

COMMUNIQUE

FA v CS, MINISTRY OF HEALTH PETITION NO E008 OF 2023

INTRODUCTION

On September 21, 2023, four brave women living with HIV, supported by the Ambassador for Youth and Adolescents Reproductive Health Program (AYARHEP) and the Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) and Katiba Institute filed a groundbreaking petition at the High Court of Kenya in Kisumu. This petition aims to hold the Cabinet Secretary for Health and the Kenya Medical Suppliers Authority accountable for their failure to ensure consistent, accessible, and high-quality healthcare services for Persons Living with HIV (PLHIV).

THE ISSUE

Since January 2020, PLHIV in Kenya have faced severe delays in accessing life-saving HIV medicines and essential treatment commodities in public health facilities. The root causes of these shortages include disputes between the Government of Kenya and the United States Agency for International Development (USAID), which has led to critical ARV donations not reaching those in need. Additionally, allegations of corruption and mismanagement within the Kenya Medical Supplies Authority (KEMSA) have eroded trust with international aid agencies, resulting in these agencies delivering ARVs independently.

In response, KEMSA imposed taxes on these essential commodities, further exacerbating the crisis. This standoff led to extensive stockouts of vital drugs and commodities for HIV treatment in public health facilities across several counties.

CONSTITUTIONAL VIOLATIONS

These events have given rise to several constitutional violations:

- a. **Right to the Highest Attainable Standard of Health:** The 2nd and 3rd Respondents failed to ensure the provision of ARVs, care, and assistance to PLHIV, infringing upon their right to the highest attainable standard of health under Section 4 of the Health Act.
- b. **Right to Life:** The negligence of the Respondents in supplying essential drugs and commodities puts the right to life of PLHIV at risk, who rely on these medications for their survival.
- c. **Right to Access Information:** The 2nd and 3rd Respondents failed to provide essential information on the availability and distribution of ARVs and laboratory goods, infringing upon PLHIV's right to access information as guaranteed under Section 10 of the Health Act.
- d. **Right to Equal Protection and Freedom from Discrimination:** The shortage of essential medicines, disproportionately affecting those who cannot afford private healthcare, violates PLHIV's right to equal benefit and protection under the law.

INVOLVED PARTIES

There are seven Petitioners, including PLHIV, AYARHEP, KELIN, and Katiba Institute. The three Respondents are the Attorney General, the Cabinet Secretary of Health, and the Kenya Medical Supplies Authority (KEMSA).

REMEDIES SOUGHT

The Petitioners seek the following remedies from the Court:

- A declaration that the 2nd Respondent is responsible for ensuring accessible, available, acceptable, and high-quality health services for PLHIV.
- A declaration that the failure of the 2nd Respondent to provide continuous and uninterrupted ARV and HIV commodity supply violates several constitutional articles.
- A declaration that the 2nd and 3rd Respondents must proactively provide information to the public on ARV availability.
- An order requiring the 2nd Respondent to make public the reforms at KEMSA and its suitability for distributing essential medicines.
- An order compelling the 2nd and 3rd Respondents to publish information on ARV availability and distribution in public health facilities.
- An order for the 2nd Respondent to collaborate with PLHIV communities and state agencies to develop a long-term strategy for consistent ARV provision.
- An order for the 2nd Respondent to provide general damages to Petitioners affected by the constitutional violations.
- A requirement for the Respondents to file affidavits with the Court detailing their progress in complying with these orders.