</sup> petitioners set up an email address through which individuals who had had their rights violated could seek legal advice. The 4<sup>th</sup> Petitioner received information from various individuals, such as the 1<sup>st</sup> and 2<sup>nd</sup> petitioners that:
  - a. That the measures for isolation in public health facilities were exposing them to increased risk of contracting COVID-19.
  - b. The government had little regard for their general mental and physical health, safety, and well-being, thus defeating the public health objective of their isolation.
  - c. The 1<sup>st</sup> respondent personnel had little regard for the health of those with pre-existing conditions and failed to conduct adequate and timely screening to identify pre-existing conditions.
  - d. There was poor turnaround time for testing with COVID-19 test results, taking between 4 -7 days to complete.



- e. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners, and others subject to isolation and testing at the 1<sup>st</sup> respondent's facility, were required to pay for their testing and isolation.
  - f. Those who were unable to pay for testing and the attendant costs of treatment during isolation were being detained in hospital. This was the position that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners found themselves in.
14. **THAT** the 1<sup>st</sup> and 2<sup>nd</sup> petitioners were extremely distressed as they were unable to pay for isolation and management of COVID-19 at the 1<sup>st</sup> respondent. This is what led the 1<sup>st</sup> petitioner to write to KELIN and to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents indicating his inability to pay for the costs of isolation and requesting a waiver of the medical bills. (**Annexed and Marked "AM-004" are copies of letters written by the 1<sup>st</sup> petitioner while he had been detained following isolation, copied to KELIN via the email address, and the KELIN response highlighting the unlawfulness of detention for failure to pay medical bills**).
15. **THAT** media reports indicating that people were being unlawfully detained at public health facilities, particularly at the 1<sup>st</sup> respondent's facility, because they could not pay for isolation and testing of COVID-19. (**Annexed hereto and marked AM-005 are newspaper reports indicating the detention of individuals for failure to meet the high costs of isolation at various public health facilities**)
16. **THAT** on 6<sup>th</sup> May 2020, the 3<sup>rd</sup> respondent eventually published in his daily briefing on the pandemic, the intention of the state to waive the costs of isolation for persons who underwent treatment and isolation at public health facilities.
17. **THAT** despite communication that costs associated with treatment and management of COVID-19 would be waived, this directive is yet to be implemented and individuals who have been treated and isolated at the 1<sup>st</sup>

respondent are still being unlawfully detained. (**Annexed hereto and marked AM-006 is a news clipping demonstrating that as 27<sup>th</sup> July 2020, the 1<sup>st</sup> respondent was still holding patients at its facility and expecting them to pay their medical bills incurred during treatment of COVID-19**)

18. **THAT** the High Court has found that detention for non-payment of medical bills is unlawful for arbitrariness and violates the following constitutional rights:

- a. The right to freedom of security of the person by subjecting those detained to cruel, degrading, and inhuman treatment. The right to be free from cruel, degrading, and inhuman treatment is a right that cannot be limited.
- b. The right to freedom from discrimination based on economic status.
- c. The right to dignity due to the treatment subjected to those who find themselves detained in health facilities.
- d. Unlawful and forced detention in health facilities causes severe mental suffering which ultimately negatively affects the mental health of those who are detained.
- e. Such detention also increases the stigma associated with seeking health services, and therefore negatively affects the right to the highest standard of health.

In this regard, the decisions of the High Court in **MAO & another v Attorney General & 4 others [2015] eKLR** and **Christine Kidha v Nairobi Women's Hospital [2016] eKLR** are instructive. These decisions have also not been appealed and therefore remain good law.

19. **THAT** the 3<sup>rd</sup> petitioner informed the 1<sup>st</sup> respondent that detention of patients in hospital for the failure to meet medical bills was unlawful. The 1<sup>st</sup> respondent however ignored this advice and continues to unlawfully and

in violation of the constitutional rights to health and freedom of security of the person, to detain those who are unable to pay for treatment at its facility.

20. **THAT** further the decision of the 1<sup>st</sup> respondent to detain the 1<sup>st</sup> and 2<sup>nd</sup> petitioners is without any legal basis as section 33 of the Public Health Act only allows the 3<sup>rd</sup> respondent, or any other health authority to recover the costs associated with management of the spread of infectious diseases after the discharge of patients from isolation.
21. **THAT** I aver that this Honourable Court must issue orders stopping the 1<sup>st</sup> respondent, and all other public health facilities, from detaining patients who cannot pay for isolation and treatment of COVID-19.
22. **THAT** the detention of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners was unreasonable and unjustified in this case and was a limitation that did not accord with Article 24 of the Constitution.
23. **THAT** moreover the decision by the respondents to detain the 1<sup>st</sup> and 2<sup>nd</sup> petitioners for non-payment of the costs of treatment were unreasonable and unjustified since there have been various funding initiatives to aid in Kenya's response to the pandemic.
24. **THAT** these initiatives were geared specifically to strengthen the health care infrastructure and for treatment, and include:
  - a. In April 2020: \$50 Million World Bank Group Support to Address COVID-19 Pandemic earmarked for emergency funding for medical diagnostic services, surveillance and response, capacity building, quarantine, isolation and treatment centres, medical waste disposal, risk communications and community engagement as well as for strengthening of the country's capacity to provide safe blood services;
  - b. In April 2020,: a donation of Kshs 1.1 billion from Equity Group Foundation (EGF), with support from the Mastercard Foundation, to

provide Personal Protective Equipment (PPE) to frontline medical staff dealing with COVID-19 patients in public hospitals in Kenya;

- c. April 2020: U.S. Centers for Disease Control and Prevention (CDC) committed \$6.6 million (705 million KES) for coronavirus disease 2019 (COVID-19) activities in Kenya to support prevention, preparedness and response;
- d. April 2020: the creation of the COVID-19 Emergency Response Fund through which various individuals and entities have contributed to the efforts to manage COVID-19;
- e. July 2020: the EU Civil Protection Mechanism, in response to a request from Kenya, Slovakia has sent 20,000 protective face masks, 50,000 coronavirus test kits, hand disinfectant and laboratory supplies.
- f. July 2020: \$50 million through U.S. Agency for International Development (USAID) to support Kenya's response and recovery efforts to meet the immediate and longer-term challenges that COVID-19 is posing.
- g. As of July 2020, Kenya was reported to have raised Kshs 2.8 billion to combat the coronavirus. An additional Kshs 3.8 billion was donated by well-wishers, including individuals and companies in Kenya.
- h. As at 4<sup>th</sup> September 2020, the Global Fund had provided USD 6,909,404 to support Kenya's national response to COVID-19, and this amount was specifically earmarked for COVID-19 diagnostic tests.

**Annexed hereto and marked AM007 are documents demonstrating that the State, through the 3<sup>rd</sup> and 4<sup>th</sup> respondents, has received money to respond to the pandemic and treat of COVID-19.**

25. **THAT** even though there has been funding received to go towards treatment and isolation of patients infected with COVID-19, the 3<sup>rd</sup> and 4<sup>th</sup> respondents are yet to apply these funds towards the intended purpose.

(Annexed hereto and marked “AM008” are newspaper clippings demonstrating that as of 14 August 2020, patients undergoing treatment at public health facilities would be required to pay for protective equipment).

26. **THAT** moreover, even though the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners have requested information on the modalities of isolation and treatment and its protocols, these requests have gone unanswered by the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The 3<sup>rd</sup> and 4<sup>th</sup> respondents have therefore refused to provide information on how received funds earmarked for treatment of COVID-19 have been applied.
27. **THAT** it is necessary, where the State has received funds to improve the public health system, as has been the case here, that it provides an accounting to citizens as to how that money has been utilized.
28. **THAT** I aver that the 3<sup>rd</sup> and 4<sup>th</sup> respondents must proactively publish and publicise information on the costs of isolation as required under Article 35(3) of the Constitution and section 17 of the Health Act. I am concerned why the respondents refused, neglected, and/or failed to proactively provide this information, and more so even after requests from KELIN and other stakeholders.
29. **THAT** in a bid to have the 3<sup>rd</sup> and 4<sup>th</sup> respondent meet their obligations under Article 21 and 35 of the Constitution, the 3<sup>rd</sup> and 4<sup>th</sup> petitioners, among other stakeholders, have called on the 3<sup>rd</sup> respondent to make public and account for the donor funds and loans received towards the response to COVID-19. The 3<sup>rd</sup> and 4<sup>th</sup> respondents have, however, not responded or taken any action
30. **THAT** because the 3<sup>rd</sup> and 4<sup>th</sup> respondents have required those who are put in isolation to pay for it, even those placed in public health facilities, several people have been illegally detained because they cannot meet those costs, which has resulted in a further violation of those patient’s human rights, particularly the right to mental health.

31. **THAT** the Health Act places a joint responsibility on the 3<sup>rd</sup> and 4<sup>th</sup> respondents to create and implement guidelines for the management of infectious diseases. However, such guidelines should only be implemented in a manner that ensures the full realization of the right to health as enshrined in the Constitution of Kenya, 2010.

32. **THAT** given the foregoing, and in the interest of safeguarding the Constitutional rights of health and freedom and security of the person, I pray this Honourable Court to grant the orders set out in the Petition

33. **THAT** what is deponed to herein is true to the best of my knowledge, information and belief, save for information whereof sources of information have been disclosed.

**SWORN in NAIROBI**                      This                      day of                      2020

by the said **ALLAN MALECHE**    ) .....

)                      **DEPONENT**

**BEFORE ME**                      )

)

)

)

**COMMISSIONER FOR OATHS** )

**DRAWN & FILED BY:-**

Nyokabi Njogu, Advocate

C/O KELIN

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**NAIROBI**

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Practice No: LSK/2020/04771

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION OF 2020**

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20(1)(4), 21, 22, 23, 24, 25, 26(1),  
27, 28, 29, 35, 43(1)(A), 47, 165, 232(1), 258 AND 259 OF THE CONSTITUTION  
OF KENYA, 2010

And

IN THE MATTER OF SECTIONS 13, 17, 21, 25, 26, 27 and 33 OF THE PUBLIC  
HEALTH ACT, CHAPTER 242 OF THE LAWS OF KENYA

And

IN THE MATTER OF SECTIONS 4, 5, 8, 10, 12, 14, 15 OF THE HEALTH ACT,  
2017

And

IN THE MATTER OF SECTIONS 3, 15 AND 16 OF THE PERSONS  
DEPRIVED OF LIBERTY ACT, 2014

BETWEEN

JMK.....1<sup>ST</sup> PETITIONER  
AJ.....2<sup>ND</sup> PETITIONER  
KENYA LEGAL AND ETHICAL  
ISSUES NETWORK ON HIV/AIDS (KELIN).....3<sup>RD</sup> PETITIONER  
KATIBA INSTITUTE.....4<sup>TH</sup> PETITIONER

VERSUS

KENYATTA UNIVERSITY TEACHING,  
REFERRAL & RESEARCH HOSPITAL (KUTRRH) ..... 1<sup>ST</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT  
MUTAH KAGWE,  
CABINET SECRETARY FOR HEALTH.....3<sup>RD</sup> RESPONDENT  
PATRICK AMOTH,  
AG DIRECTOR GENERAL OF HEALTH . .....4<sup>TH</sup> RESPONDENT

**AFFIDAVIT OF CHRISTINE NKONGE IN SUPPORT OF THE PETITION**

I, **CHRISTINE NKONGE**, of **P.O. Box 26586 - 00100**, a female adult Kenyan of sound mind residing and working for gain in Nairobi County within the Republic of Kenya, and the Executive Director of the 4<sup>th</sup> Petitioner herein whose address for purposes of Petition is care of **KATIBA INSTITUTE, 5 THE CRESCENT, OFF PARKLANDS ROAD, NAIROBI**, do hereby make a solemn oath and state as follows:

1. **THAT** I am conversant with the contents of the Petition, and fully understand the issues in question and I further adopt the contents of the Petition filed herein as if the same were set out *seriatim*. (Annexed to this affidavit is Katiba Institute’s certificate of incorporation marked as “**CN- 1**”)
  
2. **THAT** I am making this Affidavit in support of the Notice of Motion, the Petition and the Prayers particularized therein.
  
3. **THAT** I have read the affidavit of Allan Maleche in support of the Notice of Motion application and the Petition and I agree with the contents therein.
  
4. **THAT** what is deponed to in this Affidavit is within my knowledge save for information the sources whereof are otherwise disclosed.

**SWORN** in Nairobi this \_\_\_\_\_ day of \_\_\_\_\_ 2020.

**CHRISTINE NKONGE** ) \_\_\_\_\_  
**BEFORE ME** ) Deponent  
)  
)  
**COMMISSIONER FOR OATHS** )

**DRAWN & FILED BY: -**  
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