



REPUBLIC OF KENYA



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QKM (Suing as the next friend and mother to PK & SKK) v Kenya Bureau of Standards & 3 others (Constitutional Petition 30 of 2019) [2023] KEHC 21321 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CONSTITUTIONAL PETITION 30 OF 2019**

RK LIMO, J

JULY 31, 2023

BETWEEN

**QKM (SUING AS THE NEXT FRIEND AND MOTHER TO PRISCILLA
KASAYA & SABINA KELI KIMANGA) PETITIONER**

AND

THE KENYA BUREAU OF STANDARDS 1ST RESPONDENT

CS, MINISTRY OF HEALTH 2ND RESPONDENT

**CS, MINISTRY OF AGRICULTURE, LIVESTOCK FISHERIES AND CO-
OPERATIVES 3RD RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. This Petition is a consolidation of Petitions Nos. 28,29 and 30 of 2019. The Petitions are related in the sense that they have been lodged for a similar cause of action against Kenya Bureau of Standards, Cabinet Secretary's Ministry of (i) health, (ii) Agriculture, Livestock, Fisheries and Irrigation, Kenya Plant Health Inspectorate services and the Hon. Attorney General (1st to 5th Respondents respectively).
2. The Petitioners have invoked the provisions of Section 71 of the Old Constitution (which now is Article 26 of Constitution of Kenya). The Standard Act (Cap 496), The *Food, Drugs and Chemical Substances Act* (Cap 254), The *Public Health Act* (Cap 242), Article 24 of the African Charter of the Rights and Welfare of the Child, Article 16(1) and (2) of the African Charter on Human and Peoples Rights, Articles 25 of the Universal Declaration of Human Rights, Articles 11(1), 11(2), and 12 of the International Covenant of Economic, Social and Cultural Rights (equivalent of Articles 22(2) a, 43(1) (c), 46(1) and 3 and 53 of *the Constitution* of Kenya 2010.



3. The three consolidated Petitions were filed by 20 petitioners from the then Kitui and Makueni districts who allege to be survivors of aflatoxicosis contracted from consuming contained maize between 2004 and 2005. The Petitioners aver that they bought some of the maize from Mutomo market while others allege that they received the maize as relief food distributed by the government as part of its emergency feeding program in 2005 following an outbreak of famine in the aforementioned districts. It is the Petitioner's case that the government i.e the Respondents owed them a duty of care by ensuring food safety and protecting them from consuming maize that they allege was contaminated with aflatoxin. The Petitioners' are seeking the following reliefs namely;
 - i. A declaration be issued to declare that the 1st, 2nd, 3rd and 4th Respondents violated the constitutional rights of the Petitioners under Section 71 of the Repealed Constitutional, Article 24 of the United Nations Convention on the Rights of the Child, Articles 5 and 14 of the African Charter on the Rights and Welfare of the Child, Articles 16 (1) & (2) of the African Charter on Human and Peoples' Rights, Articles 11(1), 11(2) & 12 of the International Covenant of Economic, Social and Cultural Rights and Article 25 of the Universal Declaration of Human Rights.
 - ii. An order of compensation by way of general and special damages to the Petitioners by the 1st, 2nd, 3rd and 4th Respondents and the Government of Kenya for the loss and injury suffered by the Petitioners as a result of the Respondent's breach of the fundamental rights of the Petitioners as well as their duties under applicable international laws.
 - iii. Costs of this Petition.
4. This Court gave direction that the Petition be canvassed through viva voce evidence.

The Petitioners' Case

5. The Petitioners' Case was based on testimonies of three witnesses namely Benjamin Kituveki Kwinga (Petition No. 29 of 2019), Kimanga Toma Gabriel (Petition No. 30 of 2019) and Queen Kanini Masua (Petition No. 28 of 2019).
6. Benjamin Kituveki Kwinga (PW1) testified on oath and adopted his affidavit sworn on 18th November, 2019 as his evidence in Chief. He referred to some supporting documents which were marked for identification but which documents were later not tendered in evidence after the petitioners opted not to call the authors of the same.
7. In cross examination, the witness stated that he bought the affected maize in 2004 from open air market but could not remember the date he bought the maize. He also stated that he could not remember the name of the trader he bought the maize from and that he could not tell whether the trader was licensed or where the trader had procured the maize from. The witness attributed the delay in filing the suit to lack of means. He also stated that the maize he consumed was taken away by officers from public health for testing. He also stated that he lost a child and also referred to several medical reports, treatments notes and receipts in reference to various petitioners. The witness stated that the doctors' reports were prepared in 2019 but the Petitioners received treatment in 2004. In further cross-examination, the witness stated that he did not receive any relief food and that he bought the maize (a bag of 50kgs) from a market in Mutomo Town. He also stated that he did not inquire whether the trader had a license to sell the maize or not.
8. Kimange Toma Gabriel (PW2) testified that he learnt from his uncle, Eljah Keli Kimanga that sometime in 2005 when he was aged 7 years he consumed contaminated maize that was laced with aflatoxins and that as a result he was admitted at Mutomo Mission Hospital between 5th to 10th May,



2005. He also testified that Christine Wanza Keli, the 2nd Petitioner (in Petition No. 30/2019) was also affected and was admitted to the same hospital at the same time because of acute aflatoxitis.
9. He further testified that he also learnt from one Peter, the father to Ezekiel Masila Moses (3rd Petitioner in Petition No. 30 of 2019) that the said Ezekiel Masila then aged 5 was affected by the contaminated maize and was admitted at Mutomo Mission Hospital between 31st May, to 7th June, 2004. He added that the same Peter also informed him that the 4th Petitioner Caroline Kawendi Peter and the 5th Petitioner Purity Kalala Peter were also affected and got admitted at Mutomo Mission Hospital between the years 2004 and 2005.
 10. He testified that there were lab tests conducted that showed that they suffered from aflatoxins but failed to tender them in evidence. He also relied on medical reports by Dr. Muleshe and a Medical Journal by Ellein E Yard which were marked for identification but not produced in Evidence.
 11. In cross examination, the witness stated that he fell ill in 2005 when he was 7 years old. He stated that he could not recall what exactly happened but he remembered falling ill and being taken to hospital during the material time. He also stated that he could not recall witnessing distribution of bad maize or where the maize came from. He also confirmed that the medical reports and treatment notes referred to were dated 2019. He also stated that he was informed about his illness by his parents and that he could not tell whether complaints were made about the bad maize or whether the contaminated maize was distributed at the local market or in from of relief food. In further cross examination, the witness stated he was told by his parents that the maize was bought from Mutomo Market but he could not tell for sure whether what he consumed was bought from the market or was relief food.
 12. Queen Kanini Masua (PW3 and Petitioner in Petition No. 28of 2019), testified that she was the mother of Priscilla Kasaya Keli Toma and Sabina Keli Kimanga the minors. She stated got affected by contamination of maize in the year 2005 in the then Kitui District.
 13. She testified that she resided in Mutomo where she bought the contaminated maize at an open air Market.
 14. She further averred that the Government was also distributing relief food at the time due to an outbreak of famine that affected the area. She testified that on or about 4th May, 2005 she together with her husband and the named minors herein, consumed a maize meal at the home of one Jonathan Kamata Kimanga and the next day the minors were taken ill at Our Lady of Lourdes Mutomo Hospital where tests conducted revealed that the minors were affected by aflatoxins. She testified that the children improved with time after treatment. She however testified that she relied on reports by Dr. Muleshi of Mutomo Hospital and Medical journey by Hellen Yard. The reports were however not produced in evidence.

She blamed the respondents for not taking necessary measures to ensure the minors and other residents were not exposed to contaminated maize.
 15. On cross examination, the witness stated that she prepared ugali and porridge in her father in laws house which her children consumed and fell ill. That doctors took samples of the unga that she used and told her that the unga was contaminated. She told this court that she did not have a report regarding the purported contaminated unga but insisted that her father in law bought the unga from the market. She could not tell how she stored the unga but that she knew that her father in law bought the maize and milled the same at Mutomo. She told this court that the maize that was bought was locally grown in Makueni. She also stated that she relied on medical reports in reference to her children and that the reports prepared in 2019. In further cross examination, the witness stated that the Area District Commissioner and chief had educated locals against consuming maize contaminated with afltoxin in



2004 and 2005. In re-examination, the witness stated that though she also consumed the contaminated maize she was not affected by the aflatoxin.

16. The Petitioners in their written submissions dated 1st March, 2023 through their Learned Advocate M/s Patrick Law Associates have made extensive submissions about their case against the Respondents stating that their consolidated petition is a test to the obligations by State agencies in regard to respecting, protecting, promoting and fulfilling rights to consumers. They contend that the Respondents failed in their duty noting that aflatoxin is the single most threat to food standards and poses greatest health risk to consumers.
17. On the preliminary objections raised by the Respondents, first on the lapse in time in filing the Petitions, they submit that petitions relates to human rights and freedoms which are not time bound. On the claim that the petition should have been a tortious action, the Petitioners submit that they had the right to identify their cause of action and draft their claim and pleading accordingly. They have cited the case of Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others (2018) eKLR where the Court upheld that a cause of action is identified by a Petitioner or Claimant and not the Respondent or Defendant.
18. On the objection that the Petition had not met the test set in Anarita Karimi Njeri, the Petitioners submit that they have clearly identified their cause of action which which according to them is based on the violation of their right to life under Section 71 of the retired Constitution and Rights guaranteed by International Human Rights Instruments ratified by Kenya.
19. On whether the state owed the Petitioners duty to protect them from aflatoxin maize and aflatoxicosis, the Petitioners submit that there was an admission in court during trial that there were aflatoxicosis cases reported in the country before 2004 and 2005 as such the state was obligated to take measures to confront the crises that occurred in that period. The Petitioners submit that the State is liable for the actions of the people that the Petitioners bought maize from in Kamutei, Kitolo and Mutomo markets. They have placed reliance on the decision of the Africa Court of Human and Peoples' Rights in Association of Victims of Post Elections Violence and Anor vs Cameroon and the Court of Appeal decision in Charles Murigu Muriithi & Others vs Attorney General (2019) eKLR where the appellate court observed that it would be unrealistic to expect the police to be in every corner and in every home, providing security and protection to everyone and their properties on a 24-hour basis. The Appellant's reliance on the decision is on the Court's observation on the state's responsibility to protect life as follows;

“The State has a duty to maintain law and order including the protection of life and property. However, as a general rule, this duty is owed generally to the public at large and not specifically to any particular person within Kenya. For a person to succeed in a claim for alleged violation of constitutional rights as a result of damage to property, it must be demonstrated that there existed a special relationship between the victim and the police on the basis of which there was assurance of police protection, or where, for instance the police have prior information or warning of the likelihood of violence taking place in a particular area or against specific homes but fail to offer the required protection. In such cases, therefore the State may be held liable where violations of the rights protected and guaranteed in the Bill of Rights are proved even when those violations are occasioned by non-state actors provided that the duty of care is properly activated. Such a liability would however have to be determined on the facts and circumstances of each case.”



20. They blame the 1st Respondent for failing to prepare, frame, modify or amend specific standards for maize in the Country between 2004 and 2005 adding that the specification standards of 1989 were inadequate in addressing outbreaks of aflatoxins.
21. They also blame the 1st Respondent for stating that they cannot enforce standards of maize in the open air markets submitting that the standards should be kept in the entire food chain from the markets to the finished products in packaged form. They reason that because the 1st Respondent has the responsibility of ensuring that imported maize has acceptable aflatoxin levels also should ensure maize sold in the local markets has acceptable aflatoxin levels.
22. On the 2nd Respondent's mandate, the Petitioners submit that the statutory body failed in its duties under the [Public Health Act](#) and Foods, Drugs and Chemical Substances Act. It is their submission that possible distributors of aflatoxin contaminated maize were Government of Kenya through donations by World Food Program, through flour millers such as Eastern Flour Millers and through private individuals from Mwala Division in Machakos District. The Petitioners also submit that the Petitioners fell ill from aflatoxin poisoning which the State ought to have prevented from happening. They submit that there were no tangible preventative measures taken by the 2nd Respondent to prevent, limit or suppress the outbreak of aflatoxicosis. One of the measures submitted on by the Appellant was declaration of aflatoxicosis as a formidable epidemic before 2004 -2005 which would in-turn have promoted its prevention because consumers would have avoided the open air markets. The Petitioners have cited the case of *The matter of Municipal Council of Mombasa & Anor vs The Minister of Public Health & 4 Others* (2011) eKLR where the court observed that the Minister of Public Health was not required to consult the Municipal Council or be advised by the Central Board of Health before he forms an opinion that a Municipal Council had failed to execute or enforce any provisions of the Food Drugs and Chemical Substances Act. To this end, the Appellant submit that the 2nd Respondent failed through its inaction which contributed to presence of contaminated maize in the market.
23. They submit that their fundamental right to life, health and adequate food of acceptable quality was infringed upon by the acts of omission by the Respondents and have relied on the media coverage of the aflatoxin cases in the subject Districts between 2004 and 2005.
24. On the violation to the right to life, the Petitioners place reliance on treatment records from Our Lady of Lourdes, and Mutomo Hospital which they submit are sufficient evidence that the Petitioners suffered from aflatoxicosis which threatened their right to health and life. Further in support of this submission, the Petitioners have cited international instruments that guarantee right to life and have been ratified by Kenya for example the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights as well as the African Charter on Human and Peoples' Rights of 1981. They submit that there was an admission by the state about storing aflatoxin contaminated maize in its maize reserve which was ultimately released to schools. Counsel for the Petitioner submits that this action exposed petitioners in Petition number 28 and 30 who were minors at the time. The Petitioners have not demonstrated the link between the alleged contaminated maize released to schools with the Petitioners and whether the Petitioners consumed the affected maize meal in school.
25. They submit that they are entitled to the reliefs sought in their Petitions adding that, they suffered Special damages pleaded and supported through medical reports and discharge summaries from Mutomo Mission Hospital. They urge this court to consider time they were admitted to hospital and award them general damages of Kshs. 2.5 million each.



The Respondents' Case

26. The Petitions are opposed by all the Respondents. The 2nd, 3rd, 4th and 5th Respondents responded to the Petitions vide Grounds of Opposition dated 12th October 2021 where the following grounds are raised;

- a. That the Petitioners have not demonstrated before this Honourable Court how the Respondents have violated their constitutional rights
- b. That it is well settled law that the Petitioners have to identify the specific rights that have been infringed as was decided in the case of Annerita Karimi Njeru vs R (1976-1980) klr 1272 where the court found that a Petitioner ought to identify and specify how his rights have been infringed.
- c. That petition has been inexcusably delayed as the cause of action arose in 2004, over 20 years ago
- d. That the Petition is full of glaring conjectures and unsubstantiated allegations against the Respondents. That is to say, the Petitioner has failed to demonstrate to the required degree of standards and with reasonable precision which of his fundamental rights and/or freedoms have been violated and by whom and how.
- e. That the petition lacks merit and the same is an abuse of the due process of the court and should be dismissed with costs.

27. The 2nd Respondent also filed a response to the Petitions vide the Replying Affidavit of Susan Mutua, the Director of Public Health at the Ministry of Health sworn on 21st March 2022. The deponent denied the Petitioners' assertion that the government had abdicated its role of protecting the health of the public. She however admitted that Machakos and Kitui districts were identified as having maize contaminated with 20-8,000 ppb levels of aflatoxin at the material time. The deponent further averred that a study by CDC in 2004 suggested that consumption of contaminated homegrown maize as well as inadequately dried maize in homesteads were factors leading to aflatoxicosis. That following the discovery, the government engaged in a campaign to confiscate contaminated maize from the aforementioned districts and took the following actions to control supply of aflatoxin contaminated maize;

- a. On 13th May 2005, the office of the District Public Health Officer in Machakos inspected 66 kgs of maize stored in National Cereals and Produce Board warehouse;
- b. On 2nd June 2005, the contaminated maize was destroyed by burning
- c. On 11th June 2004, the Public Health Office, central division, Machakos issued a circular indicating an outbreak of aflatoxin food poisoning in various parts of the then Eastern Province following sampling of food from the National Cereal and Produce Board (NCPB), Eastern Flour Mills and Mungi Stores. And that 600 bags of a consignment of 2000 bags was seized from NCPB.
- d. On 22nd May 2004, samples were submitted to the National Public Health laboratory



- e. On 10th June 2004, a certificate of analysis was issued which indicated that 3 of the 4 samples submitted had no detection of aflatoxin but had a level of 400 ppb aflatoxin.
28. The deponent prays for dismissal of the petitions stating that they had been filed in bad faith and with an inordinate delay.
29. The 1st Respondent also filed a reply to the Petition vide the Replying Affidavit of John Kabue, the assistant manager, quality assurance in the 1st Respondent's office. In the Replying affidavit sworn on 30th April 2020, it has been averred that the Petitions are defective and an abuse of court process for having been filed more than 15 years after the cause of action arose, before the promulgation of the current constitution and for containing tortuous claims. The deponent avers that the 1st Respondent upheld its mandate by developing standards and codes of practice for maize grain and maize meal being (KS EAS 768 2:2017 and KS EAS 768 2:2012) which are publicly available and bind every manufacturer, importer, exporter and seller of maize and maize meal in Kenya. Further, that the standards developed prescribe the maximum allowable levels of aflatoxins in maize and maize meal and that it is presumed that all maize and maize products sold in Kenya meet the aforementioned standards. The deponent also avers that aflatoxicosis emanates from aflatoxins which are naturally produced by certain kinds of fungus in the environment and that such a natural event is beyond the 1st Respondent's regulatory mandate. It has also been averred that contamination can occur at any point in the supply chain such as pre-harvesting, after harvesting, inspection, testing, manufacture and sales. As such, it would be irrational to attach general liability to public bodies for harm or injury caused by acts and omissions of individual third parties. The deponent also avers that there were no samples of contaminated maize that was presented to the 1st Respondent for inspection or testing to establish the cause/source of the aflatoxicosis after occurrence of the injury complained of. The deponent avers that the Petition is vague and fails to meet the test of specificity required of constitutional petition as the Petitioners in Petition No 29 of 2019 only state that they purchased the contaminated maize from Kamutei Market but did not provide a link between the acts and omissions of the 1st Respondent and the injury suffered. The 1st Respondent avers that the Petitioners were required to provide particulars pertaining to;
- i. Name and address of the person and entity where the contaminated maize was purchased
 - ii. Date of purchase of the contaminated maize
 - iii. Storage facilities in which the contaminated maize was stored before and after purchase
 - iv. Packaging material in which the contaminated maize was purchased
 - v. Independent medical examination of each Petitioner by the 1st Respondent's doctors'
30. The Respondents called two witnesses during trial to rebut the Petitioners Case and defend themselves against the allegation made by the Petitioners.
31. John Kabue (DW1), an Officer from the 1st Respondent testified that he was in charge of quality assurance in food and that he had worked at the 1st Respondent office since 1998. He testified that he was an expert in food technology with bachelor's degree from Jomo Kenyatta University of Agriculture and Technology (JKUAT) in Food and Post-Harvest Technology. He adopted his affidavit sworn on



- 30th April, 2020 whose contents have been captured above as his evidence in Chief. He tendered documents in support of his case as DEx1, 2, and 3 showing the specification of standards acceptable in respect to maize sold in Kenya.
32. The witness proceeded to state that he had not received any complaint from Mutomo in 2004-2005 in the course of his duty relating to maize contaminated with aflatoxin. He however stated that he had heard of issues relating to aflatoxins in the country. The witness also explained that aflatoxin could occur anywhere and that was the reason why the 1st Respondent had set standards/ specifications. He also explained that the 1st Respondent only dealt with manufactured products and could only interfere with products milled at factory level where they do inspections. He also stated that the officers from the 1st Respondent's office also conduct surveillance in the market to ensure that products bear the KEBS mark of certification. The witness also stated that the 1st Respondent had food safety standards in place in 1998 but also told the court that such standards were reviewed every five years. He stated that public health officers were the ones in charge of inspecting raw foods sold in open air markets. He stated that he was not aware and could not speak of what transpired between 2004 and 2005 in the open markets.
 33. He testified that the Petitioners could have faulted his office if there was a manufacturer who had sold contaminated maize flour.
 34. Susan Mutua(DW2) told the court that she was the head of the department, public health based at the ministry of health. She stated that she had been working in that capacity for three years but had been at the ministry for 20 years. The witness then proceeded to adopt her Replying Affidavit sworn on 21st March 2022. She also produced the following reports, a report from World Food Program marked D EX 4, a certificate of destruction marked as D EX 5 and a letter delivered to the District Medical Officer of Health marked as DEX 6.
 35. The witness proceeded to tell the court that he was aware that there was an outbreak of aflatoxicosis in Makueni, Kitui and Machakos between 2004 and 2005 following sale of maize which was contaminated with aflatoxins in markets in the aforementioned districts. That after the reports were made, officers were sent to the ground where they conducted chief barazas for purposes of public sensitization of the outbreak. She stated that this was done after the contaminated maize had been consumed and that the contaminated maize was confiscated and destroyed. She attributed liability to sellers stating that sellers had a duty of ensuring that products sold were fit for consumption. She also stated that food distributed by the government in Machakos was found to contain aflatoxins but also stated that the food did not get to the market as it was destroyed. The witness commented on the aflatoxin levels allowable in products which she stated was 20 ppb before but now was 5 ppb. During further cross examination, the witness stated that contamination occurs during storage.
 36. The 1st Respondent filed two sets of submissions. The first set is dated 8th May 2023 and was filed on 17th May 2023 by the firm of Awele Jackson Advocates LLP while the other set is dated 18th May 2023 and were filed the same day by the firm of Kimondo Gachoka and Company Advocates..
 37. In the submissions dated 8th May 2020, counsel for the 1st Respondent submits that the 15 years' delay in filing the Petitions has not been explained. Counsel has cited the case of Daniel Kibet Mutai & 9 Others vs Attorney General (2019) eKLR where the Court of Appeal found the Petitioners guilty of laches for failing to explain a 30 years delay in filing their suit similarly in the cited case of Peter M Kariuki vs Attorney General (2014) eKLR where the court declined to excuse a 23 years delay in filing suit. They submit that the delay has not been explained adding, that the Petitioners have not demonstrated the steps they took after promulgation of the current Constitution in 2010 which allows filing of such petitions even by way of letters. It has been submitted that the petition has been filed with a view to avoid the three-year limitation period under the Limitations Actions Act. It further submits



- that it is impossible to scientifically test the Petitioners claim or the grains they consumed to establish the extent and cause of their injuries.
38. The 1st Respondents submit that the Petitioners have failed to discharge the burden of proving that they suffered harm due to consumption of contaminated maize because no evidence were tendered to prove the same.
 39. In the second set of submissions filed by the firm of Kimondo Gachoka and Company Advocates, it has been submitted as follows on behalf of the 1st Respondent, on whether the 1st Respondent owed the Petitioners a duty of care, counsel similarly submits on the 1st Respondent mandate which is provided for under Section 4 (1) of the Standards Act and that the same is limited to products which have gone through a manufacturing, treatment, processing and production process. Counsel submits that the 1st Respondent had no duty to monitor maize consumed in private persons' homes.
 40. The 1st Respondent contend that the Petitioners failed to provide evidence demonstrating that the maize meal was made from products subject to the 1st Respondent's inspection. Secondly, counsel submits that the Petitioners failed to provide tests linking the food consumed by the minors to the alleged aflatoxin poisoning. It contends that poisoning can also occur from consumption of other foods that harbor contamination. Counsel also submits that the documents relied upon by the Petitioners were not properly produced as they were only marked for identification. Reliance has been placed on the case of South Nyanza Sugar Co. Ltd vs Mary A. Mwita & Anor (2018) eKLR where the court held that documents marked for identification did not form part of a court's record. It has been submitted that this failure to tender documents also affected the Petitioners' ability to prove their claim for special damages.
 41. It submits that the Petitioners have failed to prove that they are entitled to the reliefs sought contending that they failed to precisely show the violation of any of their fundamental right and how the 1st Respondent contributed to the violations it any.
 42. The 2nd, 3rd, 4th and 5th Respondents have also made written submissions through the State Counsel.
 43. The State Counsel submits that whenever an issue of health hazard crops up, its offices have acted with speed in containing the hazard to ensure that it does not spread.
 44. The Respondents blames the Petitioners for not purchasing maize from licensed traders to ensure their own safety and submits that the doctrine of Volenti non fit injuria applies in this instance. They rely on Seqwick Kenya Insurance Brokers -versus- Price Water House Coopers Kenya [2007]eKLR to support their contention.
 45. They submit that they have a duty in respect to relief food but add that the petitioners have failed to connect their reported illness to the relief food. They rely on Caparo Industries PLC versus Dickman & Others (1990) ALLER
 46. On the duty of care, the Respondents submit that the Petitioners have failed to prove that there was any violation of their fundamental rights adding that there was no evidence that the relief food supplied was contaminated with aflatoxins. They further submit that this Petition should fail because the Petitioners have not illustrated with specificity the provisions of the constitution the respondents violated and in what manner.



47. This Court has considered both the petitioners case and the Respondents'. The main issues for determination are as follows:-
- i. Whether the Petitioners have proved that they were exposed to contaminated maize.
 - ii. Whether the Respondents failed in their respective statutory duties and obligations and whether their respective acts of omission or commission exposed the Petitioners to health hazard.
 - iii. Whether the Petitioners' fundamental rights were breached and whether they are time bound.

Whether the Petitioners have proven that they were exposed to maize contaminated with aflatoxins.

48. The Petitioners position is that in 2004 and 2005, they consumed maize that was contaminated with aflatoxin following which they contracted aflatoxicosis which in turn led their hospitalization for an average period of five days in hospital in the County of Kitui. The Petitioners state their right to life, health and adequate food of acceptable quality were violated by the State through its agencies by their failure to discharge their statutory obligations.
49. The Petitioners filed three petitions and called three witnesses in support of their cases. PW2 stated that he was seven years old at the material time and could not remember where the maize he consumed was procured from and that he could only remember that he fell ill around that time. From the evidence from PW1 and PW3, we can deduce that the maize complained of was procured from vendors in open air markets from the petitioners' locality. According to the Petitioners, the State was responsible for protecting them from the maize, specifically, that the aflatoxicosis infections would have been avoidable had the State agencies discharged their mandates under the *Standards Act*, the *Food, Drugs and Chemical Substances Act* and the Public Health Act. The Petitioners aver that the after discovery of the aflatoxicosis outbreak, the government deployed different agencies' officers to the affected areas with a view of urging people to eat safe maize and avoid contaminated food. This action by the government according to the Petitioners was an admission of culpability.
50. The Petitioners have in particular taken issue with the 1st Respondent stating that their standardization model is outdated and that it failed in its mandate to prepare, frame, modify or amend specifications standards for maize in all sectors in the in the Country. According to the Petitioner, the 1st Respondent (KEBS) could not run away from responsibility by stating that it was only responsible for standardization of products going through manufacturing process. The Petitioners hold that if the maize sold in the open air market should be subjected to the standardization of products going through manufacturing process. The Petitioners position is that the maize sold in the open air market should be subjected to the same standardization of products going through manufacturing process. The Peitioners hold that the maize sold in the open air market should be subjected to that standardization for safety reasons.
51. The 1st Respondent has contested the above allegations and called an expert namely, John Kabue (DW1) who took this court through standardization process including the technical aspects of what their job/mandate entails. He denies being responsible for standards of maize sold in open air markets stating that the same was outside its legal mandate.



So what are the statutory functions of the 1st Respondent?

52. The functions of the bureau are provided for under Section 4 of the Standard Act as follows;

- “ a. to promote standardization in industry and commerce
- b. to make arrangements or provide facilities for the testing and calibration of precision instruments, gauges and scientific apparatus, for the determination of their degree of accuracy by comparison with standards approved by the Minister on the recommendation of the Council, and for the issue of certificates in regard thereto
- c. to make arrangements or provide facilities for the examination and testing of commodities and any material or substance from or with which and the manner in which they may be manufactured, produced, processed or treated
- d. to control, in accordance with the provisions of this Act, the use of standardization marks and distinctive marks
- e. to prepare, frame, modify or amend specifications and codes of practice
- f. to encourage or undertake educational work in connection with standardization
- g. to assist the Government or any local authority or other public body or any other person in the preparation and framing of any specifications or codes of practice;
- h. to provide for co-operation with the Government or the representatives of any industry or with any local authority or other public body or any other person, with a view to securing the adoption and practical application of standards
- i. to provide for the testing at the request of the Minister, and on behalf of the Government, of locally manufactured and imported commodities with a view to determining whether such commodities comply with the
- j. provisions of this Act or any other law dealing with standards of quality or description”

53. Kenya Standard is defined to mean a specification or code of practice declared under Section 9. The Sections States:-

“ The Council may by notice in the Gazette;

- i. declare any specification or code of practice framed or prepared by the Bureau to be a Kenya Standard
- ii. Notify from time to time any amendment to, replacement of, or abolition of, a Kenya Standard declared under paragraph (a).”

54. The Act defines “specification” to mean;

“ means a description of any commodity by reference to its nature, quality, strength, purity, composition, quantity, dimensions, weight, grade, durability, origin, age or other



characteristics, or to any substance or material of or with which, or the manner in which, any commodity may be manufactured, produced, processed, treated, tested or sampled.”

55. According to the 1st Respondent Kenya Bureau of Standard (KEBS) has been in place even prior to 2005 when the incident occurred though the witness was unable to provide prove. This Court was however told that Kenya Bureau of Standard (KEBS) developed standards and codes of practice for maize grain and maize meal being KS EAS 2:2013 and KS EAS 768:2012. They also provided the allowable levels of aflatoxin in maize grain and maize meal.
56. The burden of proof is always on whoever alleges Section 107 of the *Evidence Act* placed this burden on the Petitioners and the question posed is whether the Petitioners discharged this burden.
57. The Petitioners have not tabled any tangible evidence in my view showing if and where they purchased the contaminated maize. They have further claimed that some of the contaminated maize was distributed as relief food and their main thrust in this matter is that 2nd Respondent conceded that there were incidents of contamination of maize around that particular time. However, the same officer Susan Mutua (DW2) stated that Public Health Officials moved in first and seized control of any contamination and destroyed them before the maize reached the market. She also denied the suggestion that the relief food including maize distributed by the government was contaminated. This denial put the Petitioners’ Case on the spot because of the burden of proof.
58. In respect to the 1st Respondent’s mandate, this court is not convinced that they have a legal obligation to test all maize sold in the open air market in Kenya. Apart from the impracticability of such a monumental task, the law as cited above does not place the such responsibility on them. The Law (Section 4(g) Standard Act) only states that they are available to assist the government or local authority if requested in preparation and framing of any specifications or codes of practice”. It can also when requested carry out tests of any “manufactured or imported commodities” to determine if they comply with the standards. The petitioners contend that the standardization applied are outdated but have failed to tender expert evidence to show that the standards are low and or that the people suffered because of the low standards or specifications applied by the 1st Respondent.
59. This Court finds that the Petitioners had the burden to demonstrate that the 1st and 3rd Respondents failed in their respective Statutory duties and as a result of their failure they suffered and/or were exposed to health hazards. That threshold has not been met in this petition.
60. The Petitioner’s argument is that the use of the term origin in the description of specification relates to in this case maize as a raw material for production of maize meal and other by products. Whilst this could be true, the I do not see how realistically, KEBS as a regulatory body can be able to regulate all the maize that goes into production of maize meal and the by-products unless, a seller was seeking standardization mark for the sale of maize grain but if the seller was seeking the mark for selling the finished product, then liability in my view would be on the quality of the finished product itself.
61. The Petitioners as observed above were required to demonstrate through evidence that the 1st Respondent had passed as fit for consumption the subject maize but upon consuming the product they fell ill and suffered as a result.
62. The Petitioners’ position on the role of the 2nd Respondent is that the inaction of its officers contributed to the shipping and availability of aflatoxin contaminated maize in Eastern Kenya. Their case is that the Minister for health (at the time) had power to intervene in the event that the Municipal Council



had failed to execute the provisions of the *Food, Drugs and Chemical Substances Act*. This is provided for under Section 32 (2) of the Act which provides;

“If the Minister is of the opinion that a municipal council has failed to execute or enforce any of the provisions of this Act in relation to any article and that its failure affects the general interests of the consumer, the Minister may by order empower an officer to execute and enforce those provisions or to procure the execution and enforcement thereof in relation to any article mentioned in the order.”

63. In response to this, the 2nd Respondent particularized the actions taken after report of aflatoxicosis cases in the Eastern Region. At paragraph 5 of the Replying Affidavit sworn by Susan Mutua, the deponent averred that the affected districts were Makueni, Kitui and Machakos where food samples collected contained 20 to 800ppb aflatoxin.
64. The 2nd Respondent as observed above explained to this court on the steps taken when the discovery of the cases of aflatoxins were discovered and stated that samples were collected from the affected areas and steps taken to destroy what was found to be harmful to health. This court had to weigh the positions of Petitioners and the 2nd Respondents in regard to the presence of contaminated maize and though I find that on a balance of probabilities, the petitioners case seems to be made out at last on the basis of admissions by the 2nd Respondent, the other aspects of proof that the petitioners actually suffered harm is wanting. The basis of my finding is the subject of determination the next issue for determination in this judgement.

(ii) Whether there was failure by the Respondents in their duties and if the omission caused harm to the Petitioners.

65. The Petitioners insists that the Respondents failed to discharge their duties resulting in the incidents of presence of aflatoxins in the maize sold in open air market in Mutomo Area. The 1st and 2nd Respondents as observed above, contested the claims by tendering evidence of their respective roles.
66. This Court has considered the allegations made and find that the expectations of the Petitioners in regard to the mandate of the Respondents is a bit stretched and would amount to unrealistic approach to the role of government agencies in protecting the people. To expect them to be aware of the maize grown and sold in every market place in Kenya even before an incident occurs is unrealistic leave alone the statutory obligations of these officers.
67. This was the finding of the Court of Appeal in the decision cited by the Petitioners of Charles Muriigu Muriithi & Others vs Attorney General (2019) eKLR. The Petition was one of many that arose as a result of the 2007 post-election violence in Kenya where many lives were lost and properties destroyed. Following the crisis, many individuals whose properties were destroyed brought claims for compensation, especially against the Government citing that the government owed them a specific duty to protect their individual lives and properties. The matter was initially heard by a three judge bench who observed that like all persons within the Kenyan territory entitled to the protection of their privacy, personal security and to their property as guaranteed by Section 70 of the repealed Constitution. They however found no proof in the appellants' claim that the State had prior information that post-election violence would occur after the conduct of the 2007 General Elections; that it failed to act on such information to prevent the violence. The Appellate court upheld the decision of the trial court and held as follows;

“The State has a duty to maintain law and order including the protection of life and property. However, as a general rule, this duty is owed generally to the public at large and not



specifically to any particular person within Kenya. For a person to succeed in a claim for alleged violation of constitutional rights as a result of damage to property, it must be demonstrated that there existed a special relationship between the victim and the police on the basis of which there was assurance of police protection, or where, for instance the police have prior information or warning of the likelihood of violence taking place in a particular area or against specific homes but fail to offer the required protection. In such cases, therefore the State may be held liable where violations of the rights protected and guaranteed in the Bill of Rights are proved even when those violations are occasioned by non-state actors provided that the duty of care is properly activated. Such a liability would however have to be determined on the facts and circumstances of each case.

In the circumstances of this case and bearing in mind the ratio of the police to the population in this country, it would be unreasonable and unrealistic to expect the police to be in every corner and in every home, providing security and protection to everyone and their properties on a 24-hour basis. That can only exist in Sir Thomas More's Utopian idealistic and fictional island society. No nation, the world over has been able to achieve this. That is why, for the Government to be liable for civil disorder the victim must prove that the Government owed him a specific duty of care; that the police ignored impeccable information of an impending attack against specific person(s); that the police negligently or deliberately failed to offer protection to the victims and their property; that the police or other Government agencies played a part in the creation of state of insecurity or did some acts that rendered the victims more vulnerable or increased their danger.”

68. Referencing the circumstances of the case above to the facts of the present case, the general constitutional and statutory duty of the Government or its agencies to remove contaminated food from the market only crystallizes in special individualized circumstances such as where a citizen has been given relief food by the government or purchased food which had a quality assurance mark from KEBS for instances which turn out to be contaminated or in cases where the government is aware of such contamination but fails to act to remedy the situation. In my opinion, expecting the state to have had knowledge of the aflatoxin contamination before it happened simply because there were reported cases in the 90's is unrealistic. Further reports indicate that aflatoxin contamination can even affect good maize to become contaminated over time and it is only after testing that the same can be discovered. Thirdly, evidence from the Petitioners, particularly PW3 was to the effect that after she made the report to the doctors, state officers went to her home and retrieved the contaminated maize. Although there was no evidence to prove that it shows that perhaps the Respondents acted to avert a crisis.
69. The gist of the Petitioners Case is that they consumed maize laced with aflatoxins and were hospitalized as a result. The evidence of hospitalization however is lacking in this case. The Petitioners in support of their case relied on medical report an discharge summaries from Our Lady of Lourdes Mutomo Hospital and various medical reports by Dr. Muleshe. The documents were to prove that the Petitioners actually suffered and/or were exposed to aflatoxins in maize bought from the open markets in Mutomo. However, the Petitioner failed to produce documentary evidence showing that one, they purchased the contaminated maize from licensed vendors in Mutomo and two, that they were hospitalized as particularized in their Petitions. The Medical documents were just marked for identification after their authenticity were contested by the Respondents. The Petitioners surprisingly failed to call the authors of the documents rendering all the medical documents relied on in this petitions to be of little or of no probative value.



70. The Court of Appeal in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR while addressing the issue of production of documents more so when documents are marked for identification but not produced as evidence stated as follows

“The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit?

The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved.

First, when the document is filed, the document though on file does not become part of the judicial record.

Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.

Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record

The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification

Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account

...Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an



exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.”

71. In the absence of prove of the origin of the contaminated maize, it is difficult to fault the respondents because it is not sound to just lay blame because of reported incidents of aflatoxins in 2004 and 2005. The claims should have been specific to a given area and/or the market or the vendor who sold the maize. The medical journal by Zlen E yard was also not produced.
72. This court also finds that in the absence of medical evidence which documents were crucial to establish that the Petitioners were exposed to harm and were harmed, the Petitioners’ case hanging on a very thin thread. It simply cannot be sustained.

(iii) Whether the Petitioners’ fundamental rights were breached and if they are time barred.

73. The Petitioners have cited various rights envisaged by both *the Constitution* and various international instruments alleging breaches of the same.

The Petitioners had the burden of proving that the said rights were violated by either specific acts of commission or omission by the respective respondents through specific acts or omission but that is lacking in this petition.

74. The burden of proof on a Petitioner in a constitutional Petition was addressed by the Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR as follows;

“Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

75. The Petitioners Case is a bit cloudy in terms of specific acts of omission or commission by the Respondents as I have already noted above. The Petitioners have failed to demonstrate with clarity what the Respondents did or failed to do that violated their consumer rights.
76. The case against the 1st Respondent as seen above failed to disclose its responsibility to maize sold in the open market. They have failed to demonstrate with a reasonable degree of precision the inaction or actions of 2nd, 3rd and 4th Respondents respectively.
77. The Petition has not been sufficiently expounded by evidence tendered before me. In Leonard Otieno Versus Airtel Kenya Limited [2018] eKLR Mativo J (as he then was) dealt on this question when he noted;

“It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Claims of violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* an inevitable result in ill-considered opinions. The Presentation of clear evidence in support of violation of constitutional rights is not a mere technicality,



rather, it is essential to a proper consideration of Constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypothesis.”

78. The Petitioners’ Case is mainly on inter alia a Journal whose author was not availed and general information that reported that there were incidents of aflatoxin found in cereals in some areas of Makueni, Machakos and Kitui in 2004 and 2005. This Petition however lacks in specificity. A party alleging violation of any Constitutional right must be specific about the breaches and the specific actions of those indicted for breaches or violation.
79. This Court while it finds that breaches of fundamental human rights are not time bound as determined in Anita Karimi Njeru versus Republic (1976-1980) eKLR.
80. In sum I find that, the Petitioners have failed to prove that their fundamental rights were breached by the Respondents. They have also not explained what made them file this suit after 15 years.
81. In the end, this Court finds that the Petitioners’ Case is presumptive given the reported cases of aflatoxin in Makueni, Machakos and Kitui Districts in the year 2004 and 2005. This court also finds the petition short of specifics and proof. The same is disallowed. I will however make no Order as to Costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 31TH DAY OF JULY, 2023.

HON. JUSTICE R. LIMO-JUDGE

