

CM (Suing on her Behalf and on Behalf of PM a Minor) & 8 others v Attorney General & 2 others; Independent Medico-Legal Unit (IMLU) (Interested Party); Makanyengo & another (Amicus Curiae) (Petition 151 of 2020) [2023] KEHC 22332 (KLR) (Constitutional and Human Rights) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22332 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 151 OF 2020

HI ONG'UDI, J

SEPTEMBER 22, 2023

BETWEEN

**CM (SUING ON HER BEHALF AND ON BEHALF OF PM A
MINOR) 1ST PETITIONER**
MOA 2ND PETITIONER
MO 3RD PETITIONER
MWM 4TH PETITIONER
KF 5TH PETITIONER
FA 6TH PETITIONER
KB 7TH PETITIONER
**KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV & AIDS
(KELIN) 8TH PETITIONER**
KATIBA INSTITUTE 9TH PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT
CABINET SECRETARY, HEALTH 2ND RESPONDENT
**CABINET SECRETARY, INTERIOR AND COORDINATION OF NATIONAL
GOVERNMENT 3RD RESPONDENT**

AND

INDEPENDENT MEDICO-LEGAL UNIT (IMLU) INTERESTED PARTY

AND



JUDGMENT

1. The petition dated 5th May 2020 was filed under Articles 3, 10, 19, 20, 22 and 258 of *the Constitution* for the alleged contravention of the petitioners' constitutional rights under Articles 19, 21, 28, 29, 39, 43, 47, 48 and 53 of *the Constitution*. Accordingly, the petitioners seek the following orders:
 - a. A declaration that the 2nd and 3rd respondents actions of arresting and detaining in self-paid mandatory quarantine facilities and designated 'curfew breakers holding places', persons who have violated curfew orders under the *Public Order Act*, Cap 56 as read with the Public (State Curfew) Order, 2020 is a violation of Articles 29(f), 39, 43(1)(a), 48, 49, 50 and 51 of *the Constitution* and Section 8(6) of the Public Order, Act.
 - b. A declaration that the 2nd and 3rd respondents' actions of arresting and detaining in self-paid mandatory quarantine, persons accused of violating 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 is contrary to the rule of law under Articles 10,29(f),43(1)(a),49,50 and 51 of *the Constitution* and additionally violates Regulation 10 of the Public Health (Prevention, Control and Suppression of COVID 19)Rules,2020 and Regulation 9 and 11 of the Public Health (COVID 19 Restriction of movement of persons and related measures)Rules,2020.
 - c. An order of prohibition against the 2nd and 3rd respondents from detaining in designated 'curfew breakers holding places' and/or mandatory quarantine, persons who have been arrested for contravening the curfew orders under the *Public Order Act*, Cap.56 as read with the Public (State Curfew) Order 2020.
 - d. An order of mandamus compelling the 2nd and 3rd respondents to release persons arrested and detained in curfew breakers holding places' and/or mandatory quarantine for contravening the curfew orders under the *Public Order Act*, Cap.56 as read with the Public (State Curfew) Order 2020 and to present such persons in court for trial in order for the court to impose sanctions in accordance with *the Constitution* and prescribed law.
 - e. An order of prohibition against the 2nd and 3rd respondents from detaining in designated curfew breakers holding places and/or mandatory quarantine, persons who have been arrested for committing offences under 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.
 - f. An order of mandamus compelling the 2nd and 3rd respondents to release persons arrested and detained in curfew breakers holding places and /or mandatory quarantine for contravening the curfew orders under the Public Health (COVID19 Restriction of Movement of persons and other related measures) Rules,2020 and *Public Health Act* (Prevention, Control and Suppression of COVID 19) Regulations,2020 and to present such persons in court for trial in order for the court to impose sanctions in accordance with *the Constitution* and prescribed by law.



- g. A declaration that the directives issued by the 2nd respondent with respect to detaining persons who broke curfew orders in mandatory quarantine at their own cost and curfew breakers holding places, is not a justifiable limitation of rights under Article 24 of *the Constitution*.
- h. A declaration that the 2nd respondent acted ultra vires in issuing directives on detaining persons who have contravened the curfew orders in mandatory quarantine as well as curfew breakers holding places and the 3rd respondent acted ultra vires in implementing the directives, contrary to Article 47 and Sections 4 and 5 of the Fair Administrative Actions Act and the rule of law national values and principles under Article 10 of *the Constitution*.
- i. A declaration that the 2nd respondent infringed the petitioners rights and the rights of other passengers who arrived between the 23rd March and 25th March 2020 under Articles 21 and 43 (1)(a) of *the Constitution* as read Sections 4 and 5 of the *Health Act* when it failed to put measures in place to prevent the spread of COVID 19.
- j. A declaration that the 2nd respondent's implementation of mandatory quarantine was in violation of the 1st to 7th petitioners rights under Articles 28, 29(f), 31, 39, 43(1)(a) of *the Constitution*.
- k. A declaration that 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 Article 29(f), 39 and 45(a) of *the Constitution*.
- l. A declaration that the 2nd respondent's failure to provide written medical results of the 1st to 7th petitioners for a period of more than 24 hours after testing for Covid 19 was unreasonable and the announcing of the medical results containing the 1st to 7th petitioners' health status in public was in violation of the right to access information under Article 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.
- m. A declaration that the 2nd respondent by requiring the 1st petitioner's child to pay for mandatory quarantine violated the child's right to healthcare under Article 53(1)(c) of *the Constitution*.
- n. A declaration that the 2nd respondent's failure to provide for guidelines for the treatment, handling and management of children in quarantine facilities is a violation of the 1st petitioner's child's rights under Article 43(1)(a),53(1)(c) and 53(2) of *the Constitution*.
- o. The 3rd respondent issues a circular within seven days from the date hereof stating that the arrest and detention of persons in designated curfew breakers holding places and/or mandatory quarantine facilities is prohibited.
- p. The 2nd respondent in consultation with the county governments and non-state actors in the health sector within 14 days from the date hereof, revise the COVID 19 quarantine protocols published on 27th March 2020 so that it is compliant with *the Constitution* and that it incorporates principles from the Interim Guidance on considerations for quarantine of individuals in the context of containment of the coronavirus disease (COVID 19) published by the World Health Organization on 19th March 2020.
- q. An order of mandamus compelling the 2nd respondent to develop and publicize guidelines on the care of children in quarantine facilities.



- r. An order for special damages for the 1st to 7th petitioners for the costs they paid in mandatory quarantine and extended mandatory quarantine as particularized below:
 - i. C.M. - Ksh. 112,000
 - ii. M.O.A - Ksh.6785
 - iii. M.W.M - Ksh. 169,200
 - iv. K.F. - Ksh.98000
 - v. F.A. - Ksh.65000
 - s. An order that the 2nd respondent pays the general damages for the 1st to 7th petitioners for the physical and emotional distress the petitioners underwent in mandatory quarantine and for the 2nd, 3rd and 4th petitioners emotional distress for the extension of the mandatory quarantine.
 - t. That the 2nd and 3rd respondents do within 21 days from the date hereof, file affidavits in this Court detailing their compliance with the implementation of these orders.
2. Following the declaration that COVID 19 is a public health emergency by the World Health Organization (W.H.O) on 30th January 2020, the then President of Kenya, His Excellency Uhuru Kenyatta on 28th February 2020 established the National Emergency Response Committee on Coronavirus (NERC) headed by the 2nd respondent. The virus was later on 11th March 2020, declared as a pandemic by W.H.O.
 3. On 13th March 2020 the 2nd respondent announced Kenya's first COVID19 case. Owing to this, the 2nd respondent on 22nd March 2020 announced that the NERC had decided that all persons who violate the self-quarantine protocols would be forcefully quarantined for 14 days at their cost and thereafter arrested and charged in accordance with the *Public Health Act*.
 4. Grounded on this directive all persons who arrived in Kenya by air from 22nd March 2020 were required to enter into self-paid mandatory quarantine. This at the beginning was conducted at Kenyatta University, Kenya Medical Training College at Nairobi and Kenya School of Government. The other government approved facilities were hotels such as Crowne Plaza, Boma Inn, Ole Sereni, Hillpark Hotel and Four points by Sheraton. Furthermore, on 25th March 2020, the 3rd respondent enacted an order, under Section 8 of the *Public Order Act* issuing a nationwide curfew between 7.00 PM and 5.00 AM.
 5. This action was opposed by the 8th and 9th petitioners among other civil societies for the reason that the mandatory quarantine and isolation of persons affected by COVID 19 was uncoordinated, unplanned and not guided by any policy.
 6. On 3rd April 2020 the 2nd respondent published the Public Health (Prevention, Control and Suppression of COVID 19) Regulations, 2020 which provided that quarantine would be limited to 14 days. Moreover, the persons who had already been detained in the facilities were further required to be held for another 14 days if a person in their facility tested positive for COVID 19. These Rules further provided that a medical officer of health was authorized to inspect the premises of anyone who tested positive for COVID 19 and could force persons in the premises to be detained in a quarantine facility.
 7. The Public Health (COVID 19 Restriction of Movement of Persons and Related Measures) Rules, 2020 enacted on 6th April 2020 further empowered the 2nd respondent to designate any area in Kenya an infected area hence limit transport services in the infected area. This Rules also prohibited public



gatherings. In addition to this the 2nd respondent published four other orders which established that the Nairobi Metropolitan Area and the Counties of Mombasa, Kilifi and Kwale were restricted areas.

8. Correspondingly on 17th April 2020, the 2nd respondent issued the Public Health (Restriction of movement of persons and related measures) Variation Rules, 2020 in which restricted the operation of ferry services and imposed criminal penalties for violations of those restrictions under Rules 4A and 5(5).
9. The crux of this petition is not the government's implementation of the COVID 19 quarantine Rules by the government, but the manner in which the government implemented and enforced the mandatory quarantine which is argued to have been contrary to its constitutional obligations.
10. The petitioners also took issue with the fact that despite the existence of these Rules and Regulations and attendant penalties for offences committed therein, the 2nd and 3rd respondents failed to uphold the law, by ordering that anyone in breach of the curfew orders or the Public health rules be arrested and detained at their own costs in mandatory quarantine. According to them the government in doing so occasioned grave violation of human rights in a manner which is not justifiable under Article 24 of [*the Constitution*](#).

The 1st Petitioner's case

11. The 1st petitioner in her affidavit dated 2nd May 2020 avers that she was living and working in Malawi prior to the COVID 19 pandemic where there had been no reported case of corona virus at the time. She left Malawi on 23rd March 2020 with her 9 year old daughter, P.M. and made her way back to Kenya before the border was closed. On arrival they were informed by the Kenya Airways crew that they would be subjected to mandatory quarantine. They were taken through a long process as they awaited further communication and direction. That there were General Service Unit (GSU) officers at the airport entrances to ensure compliance.
12. She deposes that after waiting for 7 hours they were transported to Crowne Plaza Hotel where they were informed that they had to pay for their stay for the 14 days of quarantine. Those who could not pay including herself and her daughter were returned to the Airport terminal where they slept on the floor without being given any food.
13. They were finally taken to Hillpark Hotel on 25th March 2020 where she was asked to pay Ksh.8000 per night for the 14 days. At the facility, they were not attended to by any medical officer. Since the staff feared getting in contact with them they would leave their food at the doors and take off. She informs that at the lapse of the 14 days, on 4th April 2020 the passengers at her hotel were tested for COVID 19 and released verbally on 6th April 2020 upon testing negative. They had to borrow money from friends to pay for all their bills. This left them traumatized.

The 2nd Petitioner's case

14. In his affidavit dated 2nd May 2020, he informs that he travelled from Australia to Kenya on 21st March 2020 arriving on 23rd March 2020. He was not aware of the mandatory quarantine but only knew of self-quarantine at home. After a long wait at the airport, he and others were informed that they would be taken to the Boma Hotel by the National Youth Service (NYS) buses, and would pay 90 US dollars per day for the 14 days. The passengers upon hearing this protested stating that they did not have money to pay. They were then given other hotel options to choose from. He however refused to go to any as he did not have the money to pay for the accommodation.



15. He deponed that persons who were not able to pay the hotel bills were taken to government facilities. He among others were taken to Kenyatta University where they were required to pay 20 US dollars per night. There, the health officials informed them that they would be there for 14 days as per the Ministry's guidelines. He was tested twice for COVID 19 that is on 30th March 2020 and 10th April 2020 and told to expect the results within 24 hours. He only received the results which were negative on 19th April 2020. To him the experience was horrible as he was not supplied with masks and neither were his beddings changed often. The ordeal caused him great inconvenience, emotional distress and anxiety.

The 3rd Petitioner's case

16. In his affidavit dated 3rd May 2020 he avers that he arrived in Kenya from Pakistan on 25th March 2020. He states that the health officials informed them that they could choose from 57 facilities where they could spend their mandatory quarantine. He chose Grace House Resort at Kilimani where he was expected to pay Ksh.7000 per day for the 14 days. He appealed to his employer and family to help him pay the bill.
17. He deposed that as they waited to be transported, he noted that the COVID 19 protocols such as social distancing were not observed. This was also the state in the crowded buses that they were transported in. At the hotel, the public health officials came on a daily basis to check their temperatures. After the lapse of the quarantine period, he was tested on 2nd April 2020 and found to be negative. He notes however that 3 people tested positive for the coronavirus at their hotel. This made the whole group to be quarantined for a further 14 days. Aggrieved by this, the persons wrote to the Ministry of Health stating their plight and the financial strain on them. They did not receive any response.
18. He averred that they were tested a second time on 13th April 2020, and were informed the next day that only one person had tested positive. No results were given to them as expected hence violating his right to information. They were however informed that they could be released the next day upon paying the pending hotel bill. He states that the experience took a psychological toll on him.

The 4th Petitioner's case

19. In her affidavit dated 2nd May 2020 she deponed that she arrived from Singapore on 23rd March 2020. She equally recounted the facts as stated by the other petitioners on arrival at the airport. Her mother managed to raise enough funds for her to stay at Pride Inn Azure at Ksh.126, 000. Those not able to pay the hotel bills were sent to government facilities which were cheaper.
20. She deposes that she was tested for COVID 19 on 31st March 2020 and 4th April 2020 and tested negative both times. They were however informed that the mandatory quarantine would be extended for a further 14 days due to the positive cases that had been confirmed at their hotel. She in total stayed at the hotel for 21 days and paid Ksh.169,200. They were released on 12th April 2020. She deposes that the experience left her distraught and made her go through immense mental stress.

The 5th Petitioner's case

21. In her affidavit dated 3rd May 2020, she avers that she travelled to Kenya from London on 24th March 2020. Riding on the facts as stated by the other petitioners she chose to spend her mandatory quarantine at the Kenya School of Government but was told it was full. She ended up being taken to Mash Park Hotel where they were to pay 50 US dollars a night.



22. She informs that the Ministry of Health officials came to the hotel the second day and kept in communication with them the whole time. However due to the stressful situation of quarantine she experienced panic attacks during her stay there. She was tested Covid - 19 on the 12th day of quarantine. She was told verbally that she had tested negative. She and others were released on the 15th day of quarantine after paying the hotel bills.

The 6th Petitioner's case

23. In his affidavit dated 3rd May 2020 he averred that he arrived in Kenya from Malawi on 23rd March 2020. He like the 1st petitioner was taken to Crowne Plaza Airport Hotel but was unable to pay hotel fee and was returned to the Airport terminal. On the next day he was taken to Hillpark hotel where he was asked to pay Ksh.7000 per night. He averred that on 27th March 2020 the Ministry of Health officials came to the hotel, and he informed them that he suffered from chronic sinusitis. A doctor visited the hotel the following day and after examining him told him that his condition was not a sign of COVID 19.
24. He deposes that he and others were later tested for COVID 19 on 2nd April 2020 and were informed on 6th April 2020 that they had tested negative and could leave once they had settled their hotel fees.

The 7th Petitioner's case

25. In her affidavit dated 3rd May 2020 she deposed that she arrived in Kenya from the United States of America on 24th March 2020. She upon being told that the government facilities were full opted to go to Hillpark Hotel as it was the cheapest in the list of hotels. She sought assistance from her parents to pay the hotel charges. The Ministry of Health officials came on 26th March 2020 to get their health details. She informed them that she is asthmatic. She was later on tested for COVID 19 on 4th April 2020. After enquiring and calling the Ministry she was told she had tested negative. This was on 6th April 2020.
26. Since she and other 5 persons had not managed to raise the whole hotel fee and so could not be released. They petitioned the government for financial assistance. It is upon her mother taking a loan that she was able to pay and be released.

The 8th Petitioner's case

27. In its' affidavit dated 3rd May 2020 and sworn by Allan Achesa Maleche deposes that the Ministry of Health in its initial publication had indicated that persons who had travelled into Kenya were required to self-quarantine for 14 days which in essence would accomplish the same purpose with mandatory quarantine.
28. It is deposed in light of this that the measure to abolish self-quarantine and impose mandatory quarantine was not accompanied by reasons yet less restrictive measures were available as an alternative. Being that this act restricted a person's liberty and freedom of movement, it is argued that the same should have been implemented in compliance with *the Constitution* and the rule of law.
29. It is further deposed that this action caused the 8th and 9th petitioners among other civil societies to raise concerns on the implementation of the mandatory quarantine and isolation of persons affected by the corona virus. They argued that this was uncoordinated and not guided by policy as captured in their advisory dated 28th March 2020.
30. He avers that the stakeholders were concerned that whilst the government made persons be mandatorily quarantined in various facilities, no measures were set up to protect the workers in the



facilities from infection. Further that the mandatory quarantine was in fact exposing the persons therein to a higher possibility of contracting the virus as witnessed in the congested manner of transporting the persons and conditions in the government facilities. Likewise that, the government forced persons to select from either expensive hotels or from a government facility that had deplorable living conditions. Either way the persons were expected to pay the accommodation charges for the whole period.

31. In like manner it is noted that the persons in the facilities were not provided with the quarantine protocols. Further that their mental and physical health were not regarded in the process. Additionally it was noted there was no provision for the children in the quarantine facilities, and the COVID19 test results were never communicated within 24 hours as promised.
32. He deposes that these revelations further caused 27 organizations and 47 individuals to write to the 2nd respondent on 6th April 2020. The concerns raised therein were not addressed and more people continued to remain in the protested conditions.
33. It is deposed that the government's decision in implementation of the mandatory quarantine was arbitrary and unreasonable and contrary to W.H.O's guidelines dated 19th March 2020 to Countries before implementation of quarantine measures. He further averred that the government neglected and failed to follow the laid down guidelines both internationally and nationally in properly implementing mandatory quarantine.

The 9th Petitioner's case

34. This petitioner through Christine Nkonge filed its affidavit in support dated 3rd May 2020. She deposed that the Ministry of Health on 3rd April 2020 published on their website 'the COVID 19 Mandatory Quarantine Site Protocols: Interim Guidelines' which provided guidance on how quarantine would be conducted. On the same day, the Ministry published the 'COVID 19 Mandatory Quarantine Protocols' which provided information such as results delivery would be done within 24 hours among others. Likewise the Ministry published the Public Health (Prevention, Control and Suppression of COVID 19) Regulations, 2020 that stated that quarantine would be limited to 14 days.
35. It is deposed that despite these elaborate and detailed guidelines, the Ministry of Health on 4th April 2020 that persons detained in quarantine facilities would be held for an additional 14 days if a positive case was reported at their facility. This additional time would also be at their expense in the said facilities.
36. She further deposed that the 2nd respondent likewise went on to publish the Public Health (COVID 19 Restriction of Movement of Persons and Related Measures) Rules, 2020 and four more orders on 6th April 2020. He further issued the Public Health (Restriction of movement of persons and related measures) Variation Rules, 2020 on 17th April 2020. These Orders and rules listed offences and penalties for their breach such as those violating the curfew.
37. She deposed that on 3rd May 2020 following the numerous debates of persons being held in quarantine, the 2nd respondent announced that persons who breached the curfew order would not be held in government facilities as had been done but be handled by the Inspector General in a designated 'curfew breakers holding place'. She thus deposed that the Government is under an obligation to promote, observe, respect and protect the rights of its citizens as provided in *the Constitution*. This is legal requirement similarly echoed in international law was not observed in implementation of the COVID 19 protocols and Rules.
38. The petitioners' case was further supported by the supplementary affidavit of Dr. Teresia Mutavi dated 1st September 2020. She deposed that she is a counselling psychologist and psychiatric social



worker, and had sessions with the 1st to 7th petitioners for purposes of ascertaining the impact that the mandatory quarantine had on them.

39. She deposes that her findings were that the fear and anxiety experienced by the 1st petitioner in the mandatory quarantine led to her developing severe depression, severe anxiety and severe Post-Traumatic Stress Disorder which was also the finding for the other petitioners, save for the 1st petitioner's daughter who was found to have experienced moderate anxiety as a result of the mandatory quarantine.
40. These petitioners in a nutshell owing to their ordeal depose that the State failed to put in place measures to ensure they were not exposed to COVID 19. Further they decry the State's act of putting all passengers who had travelled into the country into mandatory quarantine yet some of the countries had not reported any positive cases of COVID 19. Equally, the petitioners are aggrieved that they were required to meet the costs of the mandatory quarantine and were even detained longer when they could not raise the facilities fees. They are as well aggrieved that the State failed to admit that the COVID 19 protocols in these facilities were not adhered to.

The Respondents' case

41. In reply to the petition the respondents filed grounds of opposition dated 29th July 2021 on the premise that:
- i. The petitioners have failed to appreciate the role of the police service in the maintenance of law and order in the face of the COVID-19 restrictions.
 - ii. The COVID-19 rules and restrictions enjoy a presumption of constitutionality having been passed in accordance with the provisions of the law.
 - iii. The petitioners have failed to appreciate the role of the law enforcement officials in enforcing the COVID-19 regulations and protocols.
 - iv. The petitioners have failed to prove and demonstrate specifically the manner in which the respondents violated their rights to privacy and access to information.
 - v. The petitioners have misapprehended and misunderstood the provisions of the impugned *Access to Information Act* and *Fair Administrative Action Act*.
 - vi. The petitioners have failed to demonstrate that the emotional, physical and psychological distress suffered by the petitioners if any was occasioned by the direct actions of the respondents.
 - vii. The petitioners have failed to demonstrate that the rights which were limited by the State with regards to COVID-19 restrictions were rights which may not be limited under the law.
 - viii. Under Article 24 of *the Constitution*, the State has a right to limit the rights of persons.
 - ix. The petition herein is premised on hearsay as the petitioners have failed to adduce any evidence of any conversations or actions which are alleged.
 - x. The petitioners have failed to meet the requirements of Section 107 of the *Evidence Act*, which provides that 'he who alleges must prove'.
 - xi. The petitioners have failed to provide justification for the grant of the orders for costs paid during mandatory quarantine by the State in absolute violation of the principle of privity of contract.



- xii. The petitioners have failed to effectively justify the need for any supervisory orders with regard to COVID-19 rules and protocols in complete violation of the principle of separation of powers.
42. The respondents further filed a replying affidavit dated 25th August 2021 sworn by Dr. Patrick Amoth who was the acting Director General for Health. He began by informing that owing to the imminent threat that was occasioned by the confirmation of the first Covid 19 patient on 13th March 2020 in Kenya, the government had to put in place urgent interventions to stop and control spread of the virus whilst protecting all the persons in the Country. One of the consequences of these measures was curtailment of the movement of persons while in quarantine.
43. He deponed that in view of the situation above, the government had to consistently put in place contingency plans on prevention, surveillance, control and response, in an attempt to stop the rapid spread of the virus. Among these measures were the various Orders and Regulations alluded to by the petitioners. These were published consistently by the Ministry of Health on its website, publicized in the media and made available to the general public.
44. He deponed further that the 2nd respondent in addition to this gave regular updates to the public regarding its efforts to combat the virus and the modalities of reporting cases and accessing medical facilities while issuing emergency contacts in case assistance was required. In view of this, he opposed the allegation that the petitioners' right to access information was curtailed. This is because under Section 6 of the [Access to Information Act](#) the state is not obliged to give information that is reasonably accessible by other means.
45. He deposed that the power to make such regulation is granted to the 2nd respondent under the [Public Health Act](#) and the [Health Act](#). In addition, the Statute empowers the 2nd respondent to impose restrictions on medical examinations, detention, quarantine, isolation and medical surveillance. He however stated that the government throughout the period continued to revise its protocols, measures and guidelines so that they would be aligned with the international standard. In particular he points to the revisions on the protocols of COVID 19 testing, quarantine centers and curfew.
46. He as well deposed that contrary to the petitioners' allegation otherwise, the State has a right to limit the rights and freedoms of persons especially in public interest which is permissible under Article 24 of [the Constitution](#). He noted that this limitation revolved around mass testing, quarantine and social distancing which was also implemented around the world.
47. He thus deponed that this caused the need for mandatory quarantine for passengers arriving from different countries. He stated that the list provided to the passengers had various options according to the passenger's financial capability and the government at no time stated that it would cater for the passengers' accommodation in the quarantine facilities. Besides, the government was not privy to the contracts they entered into with these facilities.
48. He averred that the petitioners have failed to recognize the novelty and sensitivity of the COVID 19 as well as the risk posed to the public if the COVID 19 protocols were not complied with. He points out as well that the petitioners' failed to demonstrate precisely how the actions taken by the government were outside the provisions of the law. He urged the court to find that the petition lacked merit.

The Interested Party's case

49. The interested party through its Executive Director, Peter Kiama filed a replying affidavit dated 27th November 2020. While reiterating the facts as stated by the petitioners he deposed that Kenya had an obligation to put in place measures that were sufficient and appropriate to prevent inhuman and



degrading treatment of those detained in the quarantine facilities. He stated that the measures would have included prevention of acts that would have the effect of stigmatizing the persons so detained, informed them of the persons health background, facilitated transparent communication to all persons held in the mandatory quarantine, their families and the media concerning the measures being taken by the state, in order to avert psychological suffering.

50. He deponed as well that the actions of the respondents of holding the petitioners in self-paid mandatory quarantine facilities caused them physical and emotional distress. Additionally he stated that that the deplorable living conditions being poor hygiene, scarcity of water, poor ventilation, crowding and poor sanitation conditions that existed at some of the government mandatory quarantine facilities where some of the petitioners were held amount not only to physical but also a mental form of degrading or inhuman treatment. Moreover that forcefully detaining the 2nd petitioner for failure to pay the government's facility's bill amounted to cruel, inhuman and degrading treatment in violation of Article 29(f) of *the Constitution*.
51. In essence, he averred that the manner in which the respondents implemented mandatory quarantine against the 1st to 7th petitioners amounts to cruel, inhuman and degrading treatment. Furthermore, that the respondents failed to put in place measures aimed at preventing and protecting women in these facilities from abuse. This is because the women in mandatory quarantine were forced to share sanitation facilities and in some cases rooms without regard to their vulnerability and special status including maternity.

The Parties Submissions

Petitioners' submissions

52. The petitioners through their advocates Allan Maleche and Emily Kinama filed written submissions and a list of authorities dated 17th December 2021. They identified six (6) broad issues for determination.

On the first issue, Counsel submitted that 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*.
53. The reason for this submission is that at the point of issuing the directives of arrest, there were existing laws that already provided for offences for breaking curfew as well as the 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 which they failed to adhere to. Counsel stressed that the 2nd respondent was thus bound by the Regulations and the Rules in place and could not issue penalties that were outside the strictures of the law.
54. In support reliance was placed on the case of Muslims for Human Rights (MUHURI) & Another v. Inspector-General of Police & 5 others [2015] eKLR where it was held that the 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. Also see the cases of: 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, (LSK Petition 1), Law Society of Kenya v. Attorney General & another; National Commission for Human Rights & another (Interested Parties) Petition 132 of 2020; [2020] eKLR among others.
55. Additionally Counsel submitted that the 2nd respondent's actions of arresting and detaining persons in quarantine facilities were in violation of the right to the highest standard of health and a retrogressive realization of the right to health. This was because mandatory quarantine was used as a tool for punishing those who committed offences related to preventing COVID 19 and upholding the curfew orders. It was moreover argued that these actions were in violation of their right to a fair trial which in turn violated their right under Article 24 and 25 of *the Constitution*. Counsel referred to the case of 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 where it was held 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 public interest. Also see: General Comment No. 35, Article 9 (Liberty and security of person) UN Doc CCPR/C/GC/35 (16 December 2014) and the case of Mtana Lwea v. Kahindi Ngala Mwangandi Civil Appeal No. 56 of 2014; [2015] eKLR.
 56. Equally Counsel submitted that the 2nd respondent violated the right to fair administrative action under Article 47 of *the Constitution* and Sections 4 and 5 of the *Fair Administrative Action Act*, 2015 by issuing the directives that those who broke curfew orders and were in quarantine facilities be moved to curfew breakers holding centers. This was deemed to be unlawful because there were already laws in place which provided for procedures of penalizing for those who broke curfew orders. It was Counsel's argument that these oral directives are not law and even if they were the same did not meet the threshold under Article 24 of *the Constitution*.
 57. To buttress this point reliance was placed on the 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 where it was held that 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. See: Republic v. Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti [2018] eKLR.
 58. On the second issue, counsel while making reference to the 1st to 7th petitioner's accounts submitted that the State had 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. Similarly that the 2nd respondent violated the right to provide medical information to those in mandatory quarantine as it withheld their medical results.
 59. He relied on the case of Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 2 others [2013] eKLR where it was held that 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. Also see: Katiba Institute v. Presidential Delivery Unit and others [2017] eKLR.
 60. Furthermore, it is the petitioners' case that the 2nd respondent's failure to plan and prepare for the rolling out of the self-paid mandatory quarantine procedures violates Article 21(1) of *the Constitution*,



which places a duty on the State and every organ to observe, respect, promote and fulfil the rights in the Bill of Rights. As such Counsel argued that the State had a duty to put in place measures 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.

61. Counsel further submitted that the State failed to abide by Article 29(f) of *the Constitution*, which binds it to ensure that those in mandatory quarantine would be treated in a dignified manner and not in an inhumane and degrading manner. In support reliance was placed on the South African Constitutional case of *Dawood and Another v. Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8 where it was held that human dignity is a constitutional value that informs the interpretation of other rights and is part of the analysis of limitation of rights. Akin reliance was placed on the cases of *COI & another v Chief Magistrate Ukunda Law Courts & 4 others* [2018] eKLR, and *Mayelane v. Ngwenyama and another* (CCT 57/12) [2013] ZACC 14.
62. Counsel correspondingly argued that the State failed in its duty to ensure that the mental health of those in mandatory quarantine was monitored and treated. To buttress this point reliance was placed on the case of *Purohit & Moore v The Gambia Communication 241/01* where it was held that enjoyment of the right to health is critical in realizing all the other human rights. Also see the cases of: *P.A.O & 2 others v Attorney-General* [2012] eKLR and *Mathew Okwanda v Minister of Health and Medical Services & 3 others* [2013] eKLR.
63. Moving to the third issue, Counsel submitted that the detention of the 2nd petitioner for failure to pay the facilities fees was a violation of his rights under Articles 29 (f), 39 and 45(1) of *the Constitution*. He cited the case of *M.A.O & another v Attorney General & 4 others* [2015] eKLR where it was 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. Also see cases of: *Daniel Ngetich and Others v. The Attorney General and others* (Petition No. 239 of 2014) eKLR, and *Malachi vs Cape Dance Academy International and Others* (2010) CCT 05/10 ZACC 13.
64. Counsel submitted that the 2nd respondent failed to provide the written medical results to those who had undergone COVID-19 testing in the quarantine facilities and tested negative. Instead the medical officers announced generally to the groups that had tested negative. It is only those who had tested positive who were informed individually and taken to isolation. In this regard he argued that the 1st to 7th petitioners had a right not to have information relating to their private affairs such as health status unnecessarily revealed in such a manner but relayed in a timely fashion within the 24 hours and in written form. This was never done.
65. In support of this point counsel referred to the case of *Samson Mumo Mutinda v. Inspector General National Police Service and 4 others* (Petition No. 38 of 2014; [2014] eKLR) where it was held that 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. Also see cases of *JLN and 2 others vs Director of Children Services and 4 others* (Petition No. 78 of 2014, *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR and *Katiba Institute v Presidents Delivery Unit & 3 others* (Petition No. 468 of 2017; [2017] eKLR).
66. Counsel submitted that the State violated the rights of P.M, the 1st petitioner's child in the mandatory quarantine by failing to provide guidelines or protocols on the treatment of children in quarantine facilities. Considering this, it was contended that 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*.



67. To buttress this point reliance was placed on the case of *M W K v another v Attorney General & 3 others* [2017] eKLR where it was held that in terms of Article 53 of *the Constitution*, in all matters concerning children (including litigation or Police investigations), their best interests are of paramount importance. Counsel argued that Article 53 of *the Constitution* must be interpreted to promote the foundational values of human dignity, equality and freedom.
68. On the final issue Counsel submitted that Article 23 (3) of *the Constitution* provides for the appropriate reliefs or remedies available for Courts to uphold and enforce violated constitutional rights. Equally he submitted that the Supreme Court in the case of *Jasbir Singh Rai and 3 Others v. Tarlochan Singh Rai Estate* Petition No. 4 of 2012; (2013) eKLR held that Articles 22 and 23 give the courts a special and wide responsibility for the enforcement of the Bill of Rights. Also see: *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition Nos. 14, 14A, 14B and 14C of 2014; [2014] eKLR (CCK), *Law Society of Kenya v Attorney General & another; Mohamed Abdulahi Warsame & another* High Court Petition No. 307 of 2018; [2019] eKLR among others.
69. On the issue of costs, Counsel submitted that in a matter filed in the public interest each party ought to bear its own costs as held by the Supreme Court in the case of *Jasbir Singh Rai* (supra).

The Respondents' submissions

70. The respondents' through Senior State Counsel Betty Mwasao filed written submissions dated 13th June 2023. She identified the three issues for determination.
71. On the first issue, counsel stated that the petitioners argued that the respondents violated *the Constitution* by detaining in mandatory quarantine persons who broke the curfew orders and committed any offences as stipulated in the Public Health (COVID 19 Restriction of Movement of Persons and other Related Measures) Rules and *Public Health Act* (Prevention, Control and Suppression of COVID 19) Regulations. She submitted that the mandatory quarantine directive was put in place by the 2nd respondent to prevent and control the spread of COVID 19 and give effect to the prevention and control measures recommended by W.H.O. Moreover counsel stated that Section 36 of the *Public Health Act* provides that the 2nd respondent can make Rules in the event of an epidemic.
72. Counsel pointed out that individual liberty is amenable to limitation subject to Article 24 of *the Constitution*. It was stated that the right to liberty is also recognized under Article 12(1) of the International Covenant on Civil and Political Rights Convention as one that can be limited in accordance with the law with the aim of protecting national security, public order and public health. She thus argued that the Rules on mandatory quarantine were enacted and implemented with a view to ensure all persons in Kenya were guaranteed the highest standard of health by the government by preventing spread of COVID 19.
73. In support reliance was placed on the case of *National Super Alliance (NASA) Kenya v Cabinet Secretary for Interior and Co-ordination of National Government and 3 others* (2017) eKLR and Article 29(ii) of the Universal Declaration of Human Rights which state that in the exercise of rights and freedoms everyone shall be subject to such limitations as are determined by law for the benefit of the public's interest. Comparable dependence was placed on the cases of *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others* (2014) eKLR and *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya and another* [2016] eKLR.
74. On the second issue, Counsel submitted that the respondent's discretion not to disclose information relating to the mandatory quarantine process is constitutional and protected under Section 6(1) (c) and 2(e)(i) of the *Access to Information Act*. The reason being that disclosure of the information of the



mandatory quarantine institutions would endanger the lives of the persons to be admitted in those institutions. Moreover, it was argued that this disclosure would be in violation of Section 3(6) and 3(7) of the Official Secrets Act.

75. In support reliance was placed on the case of Samuel Macharia and another v Kenya Commercial Bank Limited and 2 others (2012) eKLR where it was stated that a court of law can only exercise jurisdiction as conferred by the Constitution or the law. Nevertheless Counsel pointed out that the government had through out on a daily basis informed the public through the media and its website the status of the pandemic, the measures being taken and the guidelines put in place to address the pandemic.
76. On the final issue, Counsel submitted that the 3rd respondent is empowered by Section 8 of the Public Order Act to issue a curfew order owing to advice received from the Inspector General of Police if he considers it necessary in the interest of public order. As such counsel submitted that the 3rd respondent was within his jurisdiction in issuing the order and punishment for non-compliance with the curfew order. In support reliance was placed on the case of Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service and 4 others; Kenya National Commission on Human Rights and 3 others (interested parties) (2020) eKLR where it was held that the use of Section 8 of the Public Order Act to address a public health emergency by issuing a curfew order to address the COVID 19 crisis was according to the law.

Interested Party's submissions

77. The 1st interested Party's submissions were filed through the firm of Carolene Kituku and Company Advocates on 13th February 2021 where Counsel identified the issue for determination as follows:

Whether the respondents violated the petitioners' (as persons held in mandatory quarantine facilities) right to protection from cruel, degrading and inhumane treatment.

78. Counsel commenced by stating that the right against torture and cruel, inhuman and degrading treatment is prohibited in a number of legal instruments. In particular Article 29 of the Constitution and cruel, inhuman; Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. She noted that Kenya has also enacted the Prevention of Torture Act, 2017 to give effect to Articles 25(a) and 29(d) of the Constitution and to the principles of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
79. Further Counsel relying on the case of Dennis Mogambi Mong'are v The Attorney General and others Petition No.146 of 2011 submitted that the Court observed that torture means infliction of intense pain to the body or mind; to punish, to extract a confession or information or to obtain sadistic pleasure. It means infliction of physically founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to elicit, matter of intelligence or forensic proof and the motive is one of militant, civic or ecclesiastical interest. It is an intentional act which judged objectively, is deliberate and not accidental.
80. She thus submitted that prohibition of torture and other cruel, inhuman or degrading treatment or punishment cannot be derogated from, even during exceptional circumstances such as a pandemic. As such it was asserted that there was need for the government to respect human rights in its response against COVID 19.
81. According to Counsel the respondents' failure to put in place measures that were sufficient and appropriate to prevent psychological suffering of those detained in mandatory quarantine violated its international, constitutional and statutory obligations. In view of this she submitted that Section



17(1) of the [Prevention of Torture Act](#) provides the remedies available to a victim of torture to include compensation, rehabilitation and restitution. As such these remedies empower the Court to provide the most effective relief to a victim.

82. Likewise Counsel relying on the Supreme Court case of *Mitubel Welfare Society v Kenya Airports Authority*, PT No. 3 of 2018 submitted that it had been held that Article 23(3) of [the Constitution](#) was not exhaustive and so the Court had an obligation to fashion an appropriate relief to address the violation in question.

1st Amicus Curiae submissions

83. The 1st Amicus curiae through its Counsel, Caroline Oduor and Associates filed written submissions dated 11th December 2020. These submissions specifically focused on assisting the Court in the following areas:
- i. What is the objective of quarantine in relation to protection and advancement of individual and public health?
 - ii. What are the rights of people under quarantine?
 - iii. What is the mental health impact of quarantine?
 - iv. What measure would mitigate any negative impacts on mental health during quarantine.
84. On the first point, it was submitted that although the sole objective of quarantine is to protect the general public from an infectious disease, it may have a negative impact on the well-being of the people whose freedom has been restricted leading to harm if it is not conducted well. It was noted thus that for the objective to be effective, it should be conducted in a manner that does not cause more harm to the victims and the rest of the public. As a result of the mental health effects of quarantine, it was noted that W.H.O made various recommendations for implementation in quarantine.
85. Furthermore, the Amicus while relying on the case of *Daniel Ng'etich & 2 others v Attorney General & 3 others* [2016] eKLR stated that punitive or crime prevention purposes are not permissible objectives of quarantine as can be seen from international best practice.
86. The Amicus in the second point relying on the case of *Federation of Women Lawyers (FIDA-Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae)* [2019] eKLR (Petition 266 of 2015) noted that health is defined as a state of complete physical, mental and social well-being, and not only the absence of disease or infirmity.
87. With specific emphasis on the mental health right, it was submitted that it is a crucial part of health as recognized under Articles 43(1)(a) and 53(1)(c) of [the Constitution](#). In this regard it was stated that persons in quarantine have the right to health in this context under [the Constitution](#). It was stressed hence that the objective of quarantine must also be understood to include the preservation and protection of mental health of the persons detained wholly.
88. Moving on to the third point, the 1st Amicus noted that the coercion in healthcare under quarantine, and particularly the removal of persons' freedoms and sense of autonomy; control over their bodies and stigmatization while in quarantine undermines and impacts a person's dignity and their emotional and mental well-being. As such the 1st Amicus stated that the use of coercive means as a health care intervention, such as mandatory quarantine, should be a measure of last resort.



89. It was appreciated that for persons in quarantine stress-factors are even more acute in the public health emergency. These stress factors are caused by the duration of confinement, inadequate supplies, difficulties in securing medical care and the resulting financial losses as experienced by the petitioners.
90. Furthermore, it was stated that stigma in particular threatened the persons' rights and public health in the COVID-19 response. In this regard it was noted that, despite the Ministry of Health acknowledging this fact and publishing "A Comprehensive Guide on Mental Health and Psychosocial Support During the COVID-19 Pandemic" it was stated that the petitioners experiences indicated that the government had failed in fulfilling its own guidelines in this respect. It is for this reason that the amicus submitted that where State interventions create or perpetuate stigma, the same violates the right to health and the right to dignity.
91. On the final point, the 1st Amicus recommended that where a coercive measure such as quarantine was to be applied and to be justifiable, the following ought to be observed:
- i. The provision of the necessities of life such as food, water, shelter and healthcare services to protect the individual's wellbeing;
 - ii. The guarantee of equality and freedom from discontinuation;
 - iii. Respect for privacy, autonomy and consent;
 - iv. The preservation of a healthy environment; and
 - v. The empowerment of health care users to know and assert their rights through, amongst others, providing accessible, accurate and sufficient information and through enabling effective communication and consultation.

2nd Amicus Curiae's submissions

92. The firm of C.B. Mwongela and Company Advocates on behalf of the 2nd amicus curiae filed written submissions dated 25th February 2021. The 2nd amicus curiae sought to submit on the following areas:
- i. What is the constitutional and legal standard in striking a balance between the right to health and the rights of the petitioners particularly in the context of a health pandemic?
 - ii. What is the legal procedure for the imposition of limitations on rights by the State?
 - iii. To what extent could offences under the *Public Order Act*, be subjected to the sanctions under 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, as health risks without contravening the law?
 - iv. What are the obligations of the State in the enforcement of public health measures, particularly mandatory quarantine?
 - v. What are the distinctions between the limitation of rights of persons deprived of liberty arising from public health measures and persons deprived of liberty as a result of particular breach of the law?
93. On the first point, counsel submitted that the central dilemma in public health is to balance respect for individual rights and freedoms with the responsibility of governments to provide their citizens with sufficient protection in relation to health. This balancing act is guided by *the Constitution* and



international laws which identify some of the basic criteria for assessing public health measures, including responses during public health emergencies.

94. On limits of individual liberty counsel submitted that *the Constitution* identifies under Article 24 that this right can only be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. This limitation is also addressed under Clause 25 in the Siracusa principles on the limitation and derogation provisions in the international covenant on civil and political rights; Article 4 of the International Covenant on Economic, Social and Cultural Rights and Article 29 of the Universal Declaration of Human Rights.
95. In a nutshell it is submitted that the limitation of this right based on these laws ought to be based on a criteria that encompasses legality, effectiveness, strict necessity of the measures, proportionality of the measures to the threat, reasonability of the measures, being the least restrictive measures and equitable burden-distribution.
96. In support of this argument counsel cited the case of Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others (2017) eKLR where it was held that it follows that by virtue of Article 24 the rest of the rights and fundamental freedoms under the Bill of Rights are enjoyed and guaranteed subject to strict terms of limitations. First, it must be demonstrated that the limitation is imposed by legislation, and even then only when it is shown that the limitation is reasonable and justifiable in an open democratic society. Further it must be based on dignity, equality and freedom, taking into consideration the nature of the right or fundamental freedom sought to be limited, the importance of the purpose of the limitation, its nature and extent, the enjoyment by others of their own rights as well as a consideration whether there are less restrictive means to achieve the purpose.
97. Parallel reliance was placed on the cases 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) (2020) eKLR and Federation of Women Lawyers (Fida - Kenya) & 3 others vs Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) (2019) eKLR.
98. Following this, it was noted that in answering the question, the mandatory quarantine and curfew order which limited various rights and fundamental freedoms including liberty, freedom of movement, freedom and security of the person, freedom of association, freedom of assembly and socio-economic rights ought to be interrogated so as to establish whether the laws were backed up by the law and whether the same meets the criteria for limitation of rights.
99. Turning to the second issue, it was submitted that a decision, policy, legislation that imposes a limitation on rights must be adopted in accordance with *the Constitution* in that it must be subjected to public participation. As such the question to be answered in the circumstances of this case is whether the State undertook public participation. Relying on the case of Minister of Health and Another vs New Clicks South Africa (Ptv) Ltd and Others 2006 (2) SA 311 (CC) it was noted that what matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. Also see Doctors for Life International -V s- Speaker of the National Assembly and others (CCT12/05) [2006] ZACC 11 and Poverty Alleviation Network & others vs. President of the Republic of South Africa & 19 Others CCT 86/08 [2010] ZACC 5, among others.
100. Counsel on the third issue submitted that this point invites the Court to establish whether the offences under the *Public Order Act* (Curfew Order) qualify as health risks when considered under the Public Health Rules and Regulations so as to be subjected to the sanctions provided therein. It argues that



the Public Order Act was tailored to combating criminal activities. However the Public Order (State Curfew) Order, 2020 made it an offence to hold public gatherings, processions or movement either alone or as a group during the period of the curfew except as permitted by the police in writing. Counsel wondered to what extent the public gatherings, processions or movement either alone or as a group during the period of curfew, qualified as health risks.

101. According to Amicus while, the objective of the Curfew Order is to impose restriction on gathering and movement during the curfew period, the Public Health Rules, 2020, Legal Notice No. 50 restricted gathering and movement into and out of affected areas. Consequently therefore offences under the Curfew Order could not be subjected to penalties under the Public Health Rules and Regulations. Likewise, a person arrested for violating the curfew order cannot be subjected to a penalty prescribed for violation of restriction of movement in and out of infected area.
102. On the fourth issue, counsel stated that state officers and public officers are obligated to, inter alia, respect, protect and fulfil the rights and fundamental freedoms in the Bill of Rights hence enforcement of public health measures should be pursued in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms.
103. To buttress this point reliance was placed on the case of *M W K v another v Attorney General & 3 others* (2017) eKLR where it was held that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State. Article 21 commands the State, and every state organ including the Police to observe, to respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights subject to the limitations in Article 24 or elsewhere in the Bill of Rights. Also see the case of *Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another* (2017) eKLR.
104. It was therefore submitted that in view of mandatory quarantine the State was thus bound by the national values and principles under Article 10 of Constitution in its enforcement. Likewise, that mandatory quarantine at a minimum must have been carried out in accordance with the law. Furthermore that when quarantines or lockdowns are imposed, States are obligated to ensure access and that there is food, water, health care, and care-giving support.
105. Lastly, counsel contended that deprivation of liberty as a result of public health occurs through isolation and quarantine while deprivation of liberty as a result of breach of law is through arrest and detention. Considering this, quarantine is therefore a form of detention except that in the case of quarantine, it is a detention for one's health and public health in general. Either way it was noted that both deprivation of liberty as a result of public health or as result of breach of law impacts on a person's fundamental rights and freedoms.

Analysis and Determination

106. Before commencing this determination I take note of a number of issues as raised by the parties which I find prudent to highlight. To commence with the 1st interested party in its affidavit and submissions deposed to the respondents' failure to put in place measures in protecting women in these facilities from abuse. It was further stated that women in mandatory quarantine were forced to share sanitation facilities and in some cases rooms. A perusal of the petition and petitioners' case discloses that this is a new issue which was not pleaded to by any of the female petitioners.
107. Correspondingly the guidelines of enjoining amicus curiae in a suit as stated by the Supreme Court in the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2015] eKLR limits its assistance to the court, to points of law based on the issues raised in the petitioners' pleadings. In view of this, an amicus brief ought not to introduce superfluous matters. I observe that the 2nd amicus



curiae in its brief also introduced a new issue that was not raised in the petition. In particular, the 2nd amicus submitted on the issue of public participation which was not addressed in the petitioner's pleadings. Bearing this in mind, it is my considered view that this Court ought to refrain from making a determination on these issues.

108. That said, I have carefully perused the pleadings, parties submissions, cited cases and the law and in my considered view the issues that arise for determination are as follows:
- i. The legal basis for the 2nd and 3rd Respondents' COVID 19's response.
 - ii. Whether the 2nd and 3rd Respondents' actions in view of the imposed mandatory quarantine was lawful and in line with its constitutional obligation.
 - iii. Whether the Petitioners' constitutional rights were violated by the 2nd and 3rd respondents.
 - iv. Whether the petitioners' are entitled to the reliefs sought.

Issue No.(i) The Legal basis for the 2nd and 3rd Respondent's COVID 19's response

109. Before delving into the key issues, I find it imperative to appreciate the legal basis that informed the COVID 19 response. Following the declaration of the COVID 19 as a pandemic by W.H.O on 11th March 2020 and Kenya's first positive case on 13th March 2020, the government of Kenya like many others in the world, embarked on a series of interventions in the face of the fast - evolving situation. These interventions and measures in the end led to the instigation of the instant suit and others. In essence it was a challenge and a call to the protection of constitutional rights whilst implementing these measures.
110. The then President His Excellency, Uhuru Kenyatta vide Executive Order No. 2 of 2020 established the National Emergency Response Committee(NERC) on Coronavirus on 28th February 2020 to establish a framework to upscale and co-ordinate Kenya's preparedness and national response to the Coronavirus.
111. In Kabira, Nkatha, & Kibugi, Robert. (2020). Saving the soul of an African constitution: Learning from Kenya's experience with constitutionalism during COVID-19. African Human Rights Law Journal, 20(2), 436-461 it was observed that the governments responses were categorized as follows: first, public order measures such as the curfew, lockdown, and controlled movement between counties and second, public health measures such as quarantine, hand washing and sanitizing, the wearing of face masks, burial procedures, and so forth; and, third, socio-economic measures such as fiscal incentives for businesses and individuals.
112. The challenge herein revolves around the public order and public health measures that were adopted. The Public Order Rules were enacted pursuant to Section 8 *Public Order Act*, CAP 56 that provides for Curfew orders while the Public Health Rules were enacted pursuant to Section 36(m) of the *Public Health Act*, CAP 242 which provides for rules for prevention of disease.
113. Fundamentally, the rule of law envisages a distinction of mandates in *the Constitution*. In this regard, the Constitutional Court in South Africa in the case of Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11 observed as follows:

“The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative,



executive and judicial branches reflects the concept of separation of powers. The principle ‘has important consequences for the way in which and the institutions by which power can be exercised.’

114. Essentially, the scope of this Court’s mandate in this matter is limited to ascertaining whether the 2nd and 3rd respondent’s actions and laws set out complied with the set constitutional and legal principles. Against this background the constitutional Court in South Africa in the case of *One South Africa Movement and another v President of the Republic of South Africa and others* (24259/2020) [2020] ZAGPPHC 249; [2020] 3 All SA 856 (GP); 2020 (5) SA 576 (GP) (1 July 2020) discussing a similar challenge in the face of the COVID 19 pandemic observed as follows:

“ 33. ...The epidemic invites an emotional response from concerned citizens which is understandable. However, it is important to bear in mind that ultimately, the decisions this Court makes must be founded in law. Whether or not the decisions of the government fall foul of its constitutional duties must be examined very carefully, having full regard to the legislative, policy and factual context within which those decisions have been made.”

Issue No. (ii) Whether the 2nd and 3rd Respondent’s actions in view of the imposed mandatory quarantine was lawful and in line with its constitutional obligation

115. With this background in mind I will move to interrogate the issues raised. The key issue raised by the petitioners is their challenge to the manner in which the COVID 19 Protocols, Rules and Regulations were implemented in the context of the mandatory quarantine. It is their argument that the manner in which these Rules were implemented was uncoordinated, unplanned and not guided by policy. As a consequence they assert that this led to violation of numerous constitutional rights and was contrary their constitutional obligation.

116. For context the petitioners’ allegations were based on a number of factors brought about by the 2nd and 3rd respondents’ decisions which are now challenged in this petition. The petitioners considering this, asserted that the government’s implementation of mandatory quarantine was contrary to the laid down procedure in its Interim guidelines and international standards for the COVID 19 response.

117. The respondents herein opposed the petition contending that the petitioners had failed to prove their allegations against them. Moreover, the respondents pointed out that the petitioners had failed to acknowledge the role of the police service in the maintenance of law and order in the pandemic. Likewise that the government had to consistently put in place contingency plans on prevention, surveillance, control and response, in an attempt to stop the rapid spread of the virus.

118. It is discernible from the petitioners’ case that the government’s duty to respond and establish measures was crucial. On the flipside however the petitioners point out that even in carrying out this mandate, the respondents have an obligation to respect, protect, promote and uphold the constitutional rights anchored in the Bill of Rights. This is anchored under Article 21(1) of *the Constitution* which provides as follows:

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.

119. Furthermore, *the Constitution* under Article 24 is categorical that limitation of rights except those under Article 25 though permissible must be in conformity with the strictures provided therein. This Article provides as follows:



1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including--
 - a. the nature of the right or fundamental freedom;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
 2. Despite clause (1), a provision in legislation limiting a right or fundamental freedom --
 - a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
 - (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
 - (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
 - (3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.
120. Unmistakably, Article 24(3) of *the Constitution* imposes a duty on the State to demonstrate to the Court that the requirements of this Article have been satisfied. In essence both Article 21(1) and 24(3) of *the Constitution* makes known that the government is constitutionally obliged to act in a manner that does not place a person's constitutional rights under threat even whilst legally limiting them.
121. Among the measures undertaken by the government in the fight against the COVID 19 pandemic was the implementation of mandatory quarantine. W.H.O in its 'Considerations for quarantine of individuals in the context of containment for coronavirus disease (COVID-19) (Interim guidance)' dated 19th March 2020 described quarantine as follows:
- The quarantine of persons is the restriction of activities of or the separation of persons who are not ill but who may have been exposed to an infectious agent or disease, with the objective of monitoring their symptoms and ensuring the early detection of cases. Quarantine is different from isolation, which is the separation of ill or infected persons from others to prevent the spread of infection or contamination.
122. Considering this, the guidelines recommended to States the following before implementing quarantine:
- i. The quarantine setting is appropriate and that adequate food, water, and hygiene provisions can be made for the quarantine period;



- ii. Minimum Infection prevention and control(IPC) measures can be implemented; and
 - iii. Minimum requirements for monitoring the health of quarantined persons can be met during the quarantine period.
123. Nationally, mandatory quarantine was implemented following new directives from the 2nd respondent on abolishment of self-quarantine and institution of mandatory quarantine for all persons coming into the country on 22nd March 2020. The Ministry of Health went on to publish the COVID 19 Mandatory Quarantine site Protocols and COVID 19 Mandatory Quarantine Protocols on 3rd April 2020. These Protocols outlined in detail the manner in which the mandatory quarantine would be effected.
124. At this juncture it is prudent to highlight that the objectives and reasons behind the enactment of Rules and Regulations by the Government is a policy decision and within its constitutional mandate to legislate. Perceptibly a Court cannot question the wisdom of the legislature in making the laws as this would be in violation of the doctrine of separation of powers.
125. What however is amenable for this Court to question is whether the law is in conflict with the constitutional principles which will be our focus in the next issue. I find the holding in the case of Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others vs. Commissioner of Domestic Taxes & 2 others [2014] eKLR relevant in this regard:

“ 32. The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of *the Constitution*, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court license to declare it unconstitutional.”

Issue No. (iii) Whether the Petitioners’ constitutional rights were violated by the 2nd and 3rd Respondents.

126. Rightfully the allegation of violation of constitutional rights by the 2nd and 3rd respondents in view of mandatory quarantine and the COVID 19 response measures does not discharge the underlying principle of proof. The Court in the case of Edward Akong’o Oyugi & 2 others v Attorney General [2019]eKLR described this component in the following way:

“ 73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[38] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in improper use of judicial



authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

127. Equally, this Court in making a determination is to be mindful that the proper approach to a violation of constitutional rights challenge is a balancing act between the competing rights. This was observed by the South African Court in the case of *Gardener v Whitaker* (CCT26/94) [1996] ZACC 11 as cited with approval in the case of *One South Africa Movement and another* (supra) where it was held as follows:

“ 88. In the first place, it is well settled in our law that there is no hierarchy of rights under the Bill of Rights, and that different rights may compete against each other. The proper approach to adopt in such a case was explained by Froneman J, as he then was, in *Gardener v Whitaker*, as follows:

“It seems to me that where the alleged infringement of one fundamental right has to be determined in the context of another competing fundamental right since *the Constitution* creates no hierarchy of fundamental rights. The limitation clause (s 33) is of little help here, because by its very inclusion as a fundamental right in chap 3 of *the Constitution*, such a right already by definition complies with the requirements of s33, viz that of being reasonable, necessary and justifiable in an open and democratic society based on freedom and equality. It can also hardly be said that one fundamental right can negate fully the content of another fundamental right.”

89. The Court went on to state that:

“Where it is sought to justify the infringement of a fundamental right by virtue of a law of general application (which does not embody a fundamental constitutional right), placing the onus for such justification on the party relying thereon is easily explained. The limitation, after all, seeks to diminish a right regarded as fundamental by *the Constitution*. As stated above the same cannot be said of competing fundamental rights. They are inherently of equal value in terms of *the Constitution*. The precedence of one over another in a competing situation would depend entirely on the context in which the clash of interests occurs. In such a case a court of law is called upon to decide the matter by balancing the competing interests in much the same way as unlawfulness is established in a delictual action according to the standard of the *boni mores* of the community (cf *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 596H-597C). It seems eminently reasonable in practical terms (and because, conceptually, justification in terms of s33 does not arise in a matter concerning competing fundamental rights) to require that a plaintiff who seeks to rely on the precedence of one fundamental right over another should bear the onus of establishing the basis for such precedence. Having done so, it may



then still be possible for a defendant to defeat the claim by relying on a defence justified by a rule of law of general application but the onus of showing that it complies with s 33 (the limitation clause) would then, in that regard, rest on the defendant."

128. The petitioners herein submitted that the violation of the cited constitutional rights was due to the following summarized factors:
- i. Adoption of mandatory quarantine whilst there were other less coercive methods to achieve the same result.
 - ii. Self-paid mandatory quarantine.
 - iii. Failure to provide information on the protocols and rules to persons in mandatory quarantine.
 - iv. Arrest and detention in designated 'curfew breakers holding places' persons who infringed the curfew orders.
 - v. Detention of the 2nd petitioner for failure to pay the facilities pending fees.
 - vi. Lack of provision of guidelines for children in mandatory quarantine.
 - vii. Extension of mandatory quarantine with an additional 14 days where a positive COVID 19 case was found.
 - viii. Failure to provide COVID 19 test results within 24 hours and in written form.
 - ix. Violation of the set COVID 19 Rules and Regulations by the 2nd and 3rd respondents.
129. The 2nd respondent in its press briefing dated 22nd March 2020 made known that despite issuing directives on self-quarantine, the Protocol had not been adhered to, hence the need to implement the mandatory quarantine. The 2nd respondent in the briefing stated that the mandatory quarantine would be at one's own cost. The 2nd respondent in its further press briefing dated 7th April 2020 additionally disclosed that the additional 14 days of quarantine were in facilities where there were positive cases in an effort to curb the spread to the general public.
130. This extension was further extended beyond the 28 days in a memo dated 16th April 2020 as communicated to quarantine facilities. This was due to more positive cases. This extension was challenged by the 8th petitioner in its letter dated 18th April 2020 to the Ministry of Health for the reason that the extension was contrary to the guidelines that had been set for quarantine. The Government's stance on self-paid quarantine was also stressed in its press statement dated 11th April 2020.
131. The Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020 on the designation of facilities provides as follows under Section 13(1):
- Subject to the conditions to be specified by the Cabinet Secretary by notice in the Gazette, the Cabinet Secretary may depending on the circumstances in an area, whether designated as an infected area or not, designate a private health facility, an educational institution, hotel or any other establishment as he may deem appropriate as a designated facility for purposes of handling and or treatment of COVID-19 patients.
132. The Ministry of Health in its COVID 19 Mandatory Quarantine Site Protocols: Interim Guidelines and COVID 19 Quarantine Protocols dated 3rd April 2020 provided as follows with regard to the issues raised herein:



- i. Hotel Payments

All persons in mandatory quarantine must pay the cost of accommodation in the premises they are in prior to checking out.
- ii. Accommodation
 - a. All clients should be placed in a well-ventilated room (i.e. with open windows and an open door).
 - b. Movement of clients shall be limited, however clients may be allowed time outside of the rooms to stretch at designated areas within the premises with timed intervals while maintaining 1 meter social distance.
 - c. Accommodation premises are required to submit to the MOH Quarantine team leaders the details of all clients booked and the related hotel room no.'s.
- iii. Cleaning of rooms
 - a. During stretching periods, the management shall organize cleaning of the rooms, following the infection prevention protocols as guided by MoH response team.
 - b. Prior to occupancy the rooms should be cleaned daily with disinfectant with bleach 1:6 dilution.
 - c. The management shall ensure all the laundry is disinfected and washed accordingly.
- iv. Medical Screening and testing
 - a. The medical response team shall conduct a daily symptomatic screen, using the phone service.
 - b. From the 8th day, lab screening shall be done. A screening will be shared with the Ministry of Health leads.
- v. Testing of COVID 19 among persons on quarantine
 - a. A team of laboratory experts from the National Influenza Centre (NIC) will do the testing.
 - b. The collection of a sample will take 15 minutes per individual.
 - c. Before testing the procedure will be explained to the persons in quarantine.
 - d. The laboratory person will swab the back of the nose and the mouth to collect the sample for testing.
 - e. Results will be delivered within 24 hours after sample collection.
 - f. Positive results will be isolated and managed as per the case management guidelines.
 - g. Those who are negative will remain in quarantine till the 14 days are over

133. The protocols in addition to other guidelines provided for management of those with co-morbidities, advanced age or pregnancy and inter-hotel transfer. The Ministry also published the COVID 19 Mandatory Quarantine Discharge Protocol. It is my humble view that the implementation of the mandatory quarantine was justified and further there existed legal protocols and guidelines on the manner of implementation.



134. Curfew was enacted under the Public Order (State Curfew) Order, 2020 which imposed a curfew between 7:00PM and 5:00AM. A perusal of the material placed before this Court does not show provision of any Protocols, Rules or Guidelines that were used to guide the modalities of its implementation and consequence for failure to comply.
135. The communication as per 'CN 11' and CN 11A' as annexed to the 9th petitioner's affidavit indicate that the consequence of violation of the curfew order would lead to mandatory quarantine in a quarantine facility for 14 days as announced by the Health Chief Administrative Secretary, Dr. Mercy Mwangangi. Soon after in the 2nd respondent's press statement dated 3rd May 2020, it was stated that the Inspector General of Police under the directions of NERC had been directed to designate a curfew breakers holding place for persons who violated the curfew order. Yet again this new directive was not followed up with any Protocol, Guideline or Rules to govern the process. This is also contrary to the Public Order Act which provides for the consequence of non-compliance with a curfew order under Section 8 (6) as follows:
- 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.
136. Following an interrogation of the parties case, arguments and material adduced herein I come to a number of findings. Firstly, the 2nd respondent's implementation of mandatory quarantine did not violate its constitutional duty under Article 21 of the Constitution. As discussed herein, constitutional rights under the Bill of Rights save for those under Article 25 of the Constitution are subject to limitation in line with Article 24 of the Constitution.
137. In implementing the mandatory quarantine the 2nd respondent informed the Nation that persons had failed to comply with the self-quarantine directive hence leading to implementation of the mandatory quarantine. Moreover, he informed that the extension on quarantine was due to positive cases in the specific facilities. Obviously the 2nd respondent had to pay substantial regard to the need to mitigate the risks of spread of COVID 19 if such persons were released. The governance of the mandatory quarantine was further governed by various Protocols, Rules and Guidelines which detailed the manner the implementation would be done.
138. In addition, it is appreciated in balancing of the competing rights as between the State and citizenry, that it was the government's right and legal obligation to take reasonable legislative and other measures in the face of the COVID 19 pandemic to protect the persons within the Republic. As such the petitioners' claim of violation of Articles 28, 29, 39, 35, 43(1)(a),47 of the Constitution in this issue because of implementation of mandatory quarantine fails.
139. Secondly, the petitioners aver that the 2nd respondent's act of forcefully detaining the 2nd petitioner for failure to pay the bill for mandatory quarantine contravened his rights under Articles 29 (f), 39 and 45(1) of the Constitution. I find myself rejecting this allegation, because the 2nd respondent made it clear in its COVID 19 Quarantine Protocols and COVID 19 Mandatory Quarantine Discharge Protocol, that persons in mandatory quarantine must pay the cost of accommodation. While it was submitted that the 2nd respondent had asserted it would consider the financial situation on a case by case basis, this was not proved and as seen from the Rules it was not provided for by the 2nd respondent. It is further noted that the 2nd respondent provided the persons with an option of both government and hotel facilities dependent on a person's financial capability. It was thus incumbent on the person in the facility to pay the facility's fees before being discharged.



140. Thirdly, the 2nd respondent was also alleged to have violated the petitioners' right to information and right to privacy. On information, the allegation was on two fronts. First, disclosure of information on the Protocols and Guidelines by the 2nd respondent to the persons in quarantine. It is apparent from the material placed before this Court that the 2nd respondent not only divulged information consistently through the press briefs, but also the Ministry published information such as the Rules and Protocols on its website and anyone could access the information. This is in line with Article 35(3) which provides that:

The State shall publish and publicise any important information affecting the nation.

141. On the second front, it was asserted that the 2nd respondent failed to provide written medical results of the 1st to 7th petitioners within 24 hours after testing for COVID - 19 as provided in the Guidelines and further announced medical results publicly to all persons detained in the facility. The *Health Act, 2017* on dissemination of health information under Section 8 provides as follows:

1. Every health care provider shall inform a user or, where the user of the information is a minor or incapacitated, inform the guardian of the—
 - a. User's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;
 - b. Range of promotive, preventive and diagnostic procedures and treatment options generally available to the user;
 - c. Benefits, risks, costs and consequences generally associated with each option; and
 - d. User's right to refuse recommended medical options and explain the implications, risks, and legal consequences of such refusal.
2. The health care provider concerned must, where possible, inform the user as contemplated in subsection (1) in a language that the user understands and in a manner which takes into account the user's level of literacy.

142. Further on confidentiality of such medical information, Section 11 provides as follows:

1. 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.
2. Subject to *the Constitution* and this Act, no person may disclose any information contemplated in subsection (1) unless—
 - a. the user consents to such disclosure in writing in the prescribed form;
 - b. a court order or any applicable law requires such disclosure; or
 - c. non-disclosure of the information represents a serious threat to public health.
3. Any proposed disclosure of information under subsection 2(c), shall be subject to regulations published by the Cabinet Secretary of health, from time to time.

143. It is apparent from the COVID 19 Quarantine Protocols that the 2nd respondent was to release the COVID 19 results within 24 hours. This was not done. The petitioner's health status was later on released to them. The *Health Act* and the Protocols are silent on whether the results information must be in a written form as alleged. I do not find that Article 35 of *the Constitution* was violated as



- alleged. This is because the information was indeed released. Further *the Constitution* does not oblige the information to be released within 24 hours or in written form.
144. What is certain however is that the 2nd respondent had an obligation to uphold the confidentiality of the petitioners' results which they failed to do in violation of Section 11 of the *Health Act* and ultimately Article 31 of *the Constitution*.
145. Thirdly, an examination of the COVID 19 Protocols divulges that although the guidelines catered for management of persons with co-morbidities, advanced age or pregnancy, no provision was made for children such as the 1st petitioner's daughter in quarantine facilities. This as a consequence means that the State failed to adhere to its obligation under Article 21(1) of *the Constitution* to uphold children's rights under Articles 43(1)(a) and 53 (1)(c) of *the Constitution*.
146. Fourthly, as discussed in this analysis, the 2nd and 3rd respondents' arrest and detention, in self-paid mandatory quarantine and designated 'curfew breakers holding places', persons who infringed the curfew orders was not sustained by any law, Rule, Regulation or Protocol. This as well went against the plain penalty prescribed under Section 8(6) of the *Public Order Act*.
147. As envisaged under Article 24 of *the Constitution* any act that purports to limit a right must be justified in a reasonable manner provided for in the law. The respondents in this regard as seen in the case of *Gardener v Whitaker* (supra) bore the onus of demonstrating how this directive was in compliance with Article 24 of *the Constitution* but it failed to do so. Accordingly I find that the arrest and detention of persons who broke the curfew order by the 2nd and 3rd respondents violated Articles 10, 24 and 51 of *the Constitution*.
148. Fifthly, it is worthy to emphasize that a party that alleges violation of his or her rights must plead with reasonable precision the manner in which the rights have been violated. This was appreciated by the Court in the case of *Husus Mugiri v Music Copy Right Society of Kenya & another* [2018] eKLR where it held as follows:
- “ 18. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in *Anarita Karimi Njeru vs. Republic* [1979] eKLR. That is, the applicant must specify which specific provisions of *the Constitution* that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights. This position has been reiterated time and again.”
149. The petitioners and the interested party cited a number of constitutional provisions which they failed to show and prove the manner in which they were purportedly violated. These Articles are 29(f), 39, 45(1), 47, 48, 49, 50 and 51 of Constitution. Failure to discharge their burden of proof in these Articles automatically means that they have not proved their cases against the respondents in the cited Articles.
150. It must however be appreciated that the COVID – 19 is not something that was anticipated. It took the whole world by surprise and urgent measures had to be under taken. The Kenya government through the respondents did the best they could with the limited resources to ensure controlled spread of the pandemic.



Whether the petitioners are entitled to the reliefs sought

151. Owing to the conclusion made above, the next issue for determination is whether the reliefs sought in the petition should be granted. It is settled in law that there is no wrong without a remedy. The Court of Appeal addressing the question of the nature of constitutional reliefs in the case of *Gitobu Imanyara & 2 others* (2016) eKLR pronounced as follows:

“...the South African Case of *Dendy v University of Witwatersrand, Johannesburg & Others* - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

152. It is reasonable to therefore conclude that the petitioners are entitled to the reliefs sought in light of the issues that they have succeeded in. It is prudent to point out however that some of the reliefs sought have since been overtaken by events. I make reference to prayers c, d, e, f, o, and p.

153. On costs, the Supreme Court addressing its mind on the issue of award of costs in public interest suits in the case of *Jasbir Singh Rai & 3 others* (supra) held as follows that:

“In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant.”

154. This Court stands guided by the finding expressed above. This being a matter advancing public interest as opposed to personal gain should not attract an order as to costs to any party.

155. The upshot of the foregoing and for the reasons set out above, I come to the humble conclusion that the petition dated 5th May 2020 partially succeeds and I issue the following orders:

Prayers:

- a. Disallowed
- b. Disallowed
- c. Overtaken by events
- d. Overtaken by events
- e. Overtaken by events
- f. Overtaken by events



- g. Disallowed.
- h. A declaration that the 2nd respondent acted ultra vires in issuing directives on detaining persons who have contravened the curfew orders in mandatory quarantine as well as curfew breakers holding places and the 3rd respondent acted ultra vires in implementing the directives, contrary to Article 47 and Sections 4 and 5 of the Fair Administrative Actions Act and the rule of law national values and principles under Article 10 of *the Constitution*.
- i. Disallowed.
- j. Disallowed
- k. Disallowed
- l. Disallowed
- m. Disallowed
- n. A declaration that the 2nd respondent's failure to provide for guidelines for the treatment, handling and management of children in quarantine facilities is a violation of the 1st petitioner's child's rights under Article 43(1)(a),53(1)(c) and 53(2) of *the Constitution*.
- o. Overtaken by events.
- p. Overtaken by events.
- q. An order of mandamus compelling the 2nd respondent to develop and publicize guidelines on the care of children in quarantine facilities.
- r. Disallowed.
- s. Disallowed save for the minor P.M who is awarded Kshs.200,000/= as general damages.
- t. Disallowed.

Each party to bear its own costs.

Orders accordingly.

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 22ND DAY OF SEPTEMBER 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

