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

IN THE MATTER OF THE DEFENCE OF THE CONSTITUTION UNDER ARTICLES 3, 10, 19, 20, 22 AND 258 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 19, 21, 28, 29, 39, 43, 47 AND 53 OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 8(6) OF THE PUBLIC ORDER ACT, CAP 56 OF THE LAWS OF KENYA
AND
IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 4 AND 5 OF THE HEALTH ACT NO. 21 OF 2017
AND
IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 3, 5, 12, 13, 14 AND 15 OF PERSONS DEPRIVED OF PERSONAL LIBERTY ACT NO. 23 OF 2014
AND
IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 4 AND 5 OF THE ACCESS TO INFORMATION ACT, NO. 31 OF 2016
AND

IN THE MATTER OF SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015
AND
IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE PUBLIC HEALTH (COVID-19 RESTRICTION OF MOVEMENT OF PERSONS AND OTHER RELATED MEASURES) RULES, 2020 AND PUBLIC HEALTH ACT (PREVENTION, CONTROL AND SUPPRESSION OF COVID-19) REGULATIONS, 2020
BETWEEN

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

AND

HON. ATTORNEY GENERAL ……....…...…...…..… 1ST RESPONDENT
THE CABINET SECRETARY, HEALTH ……..…….. 2ND RESPONDENT
THE CABINET SECRETARY, INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT…….....…….3RD RESPONDENT

1st- 9th PETITIONERS' JOINT WRITTEN SUBMISSIONS

A. INTRODUCTION

1. These are the jointly written submissions of the Petitioners. The Petitioners rely on the following documents filed in support of the petition:

    a. the Petition dated 5 May 2020 (Vol. 1 pp102-156),
    b. the Supporting Affidavits of C.M sworn on 2 May 2020,
    c. the Supporting Affidavit of M.O.A sworn on 2 May 2020,
    d. the Supporting Affidavit of M.O sworn on 3 May 2020,
    e. the Supporting Affidavit of M.W.M sworn on 2 May 2020,
    f. the Supporting Affidavit of K.F sworn 3 May 2020,
    g. the Supporting Affidavit of F.A sworn on 3 May 2020,
    h. the Supporting Affidavit of KB sworn on 3 May 2020,
    i. the Supporting Affidavit of Allan Achesa Maleche was sworn on 3 May 2020,
    j. The Supporting Affidavit of Christine Nkonge was sworn on 3 May 2020 and
    k. the supplementary affidavit of Dr Theresia Mutavi sworn 1st September 2020.

2. We pray the court expunges from the record pages 652-797 as it is a repetition of the Affidavit of Christine Nkonge.

B. OVERVIEW OF THE PETITION

3. The Petitioners' case is *not* about whether quarantine *per se* is legally permissible in the context of the State's response to COVID-19:

    a. The Petitioners do not deny that the coronavirus, and the manifestation of its disease in COVID-19, is a grave threat to the people of Kenya.
    b. The State is constitutionally obligated to take measures to protect people from infection.
    c. The Petitioners however find fault in the way the state implemented the mandatory quarantine as it resulted in serious violations of human rights of the 1st – 7th petitioners, and without a justifiable limitation of rights under Article 24 of the Constitution.

C. FACTS

4. On 30th January 2020, the World Health Organization (WHO) declared Covid-19 disease a global health emergency of international concern.

5. On 28th February 2020, the President established the National Emergency Response Committee on Coronavirus and made the 2nd Respondent, Chairperson.

6. On 11th March 2020, WHO declared Covid-19 a pandemic. Countries around the world intensified steps to stop the spread of the virus within their borders. Kenya was no exception.

7. On 13th March 2020, the 2nd Respondent announced Kenya's first case of Covid-19, a woman who likely contracted the virus while travelling abroad.

8. On 22nd March 2020, the 2nd Respondent orally made an announcement aired on Kenyan television stations in which he, on behalf of the National Emergency Response Committee gave the following directives, inter alia:
    - "All international flights are suspended effective Wednesday the 25th at midnight and the only exception to this are cargo flights whose crew must observe strict guidelines.
    - Those coming into the country between now and Wednesday be they Kenyans or foreigners will undergo mandatory quarantine at a government-designated facility at their own expense.
    - Countries wishing to evacuate their nationals must make arrangements to do so within this period.
    - Kenyans who are currently in foreign countries and would not have come back within the said period are advised to observe the guidelines issued in their respective countries.
    - Whereas we had allowed Kenyans and foreigners with valid permits to come into the country we have observed there are those who are not observing self-quarantine protocols. Consequently, NERC [National Emergency Response Committee] has decided that all persons who violate the self-quarantine protocols with be forcefully quarantined for a full 14 days, at their cost and thereafter, arrested and charged in accordance with the Public Health Act…."

9. Based on the above directive any person who arrived by air into Kenya from 22nd March 2020 were required to enter into self-paid mandatory quarantine.

10. Therefore, between 22nd March 2020, when the directive was issued and 25th March 2020 at midnight, several flights arrived in Kenya, carrying many passengers and on their arrival at Jomo Kenyatta International Airport, there were no processes or procedures or information communicated beforehand or made available upon arrival to passengers, of what to expect moving forward.

11. On 23rd March 2020, several flights landed from different countries-some which had reported people with Covid-19 infections while others came from countries with no reported infections. The passengers came in their hundreds and there was great confusion at the arrival terminal on how the quarantine measures were to be imposed.

12. They waited for several hours before being cleared for admission into the country at the immigration counters. At that time there was still no official communication as to the procedure for mandatory quarantine. The same situation continued after the immigration and customs clearance, at the baggage claim area where there was no written communication as to where they would go for mandatory quarantine.

13. For several hours, the passengers were not allowed outside of the arrivals terminal; and information from government officials was not availed on the process of mandatory quarantine or the facilities that were available for them.

14. Several hours later officials came with a list of 3 government facilities (Kenyatta University (KU), Kenya Medical Training College, Nairobi (KMTC) and Kenya School of Government (KSG)) and other government-approved facilities available for mandatory quarantine. The number of

government-approved facilities that were available on the first two days was limited and the rest were mostly expensive four to five-star rated hotels such as Crowne Plaza, Boma Inn, Ole Sereni and Four Points Sheraton hotel. Passengers were required to pay for quarantine at all government-approved facilities.

15. The government facilities were either fully booked or set up in a manner that required passengers to share common facilities like bathrooms and toilets. As a result, passengers feared that these government facilities were not safe for quarantine because they risked exposing those who were not infected, with those who were.

16. Once informed of the quarantine facilities, the passengers, some coming from countries with no reports of people who had tested positive for Covid-19 and others from countries with numerous positive reports, were then crammed into buses with their luggage. The airport personnel or government authorities did not observe social distancing practices and some did not have face masks. They made it difficult for the passengers to observe such practices, as well.

17. On 25th March 2020, the 3rd Respondent, the Cabinet Secretary in charge of the Ministry of Interior and Coordination of National Government enacted an order, under Section 8 of the Public Order Act issuing a nationwide curfew between 7.00 PM and 5.00 AM.

18. The 8th and 9th Petitioners and other civil society members wrote a joint advisory dated 28th March 2020, titled "Advisory Note on Ensuring a Rights-Based Response to Curb the Spread of COVID-19: People - not Messaging –

Bring Change" addressed to the Minister of Health in which they stated their concerns. This note raised among other concerns, that the implementation of the government's directive of mandatory quarantine and isolation of people affected by COVID-19 was uncoordinated, unplanned and not guided by any policy or guidelines.

19. It also raised concerns as to (i) what measures were being put in place to protect workers at such facilities from infection; and (ii) why citizens were being forced to incur costs of isolation at these hotels.

20. The same joint advisory also noted that on 27th March 2020, a person under mandatory quarantine died in Kiti Quarantine centre Nakuru county and there was a need to investigate the death and determine if the centres are fit for the purpose and meet the requirements to ensure individual and public health.

21. On 3rd April 2020, the Ministry of Health published on its website the COVID-19 Mandatory Quarantine Site Protocols: Interim Guidelines. This document states at p. 3 that:

> "The possible quarantine settings include hotels, dormitories, other facilities catering to groups, or the home of the contact. Regardless of the setting, an assessment must ensure that the appropriate conditions for safe and effective quarantine are being met including linen processing and laundry. The designated centres are housing persons who have arrived in the country from countries with confirmed COVID-19 cases or persons who may need to be confined because they have been in contact with a confirmed COVID-19 case in the country."

22. It further provided at p. 7 that:

> "Quarantine for COVID-19 is recommended for individuals who have been directly exposed to the virus or who have travelled to areas where there are large numbers of people infected in order to prevent further transmission.
>
> 1. Stay home except to get medical care.
>
> 2. As much as possible, you should stay in a specific room and away from other people (even when quarantined at home). Do not go to public areas. …"

23. On 3rd April 2020, the Ministry of Health also published the COVID 19 Mandatory Quarantine Protocols, dated 27 March 2020 that was similar to the interim protocols. It included the following information:

> p. 11- All clients shall be quarantined in a well-ventilated single- room. (With open windows and an open door).
>
> p. 14- As observed in Wuhan, the mean incubation period for COVID-19 was 5.2 days for the majority of the cases. The Ministry of Health has therefore planned for testing from Day 5 of quarantine.

24. The latest protocols also provided the following information to those in mandatory quarantine at p. 14:

> "5. Results will be delivered within 24 hours after sample collection.
>
> 6. Positive results will be communicated to the suspected case and transferred to the isolation facility for treatment.
>
> 7. Negative results will be relayed to their owners.

8. Following the first negative test, the persons will be released into self-quarantine as per the self-quarantine protocols.

9. All in self-quarantine will be expected to continue daily monitoring of COVID 19 symptoms: Fever, cough, shortness of breath

10. Those found to be negative will continue self-quarantine till 14 days after discharge from the mandatory quarantine sites are over.

11. All people in quarantine should have a repeat test on day 10 of quarantine.

12. Anyone who develops symptoms during the period of quarantine should be tested for COVID-19.

13. Close contacts of anyone found to have positive results of COVID 19 will go into self-quarantine."

25. Despite the above being set down by the Ministry of Health, which provided for testing from the 5th day and a repeat test on the 10th day of the quarantine, most of the quarantine facilities only tested the clients on the 10th day of isolation. Some of those tested also never received any written results of their tests. For some, there was no exercise of confidentiality when releasing results but rather public announcements of the number of tests done and the number of positive and negative results in that facility.

26. On 3rd April 2020, the 2nd Respondent published the Public Health (Prevention, Control and Suppression of COVID-19) Regulations, 2020 (Legal Notice No. 49). These regulations were only published after all the passengers were already in mandatory quarantine. It is stated in Rule 12(4) that quarantine is limited to14 days.

27. On April 4th 2020, as most of the passengers were entering the final day of the 14-day mandatory quarantine, the Ministry of Health changed its protocol. The Ministry of Health orally made a public announcement that those people who had been detained at the facilities for 14 days and tested negative would be detained in mandatory quarantine at their own expense for an additional 14 days if there was a person who tested positive for COVID-19 in the facility. This was even though the new protocol was not earlier communicated to those in quarantine and they were abiding but what was told to them earlier.

28. The new, orally communicated protocol also contradicted the main guidelines, which stated that those who tested negative would be sent home for self-quarantine for 14 days after completion of their mandatory quarantine.

29. On 3rd April 2020, the 2nd Respondent published Public Health (Prevention, Control and Suppression of COVID-19) Rules, 2020 - the Prevention, Control and Suppression Rules. Rule 4 authorized a "medical officer of health or public health officer" to inspect the premises of anyone who tests positive for COVID-19 and force all the people in that premises to either be removed to a health care facility if they test positive for COVID-19 or be detained in a quarantine facility. Section 10 of the Prevention, Control and Suppression Rules also made aiding or abetting the escape from a quarantine facility a crime.

30. On 6th April 2020, the 2nd Respondent, the Cabinet Secretary in charge of Health, published the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 - the Restriction of Movement Measures. Rule 3 of the Restriction of Movement Measures gave the 2nd

Respondent the authority to designate any area in Kenya an "infected area". The Restriction of Movement Measures provided in Rules 4, 5, for the restriction of movement of persons and limitation of transport services in an infected area. Rule 6 imposed hygiene requirements, and Rule 7 prohibited public gatherings. Rule 8 established requirements for the disposal of bodies of those who died as a result of COVID-19. Each of these Rules stated that a violation would constitute a criminal offence.

31. Rules 9 and 11 established the punishments for violations of Rules 4 - 8, which included vehicles being held by the police for breach of the restriction on movement of persons and transport services for an indefinite period. And, if convicted of a violation of one of the Rules, a fine of not more than 20,000 Kenya shillings or imprisonment not exceeding 6 months or both.

32. On April 6, 2020, the 2nd Respondent published four other orders. These orders established the Nairobi Metropolitan area and the Counties of Mombasa, Kilifi, and Kwale, respectively, as "restricted areas" subject to the rules outlined in the Restriction of Movement Measures.

33. On 17th April 2020, the 2nd Respondent, the Cabinet Secretary in charge of Health issued the Public Health (Restriction of movement of persons and related measures) Variation Rules, 2020 in which Rules 4A and 5(5) were inserted. These rules restricted the operation of ferry services and imposed criminal penalties for violations of those restrictions

34. However, on 20th April 2020, despite the measures imposed under the Public Order, Act and the Public Health (COVID-19 Restriction of Movement of

Persons and Related Measures) Rules listing the offences and penalties for breach of the offences, the 2nd and 3rd Respondents failed in upholding the law. Instead, the 2nd Respondent ordered that anyone in breach of the curfew orders or the Public Health Rules be arrested and detained at their own cost in mandatory quarantine. The 3rd Respondent carried out these orders, arresting and detaining individuals in quarantine facilities for regulatory violations.

35. In another public announcement on 20th April 2020, the 2nd Respondent stated that over 400 people are currently being detained in the mandatory quarantine facilities for allegedly violating the curfew or Public Health Orders. They have been denied basic due process as the 2nd and 3rd Respondents used the quarantine process as a means of punishing alleged violators of COVID-19 regulations without following the law and not subjecting their actions for review as required under the Constitution and the law.

36. As recently as 3rd May 2020, the Ministry of Health issued another press release given by the CAS in charge of Health, on behalf of the National Emergency Response Committee, stating that as a result of debates on people being held in quarantine, curfew breakers will no longer be held in government quarantine facilities and that the Inspector General of Police was directed by the committee to designate a 'curfew breakers holding place'.

D. ISSUES FOR DETERMINATION

37. We have framed six issues that arise for determination:

    i. Whether the 2nd and 3rd Respondents' arrest and detainment, in self-paid mandatory quarantine and designated 'curfew breakers holding

places', persons who infringed the curfew orders violated Articles 10, 24,25, 29(f), 39, 43(1) (a), 47, 48, 49, 50 and 51 of the Constitution, Section 4 of the Fair Administrative Action Act, Section 8(6) of the Public Order, Act, Cap 56 and the Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020 and the Public Health (Covid-19 Restriction of movement of persons and Related Measures) Rules, 2020.

ii. Whether the 2nd Respondent's implementation of mandatory quarantine violated its duty under Article 21 as well as the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Petitioners' rights under Articles 28, 29, 39, 35, 43(1)(a),47 of the Constitution and Sections 4 and 5 of the Health Act and Section 4 and 5 of the Fair Administrative Action Act and Section 4 of the Access to Information Act. of the Constitution.

iii. Whether the 2nd Respondent's action of forcefully detaining the 2nd Petitioner for failure to pay bills for mandatory quarantine at a government facility contravened the 2nd Petitioner's rights under Articles 29 (f), 39 and 45(1) of the Constitution.

iv. Whether the 2nd Respondent's failure to provide written medical results of the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Petitioners for more than 24 hours after testing for COVID -19 was unreasonable and the announcing the medical results containing their health status in public, violated the right to access to information under Articles 35 as read with Sections 4 and 5 of the Access to Information Act No. 31 of 2016 and the rights to privacy under Article 31 as read with Section 11 of the Health Act No. 21 of 2017 and Sections 16(1) of the Persons Deprived of Liberty Act No. 23 of 2014.

v. Whether the 2nd Respondent's failure to provide for guidelines for the treatment of children in quarantine facilities is a violation of the 1st Petitioner's child's rights under Articles 43(1)(a) and 53 (1)(c) of the Constitution.

vi. What are the appropriate remedies in the matter

D. ANALYSIS

i. Whether the 2nd and 3rd Respondents' arrest and detainment, in self-paid mandatory quarantine and designated 'curfew breakers holding places', persons who infringed the curfew orders violated Articles 10, 24,25, 29(f), 39, 43(1) (a), 47, 48, 49, 50 and 51 of the Constitution, Section 4 of the Fair Administrative Action Act, Section 8(6) of the Public Order, Act, Cap 56 and the Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020 and the Public Health (Covid-19 Restriction of movement of persons and Related Measures) Rules, 2020

38. The 9th Petitioner averred that the 3rd Respondent issued a Curfew Order through Section 8(6) of the Public Order Act and the 2nd Respondent enacted the Public Health (Prevention, Control and Suppression of COVID 19 Regulations (the Regulations) and the Public Health (COVID 19 Restriction of Movement Rules, 2020 (the Rules). [1]However, the 2nd Respondent in a daily briefing published by the Ministry of Health stated that they had detained 455 other persons for defying national curfew regulations in quarantine.[2]

[1] supporting affidavit of Christine Nkonge sworn on 3rd May 2020 (Nkonge affidavit).

[2] Nkonge affidavit marked as CN 10 A , p. 597

39. The police had also stated that persons who were found not to have been wearing face masks and breaking curfews were arrested across the counties to be placed in mandatory quarantine.

40. Later, the 2nd Respondent stated in the Ministry of Health Briefing published on the Ministry's website that people arrested for breaking curfew order to be held in 'curfew breakers holding centres'.[3]

    - *Violation of the rule of law (Article 10), the freedom and security of the person (Art 29), the rights of arrested persons (Art 49) and the right to a fair trial (Article 50)*

41. The 2nd and 3rd Respondents' actions of arresting and detaining persons in mandatory quarantine facilities, at their costs, for contravening the curfew orders and for offences committed under the Public Order Act and other offences under the Public Health Act (Prevention Control and Suppression of COVID 19) Regulations, 2020 as well as the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules (Public Health COVID 19, Rules), is contrary to the rule of law under Article 10 of the Constitution and the right to freedom and security of the person under Article 29 of the Constitution, the right of arrested persons under Article 49 of the Constitution, as well as the right to a fair trial under Article 50 of the Constitution.

[3] Nkonge affidavit marked as CN 12, p. 624

- *Article 10- rule of law*

42. The 2nd and 3rd Respondents actions of detaining and putting in quarantine and 'curfew breakers holding facilities' persons who had broken curfew orders and the COVID 19 Rules and Regulations such as for failing to wear masks and adhering to social distancing requirements was contrary to Article 10 national value and principle of rule of law. The rule of law provides that the law must be certain, that any actions carried out by the State must be authorised by law, and that the State and every person must act under the law.

43. At the point of issuing directives of the arrests, there were existing laws that already provided for offences of breaking curfew as well as COVID 19 Rules and Regulations. These laws included Section 8(6) of the Public Order Act, Rules 9 and 11 of the Rules and Rule 10(3) of the Regulations.

44. Section 8(6) of the Public Order Act reads:

> "(6) Any person who contravenes any of the provisions of a curfew order or any of the terms or conditions of a permit granted to him under subsection (1) of this section shall be *guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment*."

45. The COVID 19 Rules provide for the restriction of movement, wearing of masks, as well as restriction on gatherings. Rule 11 of the Rules provides for the penalties for offences created under the Rules as follows:

> "A person who commits an offence under these Rules shall, on conviction, be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a period not exceeding six months or both."

46. The Prevention, Control and Suppression of COVID 19 Regulations also provide for penalties for offences committed under the said Regulations. Regulation 10(3) provides for the penalty of escaping a quarantine and isolation facility and Regulation 15 provides for the general penalty for violation of the regulations as follows:

> "1) Except as otherwise provided in these Rules, any person who contravenes the provisions of these Rules shall be liable to a fine not exceeding twenty thousand shillings, or to imprisonment for a term not exceeding six months, or to both."

47. We submit that when the 2nd Respondent directed that those who were found breaking the curfew orders be placed in quarantine facilities at their costs and later that they be held in "curfew breakers holding centres" he violated the national value and principle of the rule law, which binds him when interpreting the Constitution, the law and implementing policies.

48. This is because he had already enacted the COVID 19 Rules and Regulations and the 3rd Respondent had enacted the curfew orders which provided offences that arose for violating the laws as well as the penalties, yet he failed to adhere to the rule of law which he set down.

49. The rule of law means just that – that what the law says should be done must be done. In addition, it aids in preventing arbitrary actions of the state. public officers must exercise their functions per a set law. Failure to do would lead to anarchy as State officers or Public officers will act without any basis of the guidance of the law which is easily accessible to all who are affected by such actions to see. This also means that State and public officials may violate the rights of persons in the name of exercising their functions or powers which cannot be traced in the Constitution or any laws.

50. The High Court in ***Muslims for Human Rights (MUHURI) & Another v. Inspector-General of Police & 5 Others [2015] eKLR*** was eloquent on the principle of the rule of law. It stated:

> *"141. Elements of the rule of law include* firstly, *that the law is supreme over acts of both government and private persons. There is one law for all.* Secondly, *the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order, and* thirdly, *the exercise of all public power must find its ultimate source in a legal rule. Put in another way, the relationship between the state and the individual must be regulated by law." (Emphasis added).*

51. In ***Mohamed Feisal& 19 others v. Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party) [2018] eKLR*** the Court held that:

> "In a constitutional democracy like our own, it's imperative for citizens to have confidence and trust in the institutions established to

safeguard the rule of law. In this regard, the citizens expect the police officers in going about their duties to be fair, transparent and accountable in executing duties on behalf of the state. This means that chapter four of the supreme law of the land should at every juncture be the guiding light when effecting arrest and detention of suspects alleged to have committed cognizable offences."

52. In addition, in ***Keroche Industries Ltd v. Kenya Revenue Authority and 5 others 2007 2,*** the Court made the following holding:

> "[O]ne of the ingredients of the rule of law is the certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regularity of law. This is a vision and a value recognized by our constitution and it's an important pillar of the rule of law. Enforcing the law and maintaining public order must always be compatible with respect for the human person. Under article 73(a) and (b) of the constitution, it provided that authority assigned to a state officer is a public trust to be exercised in a manner that is consistent with the purposes and objects of the constitution, demonstrates respect for the people, brings honor to the nation and dignity to the office, promotes public confidence in the integrity of the office and vests in the state office the responsibility to serve the people, rather than the power to rule them".

53. This Court in the case of ***Law Society of Kenya v. Hillary Mutyambai Inspector General National Police Service & 4 others; Kenya National Commission on Human Rights & 3 Others (Interested Parties) Petition No. 120 of 2020; [2020] eKLR (LSK Petition 1)*** at para 123,133, 134 held that the Curfew orders were constitutional and lawful and,[4] in the case of ***Law Society of Kenya v. Attorney General & another; National Commission for Human Rights & another (Interested Parties) Petition 132 of 2020; [2020] eKLR (LSK petition 2)*** this Court held at paras 104 and 105 found that the Rule 11 of the Rules which provided for offences and penalties was not unconstitutional or ultra vires the existing laws.

54. The 2nd Respondent was therefore bound by the Regulations and the Rules that were in place and could not issue penalties that were outside the strictures of the law.

55. In addition, in the case of ***Okiya Omtatah Okoiti & 2 others v. Cabinet Secretary, Ministry of Health & 2 others; Kenya National Commission on***

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[4] Para 123 "The Petitioner's argument that Legal Notice No. 36, the Public Order (State Curfew) Order, 2020, is unlawful for failing to state the period of the curfew and the authority or person to provide permits therefore fails. "

Para 133 " Although the Curfew Order meets the constitutional and statutory parameters, the Petitioner and the interested parties made a strong case for the retooling and remodelling of the instrument so that it can achieve its objectives with reduced impacts on the rights and fundamental freedoms of Kenyans It is observed that the curfew was imposed for a public health purpose. The curfew is not meant to fight crime or disorder. I do not understand why the issuance of permits under the Curfew Order is solely reserved to police officers. Why shouldn't a person in need of emergency care seek authority from a medical officer, the village elder, Nyumba Kumi, the local administrator or even the Member of the County Assembly? In order for the Curfew Order to achieve its objectives and to be embraced by the public it should not be seen as a tool of force but something that aims to protect the health of the people."

Para 134. " I think the main problem with the Curfew Order is the manner in which it has been implemented. The interested parties have correctly concentrated their firepower on that deficiency. It is, however, observed that unconstitutional and illegal acts that occur in the implementation of a legal instrument does not render that instrument unconstitutional. The problems that arise from the implementation must be addressed separately."

"

Human Rights (Interested Party) [2020] eKLR, this Court held at para 144 that:

> "144. I have very carefully considered Section 27 of PHA; Section 5(1) (2) of Health Act, 2017; Article 2(6) of the Constitution; Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Counsel submissions, and based on the aforesaid, I find the action of quarantining persons without an order from a magistrate and at their own cost to be a violation of Section 27 of the Public Health Act; Article 43(1)(a) of the Constitution; and the relevant Regional and International Instruments stated herein above."

56. The 2nd Respondent's actions of arresting and detaining persons in quarantine facilities were in addition, a violation of the right to the highest standard of health and a retrogressive realisation of the right to health to the extent that a public health measure- mandatory quarantine was being used as a tool for punishing those who committed offences related to preventing COVID 19 and curfew orders thus criminalising a crucial and critical public health system.

Article 50- the right to a fair trial

57. It is the Petitioners' submission that the 2nd and 3rd Respondents actions of putting people who committed offences by breaking curfew orders or not wearing masks in mandatory quarantine at their own cost was contrary to the right to a fair trial. This is because the reading of laws that provide for the offences and the penalties shows that such penalties can only be imposed upon the conviction of the accused persons.

58. The process of convicting an accused person includes arresting and presenting the accused person before a judicial officer to undergo a criminal trial to determine whether they are guilty of committing an offence. This right is provided for in Article 50 of the Constitution.

59. **The United Nations Human Rights Committee** in its **General Comment No. 35, Article 9 (Liberty and security of person),**[5] at para 15 stated that the detention of persons without prosecution amounts to arbitrary detention:

> "To the extent that States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available."

60. On curtailing the liberty of individuals, in ***Mohamed Feisal& 19 others v. Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party) [2018] eKLR*** case, it was held that:

> "It follows that the detention of an individual is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the end or public interest which might require that March 2008 at [54]. See generally **R**

[5] **UN Doc CCPR/C/GC/35 (16 December 2014).**

Clayton and R Tomlinson, The Law of Human Rights (2''' ed, 2009) at [6.68]-[6.70]' the person concerned be detained. (see Laden v Poland, Application no. 11036103, 18.

61. By failing to present arrested persons to face a criminal trial and arresting and detaining in quarantine facilities as well as 'curfew holding centres' persons who had breached these laws, the 2nd Respondent violated the rights of persons under Article 50 as the police followed the directives and thereby acted as the judge, jury and executor. The arrest and detention of curfew breakers in quarantine on the assumption that curfew breakers have been in contact with suspected COVID 19 cases are contrary to the law.

Article 47 and Sections 4 and 5 of the Fair Administrative Action Act

62. The 2nd Respondent also violated the right to fair administrative action provided for in Article 47 of the Constitution and Sections 4 and 5 of the Fair Administrative Action Act, 2015 when it issued directives that those who broke curfew and were in quarantine facilities be moved to curfew breakers holding centres.

63. Article 47 provides that 'every person has the right to administrative action that is expeditious, efficient, *lawful, reasonable and procedurally fair*. This is reiterated in section 4(1) of the Fair Administrative Action Act. Section 3 (c) of the Fair Administrative Action Act, provides that the Act applies to all State and Non-State actors whose actions affect the legal rights of persons to whom the decision relates.

64. The 2nd Respondent's directive was *ultra vires* for being unlawful because there were already laws in place which provided for procedures of penalising those who broke curfew orders.

65. In the High Court case of ***John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others v. The County Government of Nyeri & Another JR No 17 B of 2015; [2016] eKLR,*** the Court held that when deciding whether a public body acted lawfully there is usually a category of three wrongs it can check. On illegality the court held that: "*Illegality- Decision-makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers."*

66. In ***Republic v. Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti [2018] eKLR,*** the Court held at para 15 that:

> "A decision is *illegal* if it: - *(a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement a public duty."*

67. It also held in paragraph 18 that:

"18. It has by now become axiomatic that the doctrine or principle of legality is an aspect of the Rule of Law itself which governs the exercise of all public power, as opposed to the narrow realm of administrative action only… <u>The</u>

fundamental idea expressed by the doctrine is that the exercise of public power is only legitimate when lawful… A body exercising public power has to act within the powers lawfully conferred upon it. The principle of legality also requires that the exercise of public power should not be arbitrary or irrational."

68. We, therefore, submit that the 2nd Respondent's directive and the 3rd respondent's actions of implementing the directives was contrary to the principle of the lawfulness in fair administrative action as it was carried out contrary to what the law provided.

Articles 24 and 25

69. We submit that the right to a fair trial is a right that cannot be limited under the Constitution. Therefore, by the 2nd Respondent issuing directives of holding persons in quarantine and curfew breakers holding centres and the 3rd Respondent implementing these directives, they violated the right to a fair trial of several persons, rights which cannot be limited.

70. Also, to limit any of the other rights, Article 24(1) provides that such a limitation must be done per the law. In the Court of Appeal case of ***Mtana Lwea v. Kahindi Ngala Mwagandi Civil Appeal No. 56 of 2014; [2015] eKLR*** (***Mtana Lwea*** case), the Court stated that this provision is necessary to ensure there is certainty in the law and proceeded to state that the law should also be easily accessible to all.

71. In this case, the 2nd Respondent first issued directives stating that those who broke curfew orders would be put in mandatory quarantine at their costs. Later

on 17th April 2020, he stated that the National Emergency Response Committee, of which he is a member, had directed the Inspector General of Police to place those who committed offences concerning curfew orders be placed in 'curfew breakers holding centres'.

72. We submit that these oral directives are not any form of law, therefore, could not be used to limit the rights of those who had broken curfew orders or committed offences under the Rules and the Regulations. Besides, considering the serious nature of criminal sanctions associated with breaking curfew orders, it is crucial that any offences and penalties only be allowed in written law as already provided in section 8(6) of the Public Order Act and Rules 10(3) of the Public Health (Prevention, Control, and Suppression of COVID-19) Regulations, 2020 and Regulations 9 and 11 of the Public Health (Restriction of Movement of Persons and other related measures) Rules, 2020.

73. In the alternative, if the court were to find that the directives were lawful we submit that they still do not meet the threshold in Article 24 of the Constitution. This is because the move to convert the quarantine centres into detention facilities and the creation of 'curfew breakers holding places' is not a justifiable limitation on the rights of persons as there are less restrictive means of achieving punishment for those who break curfew orders, which are already provided in law. The criminalisation of quarantine facilities and the creation of 'curfew breakers holding places' is contrary to the law in place.

ii. Whether the 2nd Respondent's implementation of mandatory quarantine violated its duty under Article 21 as well as the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Petitioners' rights under Articles 28, 29, 39, 35, 43(1)(a),47 of

the Constitution and Sections 4 and 5 of the Health Act and Section 4 and 5 of the Fair Administrative Action Act and Section 4 of the Access to Information Act.

Article 35- Access to information

74. We submit that the State failed to proactively disclose and publish information on mandatory quarantine facilities in violation of Articles 35(1) and (3) of the Constitution and Sections 4 and 5 of the Access to Information Act, 2016.

75. The 1st -7th Petitioners aver that after they arrived at the Jomo Kenyatta International Airport, passengers waited for hours for information on where they would be quarantined. Some state officials orally communicated that the few government facilities available had quickly filled up because they were less expensive than the private facilities approved by the government as quarantine centres Such as the Crowne Plaza, Four Points Sheraton, Ole Sereni Hotel, Boma Inn, Pride Inn and Tribe Hotel which are five and four-star rated hotels. It was not until 24th March 2020, in the afternoon that the government published a list of 57 available facilities.

76. It only did so after several complaints and after seeing passengers sleeping at the arrival terminal. The 2nd Respondent should have adhered to the Article 10 national values and principles of accountability and transparency in ensuring that all the government-run facilities and government-approved facilities were published in advance, as it affected thousands of Kenyans who were placed in mandatory quarantine to also avoid violating passengers' rights to dignity and inhumane treatment by sleeping on the airport floor.

77. The 2nd Respondent also violated the right to provide medical information for those who were in mandatory quarantine. They withheld the medical results of those in mandatory quarantine pending the payment of their bills.

78. Article 35 (1)(a) enshrines the right of access to information held by the State and sub-article 3 mandates the State to publish and publicise any important information affecting the nation.

79. Section 5 provides for the disclosure of information held by public entities and Section 5(1) states that subject to Section 6, a public entity has the duty to:

> "(c) publish all relevant facts while formulating important policies or announcing the decisions which affect the public, and before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles;
>
> (d)provide to any person the reasons for any decision taken by it in relation to that person …"

80. In the case of ***Katiba Institute v. Presidential Delivery Unit and Others [2017]eKLR,*** the Court interpreted the right of access to information and held at para 34 that the right of access to information isn't granted by the State by the Constitution.

81. Also, in the case of ***Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 2 Others [2013] eKLR***, the High Court held at para 34 that the right of access to information under Article 35 (3) provides for the state's duty to pro-actively disclose information in the public interest as well as to provide for open access to information held by the State for the public.

82. Based on the above law, we submit that the State had a duty under Article 35(3) to promptly proactively disclose information that would affect the public. More so because the information affected other rights of the 1st-7th Petitioners such as the right to dignity, humane treatment and the right to the highest standards of health. If they had prior information on the extensive options available for mandatory quarantine- some of which were provided only later after several passengers could not afford the limited expensive five-star hotels, they would not have mingled with several passengers from all over the world, some coming from countries with high infection rates of COVID 19 and would have chosen a place to sleep instead of being stranded.

83. This information was crucial for them to exercise their other rights and therefore a denial of the information violated their right of access to information.

- *Article 21- State's duty*

84. It is the Petitioner's case that the 2nd Respondent's failure to plan and prepare for the rolling out of the self-paid mandatory quarantine procedures caused the 1st-7th Petitioners and other passengers from several countries to be crowded together at the arrival terminal of Jomo Kenyatta International

Airport. The passengers had to wait for assistance, with no space or facilities to allow them to socially distance themselves in line with government recommendations and best practices. This overcrowding and lack of regard for the safety of the passengers continued when they were transported to their mandatory quarantine facilities when they were forced into crowded lines and placed in crowded busses. Thereby increasing the risk of exposure and infection, which is a violation of the right to health.

85. We submit that the state's failure to prepare for the arrival of the passengers and their movement into quarantine violates Article 21(1), which places the duty on the State and every organ to observe, respect, promote and fulfil the rights in the Bill of Rights. The State had an affirmative duty to put measures in place to protect the health and safety of the passengers by ensuring there was social distancing and arranging a smooth transition from the arrival terminal to the buses and then to the facilities.

86. The state had a positive duty to *protect* the passengers from third parties- in this instance other passengers who could cross-infect them if they had contracted COVID-19, which was a risk factor considering that hundreds of passengers were crowded in a small place and were prevented from leaving the airport for hours as they waited for transport. And, once the transport arrived, passengers were packed in buses to be taken to the mandatory quarantine facilities. The government's treatment of the passengers constituted a threat to the right to the highest attainable standard of health provided in Article 43(1)(a) of the Constitution, which includes the right to be free from interference with one's health.

87. Because of the highly contagious nature of the Coronavirus, potentially exposing hundreds of people to it also threatens the health and safety of all Kenyans, not just the passengers who were directly exposed.

88. Besides, placing people in mandatory quarantine facilities while, at the same time, failing to *promote* the right to health by ensuring that measures are put in place to separate the passengers and systematically move them to the quarantine facilities was both retrogressive, and counterproductive. It was therefore contrary to progressively realizing the right to the highest standard of health under Article 21(2) of the Constitution and Section 4 of the Health Act.

89. We submit that the 2nd Respondent also had a duty to ensure that third parties such as the government-approved facilities for mandatory quarantine such as hotels did not violate the rights of persons in mandatory quarantine. M.W.M avers that in the hotel where she was under mandatory quarantine there was a suspension of services because some of those in the quarantine facilities had failed to pay the bills. This was also a violation of the rights to dignity and humane treatment of those in quarantine.

90. Article 21(1) provides that "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." This language makes it clear that the State has both negative obligations (observing and respecting) and different positive obligations concerning the rights (protect, promote and fulfil). (See See the African Commission on Human Rights case of ***Social and***

Economic Rights Action Centre (SERAC) v. Nigeria 2001 AHRLR 60 (ACHPR 2001) (***SERAC case***) paras 46-47.)

91. The *negative obligation* is to *'respect'* which requires States to refrain from interfering directly or indirectly with the right to the highest attainable standard of health.

92. The *positive obligations* include to *'protect'* which means that States must prevent third parties from interfering with the rights; this includes adopting legislative measures to ensure that private actors or third parties comply with human rights provisions and where they violate the rights an effective remedy is provided; to *'promote'* requires the state to put up measures aimed at the promotion of tolerance, raising awareness and building infrastructure to enhance the enjoyment of rights, (SERAC at para 46) and to *'fulfil'* means that State is required to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to realize the right. (See also South Africa's Constitutional Court in the case of ***Glenister v President of the Republic of South Africa*** [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651, para. 105).

.

93. We, therefore, submit that an analysis of the above law and its application to the facts at hand that the State failed to uphold its duty to observe and respect the rights of the 1st-7th Petitioner who had landed in Kenya, as well the duty to fulfil which required the State to put proper measures in place to ensure that those who entered the country were able to access quarantine facilities and be treated humanely.

- *Articles 28 and 29(f) rights to dignity and humane treatment*

94. We submit that the State also failed to abide by Article 29(f), which bound it to ensure that those in mandatory quarantine be treated in a dignified and not in an inhumane and degrading manner.

95. This was especially the case for Petitioner K.F, who was sprayed with unknown chemicals by Ministry of Health officials without her consent while in quarantine. The Ministry of Health officials told K.F. that they were 'decontaminating' them as well as the area and that the chemicals were harmless. This was an inhuman and degrading treatment that violated the right to the highest attainable standard of health and the right to dignity.

96. Further placing people in quarantine without thereafter making efforts to learn their health background and making provision to cater to any necessary health concerns or lack of provision of basic sanitary essentials at the quarantine centres to protect their dignity goes against the very same right to dignity.

97. The 2nd Respondent also violated Section 5(2) of the Health Act, which states that every person shall have the right to be treated with dignity, respect and have their privacy protected, and Section 9(2) of the Health Act which requires that health care providers must take all reasonable steps to obtain the user's informed consent to treatment.

98. C.M and her 9-year-old daughter P.M and F.A also aver that when they arrived in Kenya, the only lists of quarantine facilities available were five and four-star rated hotels which they could not afford as government facilities were few

and full. As a result, because the 2nd Respondent failed to offer other cheaper facilities they were forced to sleep on the airport arrivals terminal floor and this violated their right to dignity and to be treated humanely.

99. The right to dignity is provided under Article 28 and every state organ and state officer is bound under Article 10 of the Constitution to uphold this right, which is also a national value when implementing any laws or policies. In the South African Constitutional case of ***Dawood and Another v. Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8***, human dignity is stated to be a constitutional value that informs the interpretation of other rights and is part of the analysis of limitation of rights.

100. Article 19(2) of the Constitution states that one of the purposes of protecting human rights and freedoms is to uphold the dignity of individuals. Several courts have emphasised the centrality of the right to dignity and how interconnected it is with other rights.

101. In the Court of Appeal case of ***COI & another v Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR***, the Court held at para 26 that: "regardless of one's status or position or mental or physical condition, one is, by being human, worthy of having his or her dignity or worth respected."

102. In the Constitutional Court of South Africa, several judgments have been issued concerning the right to dignity. In ***Mayelane v. Ngwenyama and Another (CCT 57/12) [2013] ZACC 14*** the Court stated that the right to dignity includes:-

> "…the right bearers entitlement to make choices and to make decisions that affect his or her life – the more significant the decision,

the greater the entitlement. Autonomy and control over one's circumstances is a fundamental aspect of human dignity."

103. We, therefore, submit that the State was therefore bound to uphold the right to dignity of the 1st-7th Petitioners which it failed to do and this was in violation of the right to dignity as well as other rights.

- *Article 43- the right to the highest attainable standard of health and sections 4 and 5 of the Health Act*

104. We submit that the State also failed in its duty to ensure that the mental health of those in mandatory quarantine was monitored and treated. Section 2 of the Health Act defines health to mean a *state of complete mental, physical and social- well-being and not merely the absence of disease or infirmity.* The protocols on quarantine stated that the officials stationed at the quarantine facilities, mostly nurses, were to offer psychosocial support. Instead, they concentrated on the physical health of those in quarantine. Even if they were to have met their obligations, the nurses did not have the qualifications to assess the mental health of those in quarantine. This failure to attend to the psychological cost of quarantine violated their rights to the highest standard of health.

105. Dr Theresia Mutavi a counselling psychologist and psychiatric social worker with more than 20 years of experience has demonstrated in her affidavit sworn on 1 September 2020 that she examined the 1st-7th Petitioners and that there were instances of moderate to extremely severe anxiety, depression, and post-traumatic stress disorder because of some of the challenges that arose when

the State implemented the mandatory quarantine. (See the affidavit of Dr Mutavi indicating the levels of anxiety, depression, and post-traumatic stress disorder on the 1st-7th Petitioners in the following sequence C.M at para 20, P.M at paras 31 and 33, M.O.A at para 36, M.O at para 42, M.W.M at paras 46 and 51, K.F at para 52, F.A at para 58 and K.B at paras 62-64.)

106. This expert analysis is an indication of how the implementation of mandatory quarantine was a violation of the right to the mental health of the petitioners.

107. Further, the actions of the 2nd Respondent withholding medical results caused the 1st to 7th Petitioners mental anguish and affected their mental health as is highlighted in their affidavits which the 2nd Respondent had a duty to protect under Article 43(1)(a) of the Constitution. Petitioners M.O.A and M.O for example stated they had not received their results and the only way they were sure they tested negative for COVID 19 was that no ambulance collected them to take them to an isolation facility as this soon became the way they were sure someone had tested positive for COVID 19.

108. The 2nd Respondent also discriminated in its treatment of people in mandatory quarantine. Some of those who were in quarantine and tested negative were subject to additional 14-day extensions at their own expense each time another person in the facility tested positive for COVID-19. In other facilities, however, people who tested negative could leave even though others in their facility tested positive for COVID-19.

109. Discrimination in the treatment of those in mandatory quarantine facilities is a discriminatory public health practice that violates the right to the highest attainable standard of health care. Unlike other components of the right to health care of the highest attainable standard, that are to be progressively realized, the equal treatment/ non-discrimination of similarly situated individuals requires no special expertise and no resources. It is an immediate realisable aspect of the right to healthcare of the highest attainable standard. The 2nd Respondent was therefore in violation of the 1st -7th Petitioners' rights under Article 43 (1)(a) and 21(2) of the Constitution.

110. We submit that the State had a duty to put measures in place to cater for those who were subject to mandatory quarantine. The nature of the quarantine being mandatory means that the measures are to protect not only a person's health but it's to meet a public health objective. The attainment of public health measures within the State's obligation to protect the greater public cannot be at the cost of individuals.

111. We submit that in the alternative, the State's failure to provide passengers with safe and adequate government-run facilities which meet public health standards meant many were forced to choose to stay in private facilities. By forcing these passengers to pay for the accommodations without giving them suitable alternatives, violated the passengers' right to the highest standard of health care under Article 43(1)(a) of the Constitution.

112. Article 43(1)(a) provides for the right to the highest attainable standard of health. The Health Act is also instructive concerning upholding the right to health.

113. Section 2 of the Health Act defines health as a *state of complete mental, physical and social well-being and not merely the absence of disease or infirmity.*

114. Section 3 provides for the objects of the Health Act as:

> "(b) protect, respect, promote and fulfil the health rights of all persons in Kenya to the progressive realization of their right to the highest attainable standard of health, including reproductive health care and the right to emergency medical treatment;
>
> (c) protect, respect, promote and fulfil the rights of children to basic nutrition and health care services contemplated in Articles 43(1)(c) and 53(1)(c) of the Constitution;
>
> (d) protect, respect, promote and fulfil the rights of vulnerable groups as defined in Article 21 of the Constitution in all matters regarding health."

115. Section 4 provides for the responsibility for health as follows:

> "It is a fundamental *duty of the State to observe, respect, protect, promote and fulfil* the right to the highest attainable standard of health including reproductive health care and emergency medical treatment by *inter alia*—
>
> (a) *developing policies, laws and other measures necessary to protect, promote, improve and maintain the health and well-being of every person*…"

116. Section 5(1) and 5(2) provide for the following standards of health:

"(1) Every person has the right to the highest attainable standard of health which shall include *progressive access for the provision of promotive, preventive, curative, palliative, and rehabilitative services*.

117. The African Commission in ***Purohit & Moore v The Gambia Communication 241/01*** at para 80, held that the enjoyment of the right to health is critical in realizing all the other human rights. The High Court in the case of ***P.A.O & 2 Others v Attorney-General [2012] eKLR,*** recognized that all human beings are entitled to the highest standards of health to allow them to live a life as enshrined in General Comment No. 14 on the Right to Health.

118. In the case of ***Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR*** the Court analysed the right to the highest attainable standard of health as provided in international treaties that Kenya has ratified to include that the right to health is connected to other rights and it also held as follows:

"14. The scope, content and nature of State obligations under Article 12 of the ICESCR have been elaborated by the *Committee on Economic, Social and Cultural Rights (CESCR)*. The *CESCR General Comment No. 14* on *The Right to the Highest Attainable Standard of Health*, the right to health is defined in the following terms; *"... a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life of dignity. The realization of the right to health may be pursued*

through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable."

119. This Court in the case of ***Okiya Omtatah Okoiti & 2 others v Cabinet Secretary, Ministry of Health & 2 others; Kenya National Commission on Human Rights (Interested Party) [2020] eKLR***, analysed the constitutionality of placing people in mandatory quarantine at their costs with the court order of the Magistrate. The Court held that such actions by the State were a violation of the right to health as enshrined in international law which Kenya ratified [Article 16 of the African Charter on Human and Peoples' Rights and Article 12(1) of the International Convention on Economic Social and Cultural Rights and Section 27 of the Public Health Act which required for a magistrate to issue a court order before placing people in quarantine.

120. We, therefore, submit that the actions carried out by the State in the implementation of mandatory quarantine: through placing persons in quarantine at their costs, failing to put proper measures when passengers arrived to contain the spread of COVID 19 and the mental health challenges that arose for those in quarantine as a result of the implementation processes as well as the discrimination in the manner in which extensions in stay were given in mandatory quarantine at the costs of people was arbitrary and in violation of the right to the highest attainable standard of health.

Article 47- Fair administrative action

121. On the issue of fair administrative action, we submit that the 2nd Respondent failed to inform those who tested negative for COVID-19 but who had others who tested positive in their quarantine facility that their quarantine would be extended at their own cost. The extension violated the right to fair administrative action because (i) petitioner M.W.M avers the announcement of this extension was done by the 2nd Respondent on television without even informing those like them who were directly affected by the announcement; and (ii) it was contrary to the protocols and Regulation 12 (4) of the Prevention, Control, and Suppression of COVID 19 Regulations which stated that if persons would only serve 14 days in mandatory quarantine and after that, they would be required to serve a week or two in self-quarantine.

122. M.O avers that he only found out about the extension of additional days on mandatory quarantine the day before being released from mandatory quarantine into self-quarantine as he had initially thought. M.W.M also avers that she only saw a memo (marked as MWM 17 at para 57 of affidavit) from the Ministry of Health stating that her days in mandatory quarantine at her own cost had been extended for an additional 14 days because someone else tested positive and also after she had already been in extended quarantine for 3 days.

123. Article 47 of the Constitution protects the right to air administrative action.

124. Section 2 of the Fair Administrative Action Act defines administrative action to include:

—

"(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) *any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates*".

125. Section 4 (1) and (2) provide that every person has the *right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair* and that every person has the right to be given *written reasons for any administrative reasons* taken against them.

126. Section 4(3) states that where an administrative reason is likely to adversely affect the rights and fundamental freedom of a person, the administrator must provide 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*;…."

127. In the case of ***Republic v. Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Ex parte Kenya Power and Lighting Company Limited [2019] eKLR,*** the High Court held at para 119 that for the court to interfere with the decision of a public body "the applicant will need to show either:- the person or body is under a legal duty to act or make a decision in a certain way and is unlawfully refusing or failing to do so, or a decision or action that has been taken is 'beyond the powers'".

128. Concerning ensuring that any decisions made affecting the rights of persons by public bodies adhere to the requirement of natural justice of prior adequate notice, the case of ***Republic v. Capital Markets Authority & another Ex-Parte Jonathan Irungu Ciano [2018] eKLR*** is instructive where the High Court held as follows at paras 23:

> "23. In my view, the notice contemplated under Article 47 of the Constitution as read with section 4(3) of the Fair Administrative Action Act must not only be prior to the decision but must also be adequate and must disclose the nature and reasons for the proposed administrative action. This was the position in Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR where it was held that:
>
> > "20. Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including "(c) responsive, prompt, effective, impartial and equitable provision of services" and "(f) transparency and provision to the public of timely, accurate information."
> >
> > ...
> >
> > 28. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as

well. (See Donoghue v South Eastern Health Board [2005] 4 IR 217)."

129. We submit that based on the above case law, the 2nd Respondent violated the right to fair administrative action under Article 47 and Section 4 of the Fair Administrative Action Act when it failed to give prior adequate notice that there would be an extension of the time within which quarantine would be served at the person's costs.

- *Article 24- limitation of rights*

130. It is our submission that at the time the passengers were landing in Kenya from 22nd March 2020 when the directives were issued, there was no law regulating placing people in mandatory quarantine at their costs, and the directives issued by the 2nd Respondent were not law. The failure to put these directives into a statutory instrument subject to parliamentary oversight and violated the rule of law and the rights to fair administrative action.
131. The Regulations that put in place mandatory quarantine for 14 days only came into effect on 7 April 2020, after people were already in mandatory quarantine.
132. Article 24(1) requires that the limitation of a right can only take place if it is lawful- in that it is provided by the law. This is to say that the 2nd Respondent unjustifiably limited the rights of the 1st-7th Petitioners by putting them in mandatory quarantine through an oral directive and thus violating their right not to be deprived of liberty without a just cause. Besides, if the 2nd Respondent used COVID 19 as a reason to limit the rights of the 1st-7th Petitioner, this ought to be done only in law for it to be a justifiable limitation in an open and democratic society.

133. In the case of ***Kituo Cha Sheria & 8 others v Attorney-General [2013] eKLR,*** this Court found that Government Directives contained in press releases threatened to violate several rights of refugees and found the directives unconstitutional.

134. Therefore, the limitation of rights created by the mandatory quarantine oral directives in press releases did not meet the first requirement that only a law can limit rights under Article 24(1) of the Constitution. There were no laws in place when the 1st-7th Petitioners arrived in Kenya between 23-25 March 2020 and the Regulations under the Public Health Act on Prevention, Suppression and Control of COVID 19 which deals with quarantine was only enacted on 3 April 2020 which provided for mandatory quarantine for 14 days and not extensions as far as 28 additional days at the cost of those in quarantine thereby also limiting their right not to be deprived of their liberty arbitrarily.

iii. Whether the 2nd Respondent's action of forcefully detaining the 2nd Petitioner for failure to pay bills for mandatory quarantine at a government facility contravened the 2nd Petitioner's rights under Articles 29 (f), 39 and 45 (1) of the Constitution.

135. The 2nd Petitioner, M.O.A avers in his affidavit sworn on 2 May 2020 that he arrived in the country on 23 March 2020 from visiting his family in Australia. He was aware that those who arrived at the airport were required to self-quarantine.

136. He avers he was told to go to the available five-star expensive hotels to go quarantine such as Crowne Plaza, Boma, and Four Points Sheraton hotel but he could not afford to pay the fees which were going up to 90 US dollars a night.

137. It was only after waiting 10 hours later that he entered a National Youth Service Bus in which he was told by the Deputy Inspector of Police that they would be sent to government facilities at the cost of the government.[6]

138. M.O.A was later quarantined at Kenyatta University Conference Centre (KUCC) with 32 other passengers from the airport. He avers they had a meeting with the KUCC management who told them that they should not worry about quarantine costs.[7] He was also told that he would be quarantined for 14 days.

139. However, he stated that one week later he saw a memo posted on the wall marked as MOA 5 in which they were informed to pay 20 dollars a night to ensure a "smooth check out".[8]

140. MOA was later tested and for COVID 19 and had to stay for additional days as he waited for his results. On the date of being informed he tested negative and was to be released, he avers at para 30 that the KUCC management refused to discharge him and 12 other passengers who had failed to pay costs amounting to Ksh 30,000. They were told by the management to call their

[6] M.O.A affidavit at para 17.
[7] Same as above at para 23.
[8] Same as above at para 24.

friends and family to raise the costs to enable them to get discharged from the hospital. However, considering the COVID 19 situation that had an economic strain on his family and friends he could not pay the amount and therefore was detained further.

141. He explains how he struggled to come up with the money to pay for the fees and called persons stationed at the Ministry of Health to try to find a solution to have him released as he couldn't afford the money.[9]

142. The amount of money he had to pay during the detention increased to Kshs 52,000. He stated that he was forced to pay what money he had left, which was 100 Australian dollars and later he was informed that he would be released on paying a balance of Kshs 45 215, which he attached a copy of his discharge bill marked as MOA 7 which the facility management stated that they would still claim from him and took a copy of his Identification card and passport.[10]

143. M.O.A stayed a total of 27 days in quarantine including the period he was detained for failure to pay fees for quarantine.

144. We submit that this was a violation of his rights under Articles 29 (f), 39 and 45(1) of the Constitution. Article 29 provides that:

> "every person has the right to freedom and security of the person, which includes the right not to be—
> (a) deprived of freedom arbitrarily or without just cause;

[9] Same as above at paras 36-39.
[10] Same as above at para 41.

(b) detained without trial...".

145. Article 39, the Constitution reads that "Every person has the right to freedom of movement."

146. Articles 2(6) provides that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." Based on this provision, Kenya has ratified the International Covenant on Civil and Political Rights (ICCPR) which states Article 9(1) states 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."

147. The High Court has dealt with the question of the constitutionality of detention of a person by a non-law enforcement officer in the case of ***Sonia Kwamboka Rasugu v. Sandalwood Hotel & Resort and Another Petition No. 156 of 2011; [2013] eKLR)***, (***Sonia Rasugu*** case) the Court, when it was claimed that a hotel detained a patron for failing to pay their hotel fees. The Court found that the detention was contrary to the right to liberty and human dignity under Articles 28 and 29 of the Constitution as follows at para 28:

> "What emerges from the decisions I have cited above is the centrality of the liberty of the person and the protection from illegal and false imprisonment as one of the fundamental rights and freedoms enshrined in our Bill of rights. Any form of detention not sanctioned by the law that seeks to procure the performance of the contractual

debt is a violation of the right to liberty. It is also an affront to human dignity to detain someone on account of a debt that cannot be enforced against them."

148. The High Court in ***Sonia Rasugu*** also relied on the case of cited ***Sunbolf v. Alford (1838) 3 M & W 248 150 ER 1135*** in which that Court stated:

> "if an innkeeper has a right to detain the person of his guest for non-payment of his bill he has a right to detain him until the bill is paid, which may be life… The proposition is monstrous. Again, if he has any right to detain the person, surely he is the judge in his own cause."

149. Borrowing from foreign case law on the deprivation of liberty, the Constitutional Court of South Africa in the case of ***Malachi vs Cape Dance Academy International and Others (2010) CCT 05/10 ZACC 13*** that:

> "…freedom has two interrelated constitutional aspects: the first is a procedural aspect which requires that no one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable."

150. Also, in the case of ***M.A.O & another v Attorney General & 4 others [2015] eKLR*** at para 99, the Court held that for detention to be lawful, it must be

carried out by lawful authority, must be for a just cause or it amounts to arbitrary detention. (See also ***Daniel Ngetich and Others v. The Attorney General and Others Petition No. 239 of 2014***)

151. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, which Kenya ratified and is part of Kenya law under Article 2(6) provide for criteria that must be met when restricting the freedom of movement which limitations are like Article 24 of the Constitution.

152. Article 45(1) of the Constitution also states that:

> "The family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the State."

153. We submit that by forcefully detaining the 2nd Petitioner, the government facility violated his right to a family life which ought to be protected by the State. Forced detention has the effect of separating persons from their families arbitrarily and thus considering the indivisibility and interconnectedness of rights the right to enjoy a family life was disrupted.

154. Based on the above case law, the forceful detention of the 2nd petitioner for failure to pay for his quarantine fees was a violation of his right to dignity, the right not to be deprived of freedom arbitrarily and without just cause, the right not to be treated in a cruel and degrading manner (Article 29) and the freedom of movement (Article 39) and the right to enjoy a family life (Article 45(1) of the Constitution.

iv. *Whether the announcing of the medical results containing the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Petitioners' health status in public, violated the right to access to information under Articles 35 as read with Sections 4 and 5 of the Access to Information Act No. 31 of 2016 and the rights to privacy under Article 31 as read with Section 11 of the Health Act No. 21 of 2017 and Sections 16(1) of the Persons Deprived of Liberty Act No. 23 of 2014 as well as whether the 2nd Respondent's failure to provide written medical results of the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Petitioners for more than 24 hours after testing for COVID -19 was unreasonable and unlawful*

- *Article 35 -right to information*

155. The 2nd Respondent violated the right to access to information as read with the right to health by failing to provide passengers with accessible information related to their health. It did so primarily by failing to provide the written medical results to those who had undergone COVID-19 testing and tested negative. At several mandatory quarantine facilities, the Ministry of Health officials who were delivering test results failed to issue written results to those who had tested negative for COVID-19. Instead, and for the 1st- 7th Petitioners, they announced to the groups that they had tested negative. Only those who had tested positive were informed in person and taken away by an ambulance to an isolation facility.

156. C.M avers that she and he daughter P.M were tested on 4 April 2020 and that at para 49 their results were read out in front of everyone that they had tested negative. In addition, that no one received their written results.

157. M.O.A avers at para 25 that she was tested twice on 30 March 2020 where she was told she would receive her results in 24 hours which she did not and again, on 10 April 2020 and she but only saw her test results on 19 April 2020 when being released. They were informed that they would know if they tested positive if an ambulance came to pick them up. At para 26 and 27 she indicated that she never received any written medical results when in quarantine and was distressed not knowing if she tested positive.

158. M.O was tested twice, on 2 April 2020 and on 13 April 2020. At para 24 he states that they were informed they would know if they are positive if an ambulance came to pick them and at para 41 he states that after the second test all those in quarantine at the facility he was in were called and told they all tested negative and that one person had tested positive. In addition, at para 46 he states that the Ministry of Health Officials had indicated to them that they would not receive any medical results until they cleared their medical bills.

159. M.W.M states that she was tested on 31 March 2020 for COVID 19 and that the results were released in the media by the 2nd Respondent before they were informed when he stated some persons had tested positive at the facility she was in. She annexes MWM 14 as evidence to show this. She avers at para 50 that the results were communicated to her through the WhatsApp chat group for those in quarantine at the hotel and no results slips were ever issued. M.W.M also avers at paras 83 and 84 that because other people had tested positive at the facility she received a second test on 12 April 2020 which was communicated again on the WhatsApp group by this time the hotel manager that all had tested negative.

160. K.F was tested on the 12th day she was in quarantine and the results did not get released after 24 hours but only after 3 days. At para 40 she states she never received her test results slip and was only told verbally by the Ministry of Health officials together with other residents.

161. F.A avers at paras 29 and 31 that he was tested on 2 April 2020 and all the hotel residents were informed they were negative together in a group.

162. K.B states at paras 37 and 40 that she was tested on 4 April 2020 and she never received her results which promoted her and others at the facility to write an access to information letter to the Ministry of Health requesting for the results marked as "KB 3".

163. Concerning releasing of results within 24 hours, Christine Nkonge in her affidavit at para 11 as read with para 13 annexed protocols of the Ministry of Health available on their website marked as "CN-5" and dated 3 April 2020, which stated that "5. Results will be delivered within 24 hours after sample collection and 8. Following the first negative test, the persons will be released into self-quarantine…"

164. Article 31 of the Constitution protects the right to privacy which includes the right not to have information related to their private affairs revealed. In addition, Section 11(1) of the Health Act, 2016, protects the right to keep health information confidential. It reads that "information concerning a user, *including information relating to his or her health status, treatment or stay in a health facility is confidential* except where such information is disclosed

under order of court or informed consent for health research and policy planning purposes."

165. Section 2 of the Person's Deprived of Liberty Act defines a detained person to mean "a person deprived of liberty under the authority of the law either by a law enforcement official for the purpose of investigation of a crime or so as to be charged with an offence or by a private person where there is reasonable suspicion that a crime has been committed; or a person deprived of liberty by order of or under de facto control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship or for protection;" and also states that a "person deprived of liberty" means "a person who has been arrested, held in lawful custody, detained, or imprisoned in execution of a lawful sentence and Section 3 provides for the rights of persons deprived of liberty and subsection 1 states that such persons are entitled to the protection of all fundamental rights and freedoms subject to such limitations as may be permitted under the Constitution.

166. This means that for purposes of the Act, those who are placed in quarantine fit the description of persons deprived of liberty and detained persons and they are afforded protection under the Constitution and the Act.

167. In the issue that is related to receiving medical results and the results being kept confidential, section 16 of the Act is instructive as it provides for confidentiality on the health information of persons deprived of liberty is provided in Section 16 of that Act. It states that:

(1) A person deprived of liberty *has a right to confidentiality regarding his or*
her health status."

168. We, therefore, submit that the 1st-7th Petitioners had a right not to have information relating to their private affairs such as health status unnecessarily revealed. Information relating to their health, COVID-19 status, and possible continued detention in what is ostensibly a health care facility is confidential and ought not to have been announced openly in front of other third parties. For the 1st-7th Petitioners, the announcement of the medical results was either done in front of other people in the quarantine facilities and for M. W.M her results were announced in a WhatsApp group by a Ministry of Health official in the facility and later by another third party the manager at the hotel. In making the statements in front of other persons without their permission, the State violated the Petitioners' right to privacy protected under Article 39 of the Constitution.

169. In the High Court case of ***Samson Mumo Mutinda v. Inspector General National Police Service and 4 Others Petition No. 38 of 2014; [2014] eKLR***, the court opined on the right to privacy that:

"... [23] The right to privacy protects a person's autonomy. The breach of the right of privacy either involves violation of the law that permits infringement of the right consistent with the limitation provided under Article 24 or failure to obtain consent of the person..."

170. The issue of privacy concerning disclosure of medical information was also considered in the case of ***JLN and 2 Others vs Director of Children Services and 4 Others Petition No. 78 of 2014***. The Court held that:

> "…The right to privacy is not absolute. Implicit in the protection accorded is that information relating to family and private matters must not be "unnecessarily revealed." Indeed, counsel for the petitioner submitted that there are instances where the right to privacy in respect of the patient/client relationship may be abridged. He cited the case of W v Edgell [1990] 1 ALL ER 835 where Lord Bingham set out the principles under which a doctor may disclose the information held in confidence. The principles were as follows;
>
> i. A real and serious risk of danger to the public must be shown for the exception to apply.
> ii. disclosure must be to a person who has legitimate interest to receive the information.
> iii. disclosure must be confined to that which is strictly necessary (not necessarily all the details) …" (See also ***David Lawrence Kigera Gichuki v Aga Khan University Hospital [2014] eKLR*** at para 29).

171. We submit that the State must ensure that the medical results of those who tested for COVID 19 in the different quarantine centres were not shared with third parties. Failure to do so violated their right to privacy of their private matters.

172. The State also violated the right to information on health status when it withheld the medical results and discharge forms of those who were in mandatory quarantine pending the payment of their bills. The duty of the State was to do the tests and provide the written results and withholding of results was a disregard of the right to access to information.

173. The 1st-7th Petitioners aver in their affidavits that they only received the written results of their COVID 19 tests upon the payment of any amounts due to the quarantine facilities with some being denied access to the medical results until they cleared their bills.

174. Article 35 enshrines the right of access to information and reads:

> "(1) Every citizen has the right of access to—
> (a) information held by the State; and
> (b) information held by another person and required for the exercise or protection of any right or fundamental freedom."

175. The above provision is reiterated in section 4(1) of the Access to Information Act. In addition, Section 2 of this Act provides for the following definitions:

> "information" includes all records held by a public entity or a private body, regardless of the form in which the information is stored, its source or the date of production".
> "personal information" means information about an identifiable individual, including, but not limited to—
> *"(a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, age, physical,*

psychological or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;
(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved …"

176. Section 9(2) provides for the processing time for the release of critical information related to the life and liberty of a person. It reads: "(2) Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application."

177. The Supreme Court in the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014]eKLR*** at para 252 recognized the right of access to information held by the public, in that instance the IEBC. Further in the High Court case of ***Katiba Institute v Presidents Delivery Unit & 3 others Petition No. 468 of 2017; [2017] eKLR***, the Court analyzed the right of access to information and held at para 28 that the right to information enables citizens to be able to enjoy other rights and stated as follows at para 31:

"The Constitution is therefore clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information own the state, state officer or public body."

178. It is our submission that the information related to the health status of the 1st-7th Petitioners was very crucial for them to exercise their right to liberty- from the quarantine facilities and related to their right to life concerning whether they had contracted COVID 19. Therefore, the State had a duty to ensure that they received their results within at least 48 hours. In this instance, most of them were promised they would receive their results within 24 hours, as also highlighted in the COVID 19 Protocols, which never happen, and they had to receive their results upon paying their hotel bills and bills in government facilities. It was also a violation of their right to withhold such critical information because of the payment of bills. These actions were therefore contrary to their right of access to information protected under Article 35 of the Constitution read together with sections 4(1) and 9(2) of the Access to Information Act.

vii. Whether the 2nd Respondent's failure to provide for guidelines for the treatment of children in quarantine facilities is a violation of the 1st Petitioner's child's rights under Articles 43(1)(a) and 53 (1)(c) of the Constitution.

- *Article 53-Rights of children*

179. The State also violated the rights of the PM, the 1st Petitioner's child in the mandatory quarantine by failing to provide guidelines or protocols on the treatment of children in quarantine facilities. This failure violated the best interest of the child and constituted a breach of the State's duty to address the needs of the vulnerable in society such as children as required under Articles 21(3), 53(1)(c) and (2), 43(1)(a) and Section 3 (d) of the Health Act.

180. PM, who is now 10 years old suffered severe psychological effects because of the implementation process of the mandatory quarantine. P.M was not provided help or assistance to deal with the psychological challenges she faced after sleeping on the airport floor because the government was unable to provide mandatory quarantine facilities that were affordable and accessible to her mother.

181. Dr Theresia Mutavi, a qualified counselling psychologist and psychiatric social worker avers in her affidavit dated 1st September 2020 that she screened PM for depression, anxiety and post-traumatic stress disorder. At paras 31 and 33 she states that on assessing PM she established that PM had moderate anxiety and post-traumatic stress disorder from seeing her mother's anxiety which was aggravated by the financial stress her mother experienced. She also avers at para 35 that PM had 'expressed how she slept in the airport when she arrived in the cold, the back and forth [in looking for a place to sleep in the hotels]' and that it was traumatic that they had to sleep on the floor.

182. C.M also avers in her affidavit at paras 25,35 and 53 that when her daughter slept on the floor at the airport she was crying and appeared distressed by the situation therefore as a mother she felt that hers and her daughter mental health were not good.

183. The State has not provided guidelines to address how to support and treat children in mandatory quarantine. For children, it has failed to put in place

measures to deal with effects on children because of prolonged detention which threatens their physical and mental health and welfare.

184. Failing to provide guidelines for handling children in mandatory quarantine also violates Articles 21(3), 43(1)(a) and 53 (1)(c) of the Constitution to the extent that the right of the child to the highest attainable standard of health is immediately and not progressively realized.

185. Article 53 provides for the right of the child. Specifically, sub-article (1)(c) enshrines the child's right to health care and sub-article (2) that a child's best interest is of paramount importance in every matter concerning the child.

186. Article 43(1)(a) also provides for the protection of the right to the highest standard of health which includes mental health.

187. Section 3 (c) and (d) of the Health Act provides that the object of the Health Act is to:

> "(c) protect, respect, promote and fulfil the rights of children to basic nutrition and health care services contemplated in Articles 43(1)(c) and 53(1)(c) of the Constitution;
>
> (d) protect, respect, promote and fulfil the rights of vulnerable groups as defined in Article 21 of the Constitution in all matters regarding health."

188. Article 24 of the Convention on the Rights of the Child of 1989, which Kenya has ratified and is part of Kenya law under Article 2 (6) enshrines the State's

duty to provide the child with the highest attainable standards of health. General Comment No. 15 (2013) on the rights of the Child to the enjoyment of the highest attainable standard of Health (Art 24) which this court can rely on (See Mitu-Bell Welfare Society v. Kenya Airport Authority and Others Supreme Court Petition No. 3 of 2018), the following paragraphs are critical: para 7 states that achieving the right to health of children is dependent on the realization of other rights in the CRC; para 12 outlines that the best interest of the child must be observed in all health-related decisions concerning the child, para 73 provides that the core obligation of states about the right to health include (a) reviewing national policies where necessary; and para 74 provides that states should show commitment to progressively realizing the right to health of children even in emergency and crises.

189. This court is also obligated under section 4(3) of the Children Act while considering any disputed matters involving children to give primacy to the best interest of children.

190. In the case of ***M W K v another v Attorney General & 3 others [2017] eKLR*** the Court interpreted the term the "best interests of the child" in Article 53 of the Constitution and held that:

> "96. In terms of Article 53 of the Constitution, in all matters concerning children (including litigation or Police investigations) [33], their best interests are of paramount importance. Article 53 of the Constitution must be interpreted to promote the foundational values of human dignity, equality and freedom. The reach of Article 53 extends beyond those rights enumerated in the Bill of Rights, it creates a right that is independent of the other rights specified in the

> Bill of Rights. It establishes a set of rights that courts are obliged to enforce. [34]
>
> …
>
> 98. The inclusion of a general standard (‘the best interest of a child’) for the protection of children’s rights in the Constitution can become a benchmark for the review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children’s lives.”

191. We submit that an analysis of the facts and the law that there were loopholes in terms of the State’s implementation of mandatory quarantine and its effect on children. At the time the policies and regulations were set down the State had not provided adequate guidelines on the treatment of children who were placed in mandatory quarantine and this was not in the best interests of the child.

192. Even though there was a pandemic that can be classified as a crisis and emergency, General Comment No. 15 mandates state parties to review national policies and demonstrate the progressive realization of the right to the highest attainable standard of health, which includes mental health of children.

193. Therefore, the State’s failure to put guidelines for children in mandatory quarantine, which resulted in P.M suffering mental health distress violated her rights as a child as well as her right to health.

viii. What are the appropriate remedies in the matter

194. Article 23 (3) of the Constitution provides for the appropriate reliefs or remedies available for Courts to uphold and enforce rights. It reads:

> *"In any proceedings brought under Article 22, a court may grant appropriate relief, including—*
>
> *(a) a declaration of rights;*
>
> *(b) an injunction;*
>
> *(c) a conservatory order;*
>
> *(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;*
>
> *(e) an order for compensation; and*
>
> *(f) an order of judicial review." (Emphasis added).*

155. In the Supreme Court case of ***Jasbir Singh Rai and 3 Others v. Tarlochan Singh Rai Estate Petition No. 4 of 2012; [2013] eKLR (Jasbir Rai)*** Mutunga CJ (as he then was) in his concurring opinion stated that Articles 22 and 23 give the courts a special and wide responsibility for the enforcement of the Bill of Rights.

156. According to the Supreme Court in the case of ***Communications Commission of Kenya & 5 othe3rs v Royal Media Services Limited & 5 others Petition Nos. 14, 14A, 14B and 14C of 2014; [2014] eKLR (CCK)*** at para 359 the word 'including' in Article 23(3) means that the reliefs listed in the provision are not exhaustive and the Court can therefore issue other appropriate relief outside those listed.

157. Kenyan Courts have interpreted the term 'appropriate relief' to mean an 'effective remedy' to constitutional violations. See the High Court decisions in ***Law Society of Kenya v Attorney General & another; Mohamed Abdulahi Warsame & another High Court Petition No. 307 of 2018; [2019] eKLR*** at paras 78-79; ***Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex Parte Council of county Governors & another Miscellaneous Application 291 & 314 of 2016; [2017] eKLR***, at para 139, ***Republic v Council of Legal Education another Ex-Parte Mount Kenya University Miscellaneous Application 16 of 2016*** at paras 143-145. See also Article 8 of the Universal Declaration of Human Rights.

158. The Constitutional Court of South Africa in ***Fose vs. Minister of Safety & Security [1997] ZACC 6; 1997(7) BCLR 851; 1997 (3) SA 786*** at para 69 and ***Minister of Health and Others V Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033*** at para 101). has stated that 'appropriate remedy' may mean that in some instances, the courts may have to fashion new remedies and be innovative to achieve its goal of protecting rights.

159. About remedies, in the Uganda case of ***Tinyefuza v Attorney General of Uganda*** [1997] UGCC3 it was held that: "if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course."

160. We therefore submit and pray that the Court upholds the petition and issues the prayers listed on pages 142-145 of the petition.

161. On the issues of costs, we pray because this is a matter filed in the public interest that each party bears it's own costs. My Lord we submit that given this Petition is brought in the public interest, each party should bear their own costs. We are guided by ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR***[11] where the Supreme Court held that:

> *"Just as in the Presidential election case, Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others, Sup. Court Petition No. 5 of 2013, this matter provides for the Court a suitable occasion to consider further the subject of costs, which will continually feature in its regular decision-making. The public interest of constructing essential paths of jurisprudence, thus, has been served; and on this account, we would attach to neither party a diagnosis such as supports an award of costs."*

DATED at NAIROBI this 17th day of DECEMBER 2021.

ALLAN MALECHE

ADVOCATE FOR THE 1st - 8th PETITIONERS

and

EMILY KINAMA

ADVOCATE FOR THE 9TH PETITIONER

DRAWN & FILED BY: -
Allan Maleche, Advocate,
C/O KELIN
C/O KELIN
Kuwinda Lane, off Langata Road, Karen C
P O Box 112 - 00202 KNH Nairobi

[11] *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR* available at http://kenyalaw.org/caselaw/cases/view/95668/.

Mobile: +254 751 292 520
amaleche@kelinkenya.org;

And

Emily Kinama, Advocate,
C/O Katiba Institute,
5 the Crescent, Off Parklands Road
Westlands
P.O. Box 26586-00100,
Nairobi.

info@katibainstitute.org
emily.kinama@katibainstitute.org ; +254704594962

TO BE SERVED UPON: -

1. The Attorney General of the Republic of Kenya
State Law Office
Harambee Avenue
P.O BOX 40112 – 00100,
Nairobi.
info@statelawoffice@ag.go.ke
Mitchelle.omom@ag.go.ke
bittaemmanuel@gmail.com

2. Carolene Kituku & Co Advocates,
Tetezi Tower, 1st Floor,
George Padmore Road,
Nairobi
carolene.kituku@gmail.com

3. Caroline Oduor and Associates
Blue Violet Plaza
1st Floor, Wing A, Suite No. 101
Kindaruma Road Off Ngong Road
P.O. Box 18872-00100
NAIROBI
info@coduoradvocates.co.ke

4. C.B Mwongela & Co Advocates
View Park Towers, 13th Floor
Monorovia Street/Utalii Lane

P.O Box 8841-00200
NAIROBI
charles@cbmwongela.com
office@cbmwongela.com