
COMMUNIQUE

ERICK OKIOMA & 12 OTHERS VS MUTAHI KAGWE, CABINET SECRETARY FOR HEALTH & 8 OTHERS FOR HEALTH & 8 OTHERS

INTRODUCTION

On Thursday, 2nd July 2020, 13 Petitioners filed an urgent case against various several government officials in the High Court in Nairobi for failure on their part to provide information sought from them in accordance to Article 35 of the Constitution of Kenya, 2010 and the Access to Information Act, 2016 in the context of the COVID-19 pandemic responses in Kenya.

The law obligates the State and public entities to provide information, both proactively and upon request, so that citizens can be informed of the State's actions, participate in State affairs, and enjoy the rights protected under the Constitution. Although the right of access to information is always important, timely and accurate information is particularly important during a global health pandemic when the right to life, health and the freedom and security of citizens are at stake.

The Court has since certified the matter as urgent and given directions for the Respondents to be served by close of business on Friday 3rd July 2020. The case will be mentioned before the Court on Tuesday 7th July 2020 for further directions and orders.

WHO IS INVOLVED?

This petition has been filed by 13 petitioners; the 4th – 8th Petitioners are Kenyans who were held in mandatory quarantine. While the 1st Petitioner, 2nd Petitioner and the 3rd Petitioners are community health champions in Kisumu County, Mombasa County and Western Kenya respectively. **These seven individuals have asked the Court to keep their identities anonymous to protect the confidentiality of their health status and personal information.**

The 9th Petitioner is the Katiba Institute, a research, policy and litigation institute that works to further constitutionalism in Kenya. The 10th Petitioner, Kenya Legal and Ethical Issues Network On HIV/AIDS (KELIN), is a non-partisan, non-profit organization and non-governmental organization working to protect and promote health-related human rights in Kenya.

The 11th Petitioner, The Kenyan Section of the International Commission of Jurists Kenya (ICJ Kenya) is a non-governmental, non-profit, and member-based organization of jurists committed to the realization and promotion of human rights, justice, rule of law and democracy in Kenya and around Africa. The 12th Petitioner, Transparency International Kenya (TI Kenya), is a not-for-profit organization aimed at developing a transparent and corruption-free society through good governance and social justice initiatives. The 13th Petitioner, is a Staff Attorney at Women's Link Worldwide, an international non-profit human rights organization working in East Africa, Latin America and Europe.

(9th to 13th Petitioner have brought the case in the public interest)

There are nine Respondents in the case. That is; the Cabinet Secretary in charge of the Ministry of Health the Acting Director-General at the Ministry of Health, the governor of Siaya County, the Council of Governors, the Cabinet Secretary for Interior and Coordination of National Government, the

Inspector General for the Kenya Police Service and the Chief Executive Officer of the Kenya Medical Practitioners' and Dentists Council. These are offices to which the requests for information, which the petition concerns were sent to by the Petitioners.

In addition, the Cabinet Secretary for Information and Communications has been sued for failure to develop Regulations under the Access to Information Act, 2016 which has hindered the implementation of the Act, while the Commission on the Administration of Justice has been sued as the oversight body under the Act.

There is one Interested party: The Kenya National Commission on Human Rights, established under Article 59(1) of the Constitution and the Kenya National Commission on Human Rights Act, 2011, and charged with the mandate of promoting the respect of human rights in Kenya.

FACTS OF THE CASE

COVID-19 was declared a pandemic by the World Health Organization on 11th March 2020. Kenya's first COVID-19 case was confirmed only a day later on 12th March 2020.

On 20th March, the government requested that public service vehicles reduce the number of passengers they carry to limit the risk of spreading the virus during commutes. On 22nd March 2020, the government announced that all international flights, except for cargo flights, would be suspended as of midnight on 25th March 2020. Any travelers, entering the country before the suspension were quarantined in government-designated facilities.

The government also imposed a nationwide curfew which prohibited movement between 7 PM and 5 AM. The Cabinet Secretary for Interior and Coordination of National Government published the Public Order (State Curfew) Order, 2020 which gave effect to the President's announcement. The curfew has since been extended severally, with the hours being reviewed to between 9.PM and 4.AM on 6th June 2020.

Subsequently, the Cabinet Secretary for Health published the Public Health (Prevention, Control, and Suppression of COVID -19) Rules, 2020—the 'Prevention and Control Regulations'. The regulations gave the Cabinet Secretary the authority to designate 'any place' an infected area and to regulate activities within infected areas when 'deemed necessary for preventing the spread of or for the eradication of COVID-19.

On 6th April, 2020 the Cabinet Secretary for Interior published the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules 2020—the 'Movement Restriction Regulations'. The Movement Restriction Regulations imposed broad limitations on individual movement and transportation. With certain exceptions, the rules limited people's movement into and out of an infected area during a restriction period. The rules also prohibited both public transportation and private vehicles from going in or out of an infected area. The Regulations also introduced the requirement that people wear 'proper face masks' in public places and maintain the one-meter distance.

Several issues have arisen in the implementation of these measures overtime which include: *how the mandatory quarantine was being implemented, including the protection of the human rights of persons in mandatory quarantine and arbitrary extensions of the quarantine period for persons in quarantine without proper communication to them, the handling of burial of persons suspected to have contracted COVID 19, such as James Oyugi, the support for health care workers to enable them respond to the pandemic effectively, the procurement and distribution of Personal Protective Equipment, the use of mandatory quarantine as punishment for persons breaching the curfew orders, travel restrictions or directives on wearing of masks and the implication of the imposition of movement restrictions on other rights such as access to sexual and reproductive health rights for women and girls in the country.*

Because of the threat to the lives, health and safety of 'every single Kenyan' and the drastic, inconsistent erratic measures taken by the Respondents, the Petitioners wrote a series of letters requesting information, individually as well as with other organizations and individuals. The Respondents have failed to respond and/or provide any information with respect to the different letters from the Petitioners as itemized below, as well as those sent by the individual petitioners in their personal capacities that cannot be shared herein to protect their identity and rights to privacy:

- i. [Open Letter to the Cabinet Secretary of Health: A Rights-Based Response is Critical in Dealing with COVID-19;](#)
- ii. [Open Letter on Implementation of Mandatory Quarantine in the COVID-19 Response;](#)
- iii. [Protest Letter against the Undignified Sendoff of the Late James Oyugi: Request for Information;](#)
- iv. [Open Letter and Request for Information on Provision of Support to Health Care Workers in the COVID-19 Response;](#)
- v. [Urgent Open Letter and Request For Information Regarding the Arbitrarily Extension Of Quarantine Period beyond 28 Day;](#)
- vi. [Open Letter and Request for Information on use of Quarantine as a form of Punishment and Criminalization of COVID-19 Response.](#)

LEGAL ISSUES

The essence of this petition is whether the manner in which the government has kept critical information especially in its response to COVID-19 is constitutional. In particular, the Court is asked to decide whether the information sort was information that concerned the life and liberty of the persons, and therefore it ought to have been provided within 48 hours of the requests as stipulated by Section 9(2) of the Access to Information Act 2016.

The National assembly enacted the Access to Information Act, 2016 to give effect to the rights provided under Article 35. It establishes a framework for responding to information requests and disseminating information to the public. However, regardless of the Petitioners efforts to seek information on the various measures taken by the government in response to COVID-19, the same has not been provided.

In light of the extensive threat posed by COVID-19, the failure to provide the information sought has compromised the Petitioners and the general public's rights to health, life, freedom and security of the person and the rights women and girls to sexual and reproductive health rights. Under the Access to Information Act, information sought relating to the life or liberty of a person should be provided within 48 hours of the request which the Respondents to do.

The Petition is also brought against the Cabinet Secretary for information and communications and the Commission for Administration of Justice for failure on their part to develop Regulations under the Act which has hindered the realization of the right to information for the Petitioners.

It is upon this premise that the Petitioners assert, that the Respondents have breached the values and principles of rule of law, human rights, good governance, transparency and accountability, and the provision to the public of timely and accurate information that are required of them under Articles 10 and 232(1)(f) of the Constitution.

WHAT DO THE PETITIONERS WANT FROM THE COURT?

- a. A declaration be issued that the respective Respondents' failure to proactively publish and publicize important information about the pandemic and the government's response violates the right of access to information as guaranteed under Article, 35(1)(a), Article 35(3) and the Access to Information Act.
- b. A declaration be issued that the respective Respondents' failure to provide the information sought by the Petitioners violates their right to freedom of expression as guaranteed under Article 33(1) (a).
- c. A declaration be issued that the respective Respondents' failure to provide the information sought by the Petitioners violates their right to life as guaranteed under Article 26(1).
- d. A declaration be issued that the Respondents' failure to affirmatively provide information about the COVID-19 pandemic and the government's response violates the right to life as guaranteed under Article 26(1).
- e. A declaration be issued that the failure to provide the information sought by the Petitioners violates their right to health as guaranteed under Article 43(1)(a).
- f. A declaration be issued that the Respondents' failure to affirmatively provide information about the COVID-19 pandemic and the government's response violates the right to health as guaranteed under Article 43(1)(a).
- g. A declaration be issued that the Respondents' failure to affirmatively provide information regarding the COVID-19 pandemic and the government's response violates Articles 10, Article 232 of the Constitution and threatens the right to health under Article 43.
- h. An order compelling the Respondents to provide the Petitioners with the information sought in the letters dated 6 April 2020, 9 April 2020, 15 April 2020, 17 April 2020, 18 April 2020, 22 April 2020, 27 April 2020 and 28 April 2020 within 48 hours of the court order.
- i. An order compelling the Commission on Administration of Justice to exercise its statutory mandate under Section 21(1)(a) of the Access to Information Act, 2016 to investigate the alleged violations of the Act.
- j. An order of compelling the Cabinet Secretary in charge of information and communications, in consultation with the Commission on Administration of Justice, to draft and publish for public comment proposed regulations within 90 days of the court order on:
 - i. The manner in which applications under the Access to Information Act, 2016 may be made;
 - ii. The form in which information requested under the Access to Information Act, 2016 may be supplied; and
 - iii. The measures to be taken by public entities to facilitate the exercise of the right under Article 35 of the Constitution and the implementation of the Access to Information Act, 2016.
- k. An order compelling the Cabinet Secretary in charge of information and communications, in consultation with the Commission on Administration of Justice, to draft and publish for public comment proposed regulations on the procedures for requesting and supplying information that concerns the life and liberty of a person within 90 days of this order (under Section 9 of the Access to Information Act, 2016).

- l. An order of compelling the Cabinet Secretary for health in consultation with the CEO of the Kenya Medical Practitioners' and Dentists Council and other relevant stakeholders to update and re-publish the 'Kenya Practical Guide for Continuity of Reproductive, Maternal, Newborn and Family Planning Care and Services in the Background of COVID-19 Pandemic' (RMNH Guidelines) to include comprehensive information to health care workers and women and girls on the provision of essential services which includes access to **ALL** sexual and reproductive health and rights.
- m. An order that the Cabinet Secretary for Health pays general damages to the Petitioners who were in mandatory quarantine for the emotional distress these Petitioners underwent as a result of the inadequate information provided during their time in mandatory quarantine.
- n. That the Respondents, within twenty-one (21) days from the date the order, file affidavits with the Court detailing their compliance with the court orders.

Download Court Documents here:

- i. Media Advisory: <https://bit.ly/2ZrHuW2>
- ii. Notice of Motion: <https://bit.ly/2NUFbW2>
- iii. Certificate of Urgency: <https://bit.ly/3gnelN1>
- iv. Petition 218 of 2020: <https://bit.ly/2ApcvBo>
- v. Affidavits of the 1st, 2nd and 3rd Petitioners in support of the Petition: <https://bit.ly/2D7LB27>
- vi. Affidavit of the 9th Petitioner, Katiba Institute: <https://bit.ly/3eXpk56>
- vii. Affidavit of the 10th Petitioner, KELIN: <https://bit.ly/2YT2HZQ>
- viii. Affidavit of the 11th Petitioner, ICJ-Kenya: <https://bit.ly/38vFL6b>
- ix. Affidavit of the 12th Petitioner, TI-Kenya: <https://bit.ly/31GRgXd>
- x. Affidavit of the 13th Petitioner, Women's Link Worldwide: <https://bit.ly/2NRChkX>