

Petition to the National Assembly concerning the lack of implementation of Court judgements by the Ministry of Health

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Parliament Buildings,
P.O. Box 41842 – 00100,
NAIROBI.

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OF KENYA
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VERY URGENT

*Dr. ...
Kindly advise and
prepare petition
preparation.
5/8/2020*

RE: PETITION TO THE NATIONAL ASSEMBLY CONCERNING THE LACK OF IMPLEMENTATION OF COURT JUDGEMENTS BY THE MINISTRY OF HEALTH

We, the undersigned,

being representatives of institutions drawn from the health, Women's Rights and human rights sectors, individual citizens of the Republic of Kenya, and residents of different Counties;

DRAW the attention of the National Assembly to the non-compliance of court Judgments by the Ministry of Health. In particular, we draw your attention to the following cases adjudicated by the Judiciary and for which the Ministry has disregarded compliance:

1. Detention of patients who cannot pay their medical bills in public health facilities

1.1 THAT, the petitioners in Petition 562 of 2012 filed an application against the Honourable Attorney General, the then Minister of Local Government, the then City Council of Nairobi, the then Minister for Medical Services and Pumwani Maternity Hospital alleging a number of violations to their rights guaranteed under the Constitution following their detention at the Pumwani Maternity Hospital owing to their inability to pay their medical bills.

1.2 THAT, the Court, on 7th September, 2015 granted orders in favour of the Petitioners including a declaration that –

*Ms Brigitta Muti LC
Please process the petition
and forward feedback by
tomorrow 6/8/2020, 11:00am
5/8/2020*

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- (a) the detention of the Petitioners by Pumwani Maternity Hospital was unlawful;
- (b) the Government of Kenya ought to take steps, including the enactment of laws and policies, to protect all patients from arbitrary detention in health centres in the future;
- (c) the City Council of Nairobi, the Minister for Medical Services and Pumwani Maternity Hospital –
 - (i) develop clear guidelines and procedures for implementing the waiver system in all public hospitals; and
 - (ii) take the necessary administrative, legislative and policy measures to eradicate the practice of detaining patients who cannot pay their medical bills.

1.3 THAT, the Court also awarded costs to the 1st and 2nd Petitioners in the sum of Kshs. 1,500,000/= and Kshs. 500,000/= respectively together with costs of the petition and interest on costs and damages from the date of judgement till payment in full.

1.4 THAT post this judgment, whereas there is in place an implementation manual for Linda Mama (free maternity care), no concrete steps have been taken by the Ministry of Health and public health institutions to offer free maternity care services. To date, there are still many instances of women being required to pay for items used during their delivery and their detention when they fail to clear these bills.

1.5 THAT the Ministry of Health has also failed to put in place the measures outlined by the Court to prevent the detention of patients in public facilities.

1.6 THAT despite numerous engagements with the Ministry of Health, very little has been done towards implementing the orders made by the Court and as a result, public hospitals continue to detain women who are unable to pay their medical fees and who have been discharged.

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2. *Failure to issue P3 Forms free of charge contrary to the Directive of the Court in Petition No. 2B of 2017*

- 2.1 THAT the petitioner in petition number 2B of 2017 sought the intervention of the Court against inter alia, the Hon. Attorney-General, the Inspector General and the Cabinet Secretary, Ministry of Health on the basis of the fact that they had introduced, allowed, ignored and refused to curb the illegal levying of costs on P3 Form in contravention of Articles 48 and 50 of the Constitution and the Kenya National Health Policy 2014-2030.
- 2.2 THAT as a result most victims have been forced to part with monies ranging from Kshs. 100/= to Kshs. 1,500/= and victims who have been unable to raise the said fee have in some instances either been unable to have their complaints prosecuted, had their cases dismissed for lack of sufficient evidence or been forced to withdraw their complaints.
- 2.3 THAT despite the Court finding the fee charged on the issue and filing of the P3 form to be illegal and making an order declaring that the P3 form “or any form required or issuable to victims of crime is free of charge and that no levy shall be imposed” and prohibiting any public or medical officer in charge of a medical health facility at the National and County level of government from levying any fee for the issuance or filing of the form, this is yet to be implemented.
- 2.4 THAT the P3 forms are vital in the institution and prosecution of offences as it forms part of the vital part of the evidence to be adduced by victims of crime and the imposition of the fee impedes access to justice by victims of crime and is hence a violation of their right to access to justice under Article 48 of the Constitution.
- 2.5 THAT despite the orders made by the Court and our efforts to pursue this matter with the Respondents, the Inspector General and the Ministry of Health are yet to implement the court order and as a result, victims of crime continue to have their right to access justice impeded.
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3. *Failure to conduct public participation and re-issue the Task Sharing Policy Guidelines 2017 to 2030*

3.1 THAT the Petitioner (the Association of Kenya Medical Laboratory Scientific Officers) in Petition No. 282 of 2017 filed a petition against the Ministry of Health and the Hon. Attorney General on the basis of the fact that the Ministry of Health had developed Task Sharing Policy Guidelines 2017-2030 without the involvement of the Petitioner or conducting public participation contrary to the principles of public participation under Article 10(2)(a) of the Constitution. In addition, the Petitioner indicated that the policy guidelines, which were under implementation, were faulty in that they allowed laboratory staff to conduct tests that required highly skilled laboratory staff and as a result, there were already cases of misdiagnosis.

3.2 THAT the Court, having considered the parties, quashed the Task Sharing Policy Guidelines 2017-2030 and found that the Guidelines –

- (a) violated Article 10 of the Constitution for lack of public participation and Articles 41, 43(1)(a) and 46(1)(a) and (c) of the Constitution for allowing non-laboratory staff to conduct tests that require highly skilled laboratory staff;
- (b) were inconsistent with section 19(1) of the Kenya Medical Laboratory Technicians and Technologists Act.

3.3 THAT the Court further issued a restraining order against the Ministry of Health from deliberating upon, developing or approving the Guidelines without public participation.

3.4 THAT to-date, the Ministry of Health is yet to withdraw the guidelines contrary to the orders of the Court. As a result, the guidelines continue to be applied in the conduct of laboratory tests by personnel who are unqualified to do so thereby jeopardizing the health and therefore the lives of Kenyans owing to misdiagnosis.

4. *Failure to satisfy decrees issued by the Court with respect to various petitions*

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- 4.1 THAT the Courts have made orders in various matters requiring the Ministry of Health to satisfy decrees that have been issued against it and in particular –
- (a) in Judicial Review 1 of 2014 (Republic versus Principal Secretary, Ministry of Health & Another ex parte Rashid Ndiema) in which the Court made an order compelling the Principal Secretary to satisfy the decree issued in Nakuru Cause No. 250 of 2013, Rashid Ndiema v the Principal Secretary, Ministry of Health & Attorney General to pay the applicant Kshs 811,112/= and costs;
 - (b) in Judicial Review 173 of 2016 (Republic versus Principal Secretary, Ministry of Health ex parte Susan Wamaitha Kamau) in which the Court made an order compelling the Principal Secretary to settle decree in Nakuru CMCC 357/2004 and pay the said decretal sum to the applicant herein Susan Wamaitha Kamau which now stands at Kshs. 396,261/=; and
 - (c) in Judicial Review 202 of 2017 (Republic versus Principal Secretary, Ministry of Health & Attorney General ex parte Geoffrey Gatwai Mwangi) in which the Court made an order compelling the Principal Secretary and the Accounting Officer of the Ministry of Health to pay to the exparte applicant the sum of Kshs. 685,221/= as per the Certificate of Order against the Government dated 19th December, 2016 issued in Kerugoya CMCC No. 181 of 2010.
- 4.2 THAT the Principal Secretary in the Ministry of Health is yet to comply with the court orders and despite pursuing this matter with the Ministry of Health, there has been no effort on the part of the Ministry to comply.
- 4.3 THAT as a result, the aggrieved parties continue to suffer injustice from the continued failure by the Ministry to comply with the said Court orders.
5. ***Failure by the Ministry of Health to adhere to the orders made by the Court in Petition No. 266 of 2015 to –***
- (a) ***re-issue Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya and the National Training***

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*Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies; and
(b) compensate the petitioner in Petition No. 266 of 2015 in line with the Court orders issued therein*

- 5.1 THAT, the petitioners in Petition 266 of 2015 filed a petition following the death of the 2nd Petitioner's child who had procured an unsafe abortion and who later died from the complications that arose from the procedure.
- 5.2 THAT prior to this, the Director of Medical Services, Ministry of Health had, via memos issued to healthcare providers, withdrawn the Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya (Standards and Guidelines) and the National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies (the Curriculum) on the basis that there was no need to train health care providers on the delivery of safe abortion services or import medicines for medical abortions as abortion on demand is illegal under the Constitution and further, the Standards and Guidelines and the Curriculum would provide an avenue for health care providers to use the same for unintended purposes.
- 5.3 THAT as a result, girls who undergo acts of sexual violence or require emergency intervention are unable to access safe quality services which action would undermine the right to access safe and legal abortion services thereby leading to the procurement of unsafe abortions and the resulting death or disability of such girls.
- 5.4 THAT the Court, having considered the petition made orders declaring inter alia that—
- (a) the memos by the Director of Medical Services withdrawing the Standards and Guidelines and the Curriculum were unlawful, illegal, arbitrary, unconstitutional and hence null and void ab initio and thereby quashed;
 - (b) abortion is illegal in Kenya save for the exceptions provided under Article 26(4) of the Constitution;

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- (c) pregnancy resulting from rape and defilement, if in the opinion of a trained health professional, poses a danger to the life or health of the mother may be terminated under the exceptions provided under the said Article; and
- (d) the Respondents jointly and or severally pay to the Petitioner a sum of Kshs. 3,000,000/=.

5.5 THAT the Attorney General never filed an appeal to this matter. To-date, the Ministry of Health are yet to re-issue the Standards and Guidelines Curriculum and further, it has failed to compensate the Petitioner as ordered by the Court.

5.6 THAT among the recommendations reviewed and noted by the Government of Kenya in its submission to the Universal Period Review (UPR)(2019 / 2020) includes clause 144.51 which commits to ‘ *Immediately implement the High Court judgement in Petition No. 266 of 2015 by reinstating the standards and guidelines on reducing maternal mortality and morbidity related to unsafe abortion and the training curriculum for medical professionals in public hospitals*’

5.6 THAT despite numerous attempts to engage with the Respondents with a view to ensuring compliance the same has not yielded any fruits and the Respondents are yet to take any steps towards compliance with the orders made by the Court.

3 THAT, we have made the best efforts through emails, letters and physical meetings to have these matters addressed by the Ministry of Health all of which have failed to give a satisfactory response.

4 THAT the Government of Kenya made several voluntary commitments related to the right to health of women and girls of Kenya during the ICPD+25 – Accelerating the Promise which took place in Nairobi, Kenya from 12-15, November 2019, to mark the 25th anniversary of the International Conference on Population and Development (ICPD+25). These commitments are part of an international effort to ensure that the promise of the ICPD Programme of Action and 2030 Agenda are achieved.

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- 5 **THAT**, none of these issues raised in this Petition is pending in any court of Law, Constitutional or any other legal body.

WHEREFORE, your humble petitioners pray that the National Assembly-

1. Investigate and establish the level of implementation of the directives issued and orders given by the Court in the cases that are the subject of this Petition;
2. Directs that the Cabinet Secretary to the Ministry of Health –
 - (a) allocate adequate monies towards satisfaction of decrees and payment of damages to petitioners in accordance with the orders made by the Courts in the various petitions outlined in this Petition;
 - (b) put in place and implement policies, guidelines and such administrative measures to prevent the unlawful and arbitrary detention of members of the public in health facilities for failure to pay their medical bills and put in place a waiver system for that purpose;
 - (c) withdraws the Task Sharing Policy Guidelines 2017-2030 and conduct meaningful public participation prior to reviewing and implementing the Guidelines; and
 - (d) issues a memo on the re-instated Guidelines for Reducing Morbidity and Mortality due to Unsafe Abortion in Kenya and the National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies and put in place measures to avail safe abortion services to girls and women in need of urgent medical interventions;
3. Review and enact the legislation necessary to prohibit the detention of persons in public health facilities for non-payment of medical fees, the payment of fees on P3 Forms and to impose obligations on duty bearers to ensure that the rights of persons seeking medical treatment are upheld; and
4. Direct that the Cabinet Secretary report to the National Assembly within ninety (90) days on the status of compliance with the Court orders and any directives that may be issued by the National Assembly.

Dated this 5th day of August 2020.

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No	NAME	ADDRESS	I.D. No.	SIGNATURE
1	Edhar Ochieng	Kibera	25446290	
2	RUTH MUMBI	MATHARE	21961643	
3	Rachael Mwikali Mueni	Mathare	31017337	
4	VICTORIA AICHO	Mathare	26071167	
5	Catherine Wangui	Kibera	26153748	
6	ALLAN MALFICITE	112-00202 ^{kwit}	22497956	
7	NERIMA WERE	112-00202	25075033	
8	ACHIENG ODERO	62323-00200	28962339	
9	VICTOR RASUQU	51005-00100	22070986	
10	FANNE IRERI	460 463240000	23092131	
11	NELLY MUNYASIA	1154-00521	22159670	
12	MAGEDA ESOLTO		27496335	
13	Tabitha Scogy	22556-00400	24258252	
14	JEDIDAH MAINA	677-00502	22438889	
15	Mwikali Kimani	19389-00202	21857828	
16	JUDITH OKAL	1192-00100	11843726	
17	BERRICE NJEN	59760-00100	25146400	
18	CHRISTINE NKONGE	25686-00100	22797846	
19	SOPIA LETEIPAN	5834-00100	23458133	
20	LUGY KIANGIKU NJENGA	75654-00200	22307111	
21	Willem Mutile	895-00501	31517250	
22	ESTHER KIMANI	10A02-00100	23541981	
23	Mercy Oongo	677-00502	28608118	
24	John Nyamu	20322-00200	4827734	
25	Mammy Kachambwa	UPPERHILL	2870812	
26	NICKSON KIMETH	Mkolongo	14430369	
27	Diana Gichengo	KIKUYU	24338297	
28				
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If presented by a Member of Parliament:

Counter signed by Hon. Esther M. Pausaris Member of Parliament for Nairobi County Constituency.

Hon. ,
Member of Parliament
Constituency.

Nairobi County.
Women Representative

MEMO

TO : THE DEPUTY CLERK, NATIONAL ASSEMBLY

THRO' : THE DIRECTOR LEGAL SERVICES, N-A

FROM : LEGAL COUNSEL

DATE : 12TH August, 2020

*Formulated, the petition
satisfies the requirements
of the Act and the SO
and may be tabled
for consideration
12/8/20*

RE: PETITION TO NATIONAL ASSEMBLY TO CONCERNING THE LACK OF IMPLEMENTATION OF COURT JUDGEMENTS BY THE MINISTRY OF HEALTH

The above matter refers and your instruction to the Legal Directorate to peruse and establish whether the Petition by Hon. Esther M. Passaris, complies with the law and Standing Orders. The Petitioner prays that National Assembly investigates and establish the level of implementation of directives issued by the Courts.

We have perused the Constitution, Petition to Parliament (Procedure) Act, 2012 and the National Assembly Standing Orders and find that the Petition as presented satisfies the requirements of the Petition to Parliament (Procedure) Act, 2012 and the National Assembly Orders and should therefore be forwarded to the Speaker for tabling in the House.

Submitted for consideration and further directions.

A handwritten signature in blue ink, appearing to be 'BK' or similar initials, enclosed in a circular scribble.

Brigitta K. Mati

LEGAL COUNSEL II