



**WNO v Beta Healthcare International Limited & 2 others (Petition 238 of 2018)
[2023] KEHC 21215 (KLR) (Constitutional and Human Rights) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21215 (KLR)

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

PETITION 238 OF 2018

LN MUGAMBI, J

JULY 28, 2023

BETWEEN

WNO PETITIONER

AND

BETA HEALTHCARE INTERNATIONAL LIMITED 1ST RESPONDENT

KENYA BUREAU OF STANDARDS 2ND RESPONDENT

KENYA REVENUE AUTHORITY 3RD RESPONDENT

JUDGMENT

1. Pursuant to a petition filed on 3rd July, 2018, the petitioner sued the following three respondents: -

- i. Beta HealthCare International Limited
- ii. Kenya Bureau of Standards and,
- iii. Kenya Revenue Authority

The grievance by the Petitioner arises from condoms supplied and marketed by the 1st Respondent between August, 2011 and July 2016. He claimed that he was a frequent user of the said condoms but came to realize in or around October, 2014 that they were of dubious quality when one broke while having sexual intercourse with a stranger he had just met thereby causing him to be infected with a sexually transmitted disease.

He thus contended that his to right protection as a consumer under Article 46 of *the Constitution* was violated. Tied to this, was the right to health under Article 43 as the poor quality of the condoms had a direct bearing on sexual and reproductive health. Moreover, his request to be supplied with information by the 1st, 2nd and 3rd Respondent as he enquired more about the product was not provided



hence his rights under Article 35 of *the Constitution* was thus violated. The detailed factual account of the Petitioner was deposed in his supporting affidavit to the Petition.

Petitioner's Case

2. The petitioner alleged that the 1st respondent was responsible for the sale and marketing of “Zoom Condoms” which were described in its website (www.betacare.co.ke) as ‘Latex male condoms, electronically tested and hermetically sealed for maximum protection.’
3. In the market, the zoom condoms were sold in three different variants:
 - i. Zoom Studded, “for maximum pleasure.”
 - ii. Zoom Chocolate Scented, “to give you that attractive scene to light up your moments.”
 - iii. Zoom Regular, “for the man who know what he wants.”
4. The petitioner averred that between January, 2014 and October, 2014, he was a sexually active man and a frequent traveler between Kisii and Nairobi Counties.
5. He claimed that he was fascinated by those condoms and would purchase them in various pharmacies, shops and entertainment joints in Nairobi, Naivasha, Nakuru, Kericho and Kisii and he would use the condoms on different women that he had sexual intercourse with in those Towns.
6. On 4th October, 2014 he had attended a friend’s wedding in Kisii in which the reception went into the night. On the dance floor, he got acquainted to a lady with whom he later got intimate that night. He used his favourite ‘zoom scented chocolate flavoured studded condom’ for protection and pleasure. However, after the sexual intercourse he discovered that the condom had broken during the act. At the moment he brushed off the issue and three days thereafter, he had sexual intercourse with his wife.
7. On 13th October, 2014 he was passing urine when he noticed some rashes on his private parts and he suddenly recalled the condom burst 8 days ago.
8. He sought traditional treatment and got a temporary reprieve but on 15th October, 2014 while on his way to Nairobi he became seriously ill in the bus and was forced to alight and seek treatment at a clinic along the way. He was diagnosed with a sexually transmitted infection (STI) and put in treatment.
9. His woes worsened after wife called him a few days later and informed him that he had infected her with STI. She blamed him for being unfaithful in their relationship and subsequently, they fell apart and his wife left him. Distressed and overburdened with guilt, he developed a mental breakdown. He became alcoholic and lost his job.
10. He averred that some of his friends confided to him that they had they had also experienced condom breaks with regard to the said brand of condoms and this made him start doubting the zoom brand of condoms.
11. He thereafter came across information that Batch Number DH1102 which was originally meant for sale in Uganda by Beta Health Care (U) Ltd (the 1st Respondent’s subsidiary) had failed all the qualitative tests administered by the National Drug Authority (NDA) of Uganda and was declared unfit for the intended use for not meeting ISO 4074:2002/2003 WHO specifications. The National Drug Authority thus ordered Batch DH1102 to be destroyed.
12. The petitioner deposed that the ISO 4074:2002/2003 WHO specifications that the condoms were subjected included: dimensions, designs, burst volume and pressure, stability and shelf-life, freedom from holes, visible defects, packaging integrity, packaging and labelling.



13. The petitioner claimed that instead of the 1st respondent's Uganda subsidiary destroying the said batch number DH1102, it unlawfully smuggled it into Kenya where it was distributed and sold through various business outlets including pharmacies and pubs.
14. The petitioner averred that he confirmed that the condom that broke while he was having sexual intercourse was from that Batch DH1102.
15. The Petitioner alleges that in September, 2016, he sought information pursuant to Article 46 and 35 of *the Constitution* and Section 5 and 87 of the *Consumer Protection Act* seeking to know from the 1st respondent whether the condom from the said batch complied with the Kenya's standards but the information that was supplied to him did not address his concerns.
16. He averred that on 16th August, 2017 and 12th March, 2018; he wrote to the 2nd respondent seeking to know if the condoms distributed by 1st respondent between August, 2011 – July 2016 had undergone quality assurance, inspection and testing services and if they had been issued with standardization marks of quality as well as the results of testing analysis done but the response given was elusive.
17. On 13th April, 2018, the petitioner wrote to 3rd respondent seeking to know if the consignment of Zoom Condoms Batch No. DH1102 for the period between August, 2011 – July, 2016 had been cleared by it and if so, to be provided with a copy of relevant importation documents. However, the request was not replied to.
18. The petitioner thus averred that his right to information and consumer rights as provided in *the Constitution* and *Consumer Protection Act* No. 46 of 2012 and the right of millions of Kenyans to economic and social rights under Article 43 (1) (a) of *the Constitution* were thus violated.
19. He averred that Section 4 of the *Consumer Protection Act* (Act No. 46 of 2012) and Article 22 of *the Constitution* gives him the locus to institute these proceedings on his own behalf and on behalf of consumers generally in public interest.
20. The petitioner alleged that due to actions of the respondents, he has suffered loss and damage namely: -
 - a. Contracted syphilis and gonorrhoea.
 - b. Lost his wife.
 - c. Suffered and still continues to suffer emotional distress and anxiety as he does not know his HIV status.
 - d. Lost his job.
21. Special damages particularized as follows: -
 - i. Courier charges Ksh.400.00
 - ii. Medical Report Ksh.3,000.00
 - iii. Costs of treatment to be availed at the trial.
22. The petitioner thus prayed for the following reliefs: -

Costs of this petition to be granted to the Petitioner

 - a. An Order directing the 1st Respondent to recall all Zoom condoms that do not bear the standard mark of quality assurance from the 2nd Respondent and/or not issued with a Certificate of Conformity with the 2nd Respondent and/or



not cleared for entry in the Kenyan Border by the Customs Department of the 3rd Respondent.

- b. An Order compelling 1st Respondent to release to the Petitioner and this Honourable Court the Importation and Clearance documents (inclusive of tax and duty) in respect Consignment of Zoom Condoms Batch No. DH 1102, marketed, distributed and sold by the 1st Respondent in the Kenyan market on diverse dates between August, 2011 to July, 2016
- c. An Order directed at the 1st Respondent compelling it to release to the Petitioner and this Honourable Court the Certificate of Conformity and the quality assurance, inspection and tests (if any) in respect Consignment of Zoom Condoms Batch No. DH 1102, marketed, distributed and sold by the 1st Respondent in the Kenyan market on diverse dates between August, 2011 to July, 2016.
- d. An Order of Mandamus directed at the 2nd Respondent compelling it to release to the Petitioner and this Honourable Court the Certificate of Conformity and the quality assurance, inspection and tests (if any) in respect Consignment of Zoom Condoms Batch No. DH 1102, marketed, distributed and sold by the 1st Respondent in the Kenyan market on diverse dates between August, 2011 to July, 2016.
- e. An Order of Mandamus directed at the 3rd Respondent compelling it to release to the Petitioner and this Honourable Court the Importation and Clearance documents (inclusive of tax and duty) in respect Consignment of Zoom Condoms Batch No. DH 1102, marketed, distributed and sold by the 1st Respondent in the Kenyan market on diverse dates between August, 2011 to July, 2016.
- f. An Order of Mandamus directed at the 2nd Respondent compelling it to recall all brands of Zoom condoms currently being sold by the 1st Respondent in the Kenyan market and subject the said condoms to verification of conformity to the Kenyan Standards or approved specifications in their country of origin and/or to re-inspect the same at the port of entry.
- g. An Order of Mandamus directed at the 2nd Respondent to re-ship, return or destroy at the 1st Respondent's expense the Zoom brand of condoms that will not conform to the Kenyan Standards or approved specifications.
- h. A declaration that the Consumer Rights of the Petitioner under Article 46 of [the Constitution](#) were violated.
- i. A declaration that the Consumer Rights of the Kenyan Consumer under Article 46 of [the Constitution](#) were violated and/or is threatened.
- j. A declaration that the Right to Access to Information of the Petitioner under Article 35 of [the Constitution](#) was denied and/or violated. m. A declaration that the Right to Information of the Kenyan consumer was denied and/or violated.
- k. A declaration that the Right to Economic and Social right of the Kenyan people to attain quality reproductive health care under Article 43 of [the Constitution](#) was violated.



- l. An order that the Petitioner be compensated for violation of the above rights.
 - m. General Damages.
 - n. Special Damages of Ksh 3,400.00
 - o. Any other further or better relief that this Honourable court will think fit and just to give in the circumstances of this case.
23. The petition is supported by the affidavit of Williamson Nyakweba sworn on 2nd July, 2018. It essentially reiterates the contents of the petition.
24. In his supplementary affidavit sworn 11th January, 2019, the petitioner reacted to the response by the respondents as follows: -
- i. He censured the 3rd respondent for filing grounds of opposition which raises factual issues instead of filing a replying affidavit.
 - ii. That the 1st respondent did not deny the authenticity of documents that the petitioner had provided.
 - iii. That it is preposterous for the 1st respondent to expect him to name of individuals who sold him condoms, the time and date and the time he was buying them over the counter. Further, no one keeps names or records of women they have slept with.
 - iv. That the explanation provided in regard to Batch No. DH1102 is an afterthought.
 - v. Quality standards ISO 4072:2002 WHO do not vary from country to country.
 - vi. That all documents marked by 1st respondent and alleged to have been issued by 2nd and 3rd respondents lack receipts to back them, most importantly, 2nd and 3rd respondents did not confirm they issued them.
 - vii. That on 19th February, 2016, the then Principal Secretary Ministry of Health, Hon. Nicholas Muraguri stated that condoms are tested in the country of origin and locally hence the 1st respondent had to get clearance of Pharmacy and Poisons Board. That on 14th August, 2018, his advocates wrote to Pharmacy Poisons Board and National Quality Control Laboratory (NQCL) and on 5th September, 2018 to Pharmacy and Poisons Board. On 14th September, 2018 – PPB confirmed it never cleared the consignment of zoom condoms from 1st respondent.

1st Respondent's Response to the Petition

25. The 1st respondent's response to the petition was through a replying affidavit sworn on its behalf by Chirag Patel on 22nd October, 2018.
26. The deponent on behalf of 1st respondent admitted that the 1st respondent was involved in marketing, distribution and selling of zoom condoms to various business outlets in Kenya – including supermarkets, shops, pharmacies and entertainment joints. It nevertheless questioned how the petitioner had been able to obtain 1st respondent's documents that he had attached to the supporting affidavit as from exhibits 3 to 12 and objected to their production on the basis that they were illegality obtained and were thus inadmissible.
27. The 1st respondent affirmed that its condoms were indeed latex lubricated, electronically tested at hermitically sealed for maximum protection and asserted that it had never received any complaints



about their quality since their introduction in the market hence was unaware on any complaints by member of the public as alleged by the Petitioner.

28. The 1st respondent disputed the various assertions made by the petitioner and indicated that no evidence had been provided to back those allegations namely:
- i. That he had been buying condoms in pharmacies and shops and entertainment joints in Nairobi, Naivasha, Nakuru, Kericho and Kisii yet no names of the specific outlets nor evidence of actual purchase was provided.
 - ii. Though he claimed he had slept with various women in the different towns, none of them had come forward to confirm that fact nor had he given any names or specific dates and hotels where those sexual exploits took pace.
 - iii. The specific woman he claimed he had slept with on 14th December, 2014 when the condom allegedly ruptured was not named or even her testimony secured.
 - iv. No concrete proof that condom that ruptured was actually contained in the specific packet of zoom that was attached to the affidavit or evidence that it broke for solely due to reasons of quality and not any other factors.
 - v. No evidence that he indeed wore the zoom condom on that day.
 - vi. Not provided any evidence of the wedding he alleged to have attended.
 - vii. No evidence that he had in fact travelled between Kisii and Nairobi on 14th and 15th October, 2014.
 - viii. No medical evidence that he suffered mental distress, guilt and the mental breakdown or that he became alcoholic.
 - ix. No evidence by any member of public that told him that they had also experienced condom burst.
 - x. No proof that he was actually married when the alleged incident occurred.
 - xi. No evidence to rule out that he did not contract the STI from his wife with whom he had unprotected sex.
 - xii. The 1st respondent further stated that the petitioner is a man unworthy of credit for he is a married man who confesses cheating on his wife with several women hence was peddling falsehoods to institute this petition.
29. The 1st respondent reiterated that the information that the petitioner was relying on to demonstrate Batch No. DH1102 had failed qualitative test for Ugandan National Drug Authority (NDA) could only be obtained in the 1st respondent subsidiary or the National Drug Authority hence the same was illegally obtained evidence that the court needs to exclude.
30. The 1st respondent nevertheless admitted that it shipped a consignment of Batch No. DH1102 from India to Uganda in August, 2012 and it was in fact true that Uganda's National Drug Authority found that it did not ISO 4074:2002 specifications and ordered its destruction. That it was destroyed and was not smuggled into Kenya as alleged by the Petitioner.
31. The 1st respondent offered a detailed explanation of how it got involved in the distribution and marketing chain, who the other participants were, the information relating on manufacturing of the condoms and quality checks administered, how the destruction came about and how it was executed as way of providing a complete picture surrounding the whole matter. It explained thus:



- i. That on 26th March, 2012, the 1st respondent, together with an Indian Company known as Cupid Limited (which was involved engaged in manufacturing, sale and distribution of pharmaceutical formulation, nutraceuticals and herbal products in India) and another Indian Company known as Anglo-French Drugs & Industries Limited (AFDIL- that was involved in the manufacturing, marketing, sale and distribution of pharmaceutical formulation, nutraceuticals and herbal products in India); the three Companies entered into a tripartite agreement (annexure CP 3) regulating the sale, marketing and distribution of zoom condoms throughout the world.
 - ii. In the said tripartite agreement, Cupid was to manufacture, sell and deliver zoom condoms to AFDIL; AFDIL agreed to purchase zoom condoms from Cupid Ltd for sale to 1st respondent for distribution and marketing to the world. It was further agreed Cupid will manufacture zoom condoms bearing the trade mark of the 1st respondent and grant licence to 1st respondent for distribution and sale of zoom condoms in the world.
 - iii. That because the 1st respondent had good presence in Kenya, Tanzania, Uganda, Zambia and Ethiopia whereas AFDIL did not have, AFDIL and 1st respondent agreed in these countries, the 1st respondent will undertake distribution, marketing and sale of Zoom condoms on behalf of AFDIL.
 - iv. As a result, on 26th March, 2012, 1st respondent requested AFDIL to supply 69,000 packets of zoom condoms to Kampala, Uganda for distribution and sale and the same were received by 1st respondent's subsidiary Beta Health Care, Uganda Ltd.
 - v. AFDIL subsequently, increased the quantity by an additional 3217 packs of 3's (9651) zoom condoms which the 1st respondent accepted on behalf of 1st respondent, it was deposed that before the shipment to Uganda, the zoom condoms had been tested before shipment as per ISO 4074:2002 as per the annexed relevant certificates marked CP -9A, CP – 9B and CP-10 in the deponent's affidavit.
 - vi. Upon arrival of shipment to Uganda a total of 720 packets making 2160 condoms were submitted to Uganda NDA for quality assessment testing as evidenced by annexure "CP 11".
 - vii. Upon being tested, the Ugandan National Drug Authority found that the said condoms were unfit for use and ordered their destruction as per annexed "CP -12" which is the NDA's letter of 15th October, 2012.
 - viii. Beta Healthcare Uganda surrendered the remainder of 7,491 zoom condoms in 2497 packets of 3's to Luwero Industries Ltd Nakasola on 15th November, 2012 and they were all destroyed through incineration under the supervision of NDA and a certificate to that effect was issued to Beta Uganda on 8th January, 2013 as per annexure 'CP -13'.
32. It was thus the 1st respondent's assertion that the total number of zoom condoms that were exported from India to Uganda were not smuggled into Kenya as alleged by the petitioner.
 33. The 1st respondent further explained that it is incorrect for the petitioner to assume that Batch No. DH1102 was exclusively manufactured for condoms destined for export to Uganda from Bengalore (India).
 34. The 1st respondent instead explained that batch numbers are assigned to products depending on the year of manufacture and the year of expiry and that explains the consignment of zoom condoms manufactured and exported to Kenya and Uganda between 2011 and 2013 would bear the same



Batch No. DH1102. There were condoms manufactured between 8/2011 and with the expiry date of 07/2016. However, shipment numbers varied depending on when the export was done as evidenced by CP 8, CP 20 and CP 29.

35. The 1st respondent swore that all its condoms shipped into Kenya met both KEBS and KRA requirements.
36. According to the 1st respondent, Kenya Bureau of Standards, (KEBS) had a pre-export verification conformity programme (PVOC) that it introduced in 2005 vide legal notice No. 78 of 18th June, 2005 – annexure ‘CP 14’ whereby under the arrangement; it would authorize an agent to carry out inspection of products on its behalf and would thus not require a second qualitative test when product arrived in Kenya.
37. In the instant case, the 1st respondent deposed that before shipment of condoms into Kenya, Societe Generale de Surveillance (SGS) which has its Headquarters in Geneva Switzerland and known for global inspection, verification, testing and certification services, had the pre-export conformity programme with KEBS hence under the arrangement inspected, verified and tested the condoms and found them to meet Kenya’s qualitative standards hence did not require to be tested again by KEBS.
38. The 1st respondent stated that purchase order No. 86 and purchase order 124 that were shipped to Kenya met both KEBS and KRA requirements as shown in annexures CP 15, CP 16, CP 17, CP 18, CP 19, CP 20, CP 21, CP 22, CP 23, CP 24, CP 25, CP26, CP 27, CP 28, CP 29, CP 30, CP 31 and CP 32.
39. That the 1st respondent could not provide the information to the petitioner because he had failed to prove that he was consumer of their condoms and further, rather than seek information in the right manner, the petitioner chose to fight the 1st respondent accusing it of selling products that did not meet health standards and threatening to sue to the company hence was on a fishing expedition to gather evidence in order to create this suit.
40. That the petitioner has suffered no prejudice since it is now clear that the 1st respondent did not smuggle any condoms into the country.
41. The first respondent asserted that the petitioner had not proven he was a consumer of their condoms in line with the definition of consumer under the [Consumer Protection Act](#), hence cannot demand to be supplied with information under Section 87 of [Consumer Protection Act](#) and further, under the [Access to information Act](#), information can be denied if giving it may prejudice commercial interests, including intellectual property rights if an entity or third party from whom information is obtained or damage a public entity’s position in actual or contemplated proceedings, and for the petitioner in this case, he had made it clear that he was intending to commence legal proceedings against the company.
42. The 1st respondent thus affirmed that it did not violate consumer rights, right to access information or economic and social rights of the petitioner or any other Kenyan.
43. Over and above the averments in the replying affidavit, the 1st Respondent also filed a notice of Preliminary Objection dated 22nd October, 2018 in which it objected to the Petition on the following grounds”
 - i. The Petition is incompetent and incurably defective and beyond redemption for contravening Section 22 of the [Access to Information Act](#) No. 31 of 2016



- ii. The Amended Petition is incompetent, misconceived and ill-advised as it offends the provisions of Rule 7 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013
- iii. The Amended Petition is incurably defective, bad in law, frivolous, hopeless and an abuse of the process of the court and is totally devoid of merit as it contravenes the provisions of rule 8 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

2nd Respondents Response

44. The 2nd respondent, Kenya Bureau of Standards (KEBS) responded to the petition through the replying affidavit sworn by Birgen Ronoh, Ag Head of Department of inspection at Kenya Bureau of Standards (KEBS).
45. KEBS through the deponent confirmed that indeed, it received petitioner's letter dated 16th August, 2017 and 12th March, 2018 which it responded to as evidenced at paragraph 33 and 35 of petitioner's bundle of documents.
46. That the 2nd respondent sought more information from the petitioner to be able to respond to his request more appropriately but instead of availing that information, the petitioner instead came to court to allege his right to information was infringed yet in view of volumes of information that the 2nd Respondent handles, it was not possible to retrieve that information based on scanty details that the petitioner had provided.
47. The 2nd respondent affirmed that zoom condoms sold in Kenya between August, 2011 and July 2016 underwent quality assurance, inspection and testing as evidenced by annexure 14 of 1st respondent's replying affidavit of 24th October, 2018 and were thus issued with standardization marks of quality, hence allegations that the condoms rejected in Uganda are the same ones that were smuggled and sold in Kenya is an untrue statement of fact by the Petitioner.
48. The 2nd respondent disputed the assertion by the petitioner that it was being elusive and colluding with the 1st respondent to mask the truth.
49. The 2nd respondent insisted that the petitioner had filed this petition for his own benefit and not the public there is no evidence by any other Kenyan who had experienced a similar problem neither was there any consent obtained from anyone else that he purported to represent.

3rd Respondents Response

50. The 3rd respondent response was through the grounds of opposition dated 28th November, 2018 in which the following grounds were raised: -
 1. That the Petitioner has not met the evidential threshold test in proof of the allegations raised in the petition and more so as against the 3rd Respondent.
 2. That there is no admissible evidence placed before the Honourable Court to support the insinuation that the 3rd respondent has failed to undertake its statutory mandate as among others, expressed under Section 5 of the *Kenya Revenue Authority Act* Cap. 469 of the Laws of Kenya.



3. That there is no admissible evidence placed before the Honourable Court to support the allegation in Paragraph 41 of the Supporting Affidavit of alleged collusion between the 1st, 2nd and 3rd Respondents.
4. No material evidence placed before the Honourable Court of any request of information from the 3rd Respondent.
5. That the alleged request by the Petitioner to the 2nd and 3rd Respondent, and whose receipt is denied by the 3rd Respondent save for batch number that is of no help to 3rd Respondent, does not provide any adequate details such as serialized agent declarations in the Simba System used by 3rd Respondent that would have facilitated retrieval of any report.
6. That the Petitioner having averred that the alleged consignment was brought into the country in the year 2011, it would not have been reasonably practical to retrieve and avail the archived data owing to several volume of documents handed by 3rd respondent daily.
7. 3rd Respondent is bound by the duty of confidentiality to Tax Payer's Information in line with Articles 24 and 31 of *the Constitution* of Kenya.
8. If indeed the alleged batch was smuggled illegally into the country as indicted in the petition; there would be no way 3rd respondent would then avail the information sought by the petitioner, and it was the responsibility of petitioner to report to the police and 3rd respondent for investigations to be commenced.
9. The petition is incompetent and ought to be struck out for:
 - i. The Petition does not disclose any Constitutional Violation by the 3rd Respondent.
 - ii. Violation of right of access to information ought to have been in the first instance been presented before the commission under Part V of *access to information Act*, 2016 which is preceding and wrongfully before the court.
51. Besides affidavit evidence, the deponents were also availed for cross-examination. Dr. George Kungu Mwaura (PW 1) confirmed that he examined the Petitioner on 15th October, 2014 at his clinic during the day time and found him suffering from 1st stage infection of gonorrhoea and syphilis. He did not reveal with whom he had sexual intercourse. He also saw him on 25th October, 2014. On 28th May, 2018; he re-examined him and prepared his medical report. He stated that his medical clinic was registered in 1992 but had not been asked to carry his registration documents to Court.
52. PW 2 was William Nyakweba Omworo, the Petitioner. He produced packets of zoom condoms as P. exhibit 1. He reiterated his evidence as outlined in the affidavit in support of the Petition. Asked on cross-examination how he had obtained the 1st Respondent documents, he said they were given to him by an employee of Beta Health Care whose name he could not provide for security reasons.
53. The 1st Respondent called ChiragKumar Patel as its DW1. He testified that the consignment of zoom condoms that came to Kenya was what was contained in order number 86 per attached exhibit CP- 15 to CP 20 and the consignment that went to Uganda was different being contained in CP 9 and 21.

Petitioner's Submissions

54. The petitioner reacted to the objection on grounds of jurisdiction respondent's by 1st and 3rd Respondent in which they submitted that the dispute in regard to access to information could not



be adjudicated upon because it was not first referred to the Commission on Administrative Justice in accordance with Part V of [Access to Information Act](#), 2016.

55. The Petitioner argued that his petition was not grounded on the violation of the right to supply information only but included the violation of rights on protection of consumers under Article 46 (1) and the right to the highest and attainable standards of health under Article 43 (1) (a) of [the Constitution](#).
56. Further, the petitioner quoted and relied on the following excerpt from the case of Katiba Institute Vs Presidents Delivery Unit & 3 others (2017) eKLR, where Justice Mwita remarked as follows: -

“... There was no constitutional or statutory requirement that compelled one to file a complaint arising from Article 35 of Constitution with Commission of Administrative Justice before lodging a petition...”
57. On the issue of petitioner’s right to Access of Information under Article 35 of Constitution, the petitioner submitted that none of the respondents provided the petitioner with the information he had sought save for replies that he described as elusive. The 3rd respondent did not even bother to reply. The petitioner relied on the case of Orange Democratic Movement (ODM) Vs Independent Electoral and Boundary Commission (2019) eKLR in submitting that refusal to divulge the information requested was a violation of his right under Article 35 of [the Constitution](#).
58. Concerning alleged violation of consumer rights enshrined under Article 46 of [the Constitution](#), the petitioner argued that it was not in contention that the 1st Respondent distributed Zoom condoms and that the petitioner had the right to purchase them. He submitted the only issue therefore was whether condoms in batch No. DH1102 met the quality and standard of goods as required under Article 46 (1) of [the Constitution](#).
59. The petitioner contended that the 1st respondent had confirmed that batch No. DH1102 have been found by Uganda’s NDA to be wanting in terms of meeting the recommended standards and even though it counteracted that the batch that was found unsuitable was destroyed as per NDA Certificate of 8th January, 2013 that explanation was effectively satisfactory in that the said batch was manufactured by 1st Respondent Company named Cupid Limited as confirmed in Paragraph 34 of Respondent replying affidavit dated 22nd October, 2018.
60. It was the petitioner’s submission that questionable batch could not fail qualitative test in Uganda but pass similar qualitative test in Kenya when it was the same WHO specification ISO 4074:2022 that was applied.
61. The petitioner questioned the certificate of complicity issued by SGS and marked CP 22 in the 1st Respondent replying affidavit observing that it relied on test report dated 12th August, 2011 marked “CP 21” which Ugandan National Drug Authority had disagreed with when it declared the said batch unfit for intended use. According to the petitioner’s case, the said batch was substandard and nothing verification was done by 2nd respondent to change the fact.
62. The petitioner’s Advocate further submitted there were no documents from Pharmacy and Poisons Board that were to show that the said condoms had been cleared by the Board. He argued that he had in his supplementary affidavit dated 11th February, 2019; he had attached the letter for Pharmacy and Poisons Board dated 14th September, 2018 in which the Pharmacy and Poisons Board had confirmed that it did not inspect nor clear the condoms yet under Cap 244 – the Pharmacy and Poison Act is mandated to control the trade in drugs and poisons.



63. The petitioner faulted the assertion by the 2nd Respondent in paragraph 7 of replying affidavit dated 20th March, 2019 which supported 1st respondent assertion that the condoms underwent quality inspection and testing and were issued with standardization mark yet the 2nd Respondent did not produce any documents to confirm that assertion and also; condoms produced by the petitioner did not have any Standardization Mark of Quality. The Petitioner also submitted that the 1st respondent had not produced any receipt to confirm that payment had been made to 3rd respondent to clear the said batch.
64. The Petitioner underscored that the Ministry of Health did not confirm clearing the said batch DH1102, the 3rd respondent did not also confirm clearing it upon entry into the country, consequently, the said batch was sold in the country illegally.
65. The petitioner submitted that 1st and 2nd respondent violated Article 43(1) of Constitution on the right to attain quality the highest quality of Health care as condoms are part of different ways of preventing sexually transmitted infections and unwanted pregnancies hence are core in sexual and reproductive health. The omission of 1st and 2nd respondent ensuring quality standards were maintained was thus an infringement of the right to health.
66. The petitioner submitted that he was entitled to the orders sought. On damages, the petitioner argued that he was a victim of substandard condoms which led him to contract a sexually transmitted disease as confirmed by the medical report dated 28th May, 2018 attached to the affidavit dated 2nd July, 2018 and ultimately, this also led his wife running away from him. He urged the court to award him compensation to the tune of Ksh.500,000,000/- and special damages of ksh.3,400/-He relied on the following authorities: -

Joo Vs the Attorney General & 6 Others (2018) eKLR, where the petitioner was awarded Ksh.2,500,000/- for violation of right to Human Dignity, and not to be subjected to cruel, inhuman and degrading treatment.

Douglas Moturi Nyairo v University of Nairobi [2018] eKLR where the petitioner was awarded Ksh.400,000,000/- for violation of right of access to information and for administrative action and the case of Mustafa Abdulrahman Khogali v Gulf African Bank Limited [2020] eKLR where the petitioner was awarded Ksh.2,000,000 for breach of constitutional rights under Article 27 on the basis of nationality and consumer rights under Article 46.

1st Respondent's Submissions

67. The 1st respondent submitted that the right of access to information is not absolute and can be limited by law where circumstances permit and is justifiable to do so.
68. The 1st respondent argued that the petitioner sent to it a demand letter disguised as a request for information. It stated that the letter dated 23rd March, 2018 was accusatory in nature condemning the 1st respondent of committing a criminal act hence Petitioner was merely fishing for information to prove the allegations against the 1st respondent and the 1st respondent was thus entitled in law to refuse to surrender the information to guard itself against self-incrimination which is protected under Article 50 (2) (1) of *the Constitution*.
69. Further, the 1st respondent questioned how the petitioner would allege that the condoms were smuggled into Kenya and at the same time demand for documentation of the condoms from the 1st respondent terming it double speak.



70. On the claim that the 1st respondent violated consumer rights of the petitioner, the 1st respondent submission that the petitioner had not proved that he was a consumer of goods supplied by the 1st respondent. The 1st respondent associated with the submissions of 2nd respondent at paragraph 23 of the submission that the petitioner had not demonstrated by way of evidence that he fell in any of the four recognized categories of consumer as provided for in Section 2 of the [Consumer Protection Act, 2012](#). In particular, the petitioner had not exhibited any cash receipt to prove that he had bought Zoom condoms at the material time nor was there proof he had used the product in question; instead he had produced were sales receipts issued by 1st respondent to its suppliers that used to market and distribute zoom condoms notwithstanding that the petitioner is not a supplier of the 1st respondent. In any case, the 1st Respondent submitted that the said receipts are for years 2011 and 2012, yet the period subject matter of this Petition is October, 2014.
71. The 1st respondent submitted that it had provided proof that zoom condoms supplied in Kenya had been inspected, verified, tested and certified to have complied with Kenya's qualitative and assurance standards by the 2nd respondent and had exhibited documents to that effect including importation documents and certificate of conformity that were issued by 2nd respondent in respect of zoom condoms.
72. To the petitioner's claim that the documents relied upon by the 1st respondent were false (paragraph 15 of petitioner's affidavit), the 1st respondent argued that under Section 107 of [Evidence Act](#) obligates the petitioner to prove that allegation yet no forensic evidence was provided substantiate the forgery allegations. The 1st respondent relied on the Court of Appeal Case of Kinyanjui Kamau Vs George Kamau (2015) eKLR which was followed in Demutila Nanyama Pururmu v Salim Mohamed Salim [2021] eKLR, where the court held that where fraud is alleged, it is not enough to simply infer fraud from facts, but that it had to be specifically proved.
73. Regarding the petitioner submission that 1st respondent's condoms were substandard; The 1st respondent argued that the petitioner did not disclose demonstrate how he arrived at that conclusion because in Kenya it is the 2nd respondent that is mandated to enforce standards of all goods either directly or through its appointed agents as the per [Standards Act](#) Cap 496 and had already it had confirmed and provided the relevant documentation to the 1st respondent which it exhibited.
74. The 1st respondent submitted neither the National Quality Control Laboratory nor the Pharmacy and Poisons Board has the legal mandate to monitor and set the standards and relied on the case of Sinotruck Machinery & Equipment Co. Limited Vs Kenya Bureau of Standards (2018) eKLR which held that: -
- “... Under the [Standards Act](#), the respondent is the only body mandated to monitor and enforce the standards of goods in question. The respondents is also mandated to carry these functions through appointed agents. ...”
75. The 1st respondent submitted that the petitioner was alleging that it was responsible for smuggling substandard condoms from Uganda but had not provided any proof of the same.

2nd Respondents Submissions

76. The 2nd Respondent filed its written submissions on 1st November, 2021, through J M Njenga & co. Advocates.



77. The 2nd respondent conceded that the petitioner sought information from the 2nd respondent pursuant to Section 8 of [Access to Information Act](#), 2016 and Article 35 of [the constitution](#) on 17th August, 2017 and were favoured with a response on 8th September, 2017 from the 2nd respondent informing them that the issue was being looked into. They sent a reminder on 12th March, 2018 which was responded to on 13th March, 2018 whereby the 2nd Respondent sought for more particulars from the petitioner to assist it trace the information he wanted. It requested the petitioner not to use batch number as reference but provide that details relating to a particular consignment. The petitioner instead filed this petition.
78. Consequently, 2nd respondent contention was that it did not refuse to supply information but was seeking more particulars to be able to trace the information and provide it to the Petitioner. It argued that it handles millions of documents and what the petitioner had provided was unhelpful in tracing the information he wanted.
79. The 2nd respondent argued that Section 8 of [Access to Information Act](#) obligated the petitioner to provide sufficient details and particulars to enable the public officer understand what information was being requested (a position that was solidified in the case of *Katiba Institute Vs President's Delivery Unit and 3 others* (2017) eKLR. It submitted that the petitioner failed to supply sufficient details that would have assisted in tracing the information. In any event, the 2nd respondent argued that if indeed the Zoom condoms in question had been smuggled into the country as alleged by the 2nd Respondent, then the information could not have been at its disposal for supply to the Petitioner.
80. On the issue of violation of petitioner's consumer rights under Article 46 of [the Constitution](#). The 2nd respondent submitted that the petitioner had not demonstrated he was a consumer of alleged zoom for he merely alleged so without any proof. The 2nd respondent referred to Section 2 of [Consumer protection Act](#) in amplifying the submission on this issue and submitted that the petitioner does fall in any of the categories set out thereof. He did not produce any receipt to show he purchased the condoms, he did not prove he was a consumer of the product, did not show he was a person to whom the product supplied to hence cannot claim his consumer rights were violated.
81. On the issue of violation of petitioner's rights to attain quality reproductive healthcare under Article 43 (1) of [the Constitution](#), the 2nd respondent submitted that it had been ably demonstrated that condoms that entered Kenya were inspected, verified, certified fit for use and no evidence that there was no evidence adduced that the 2nd respondent had breached hence no constitutional right of the petitioner or general public was violated.
82. The 2nd respondent submitted that no loss or damage had been established including that the petitioner had lost his wife and job, neither was there any evidence of emotional distress for not knowing his HIV status.
83. The 2nd respondent thus submitted that the petitioner is not entitled to any damages.

3rd Respondent's submission

84. The 3rd respondents filed its submissions dated 14th May, 2019 through Shijenje Johnson Advocate.
85. According to the 3rd respondent, Access to information under Article 35 of [the Constitution](#) is actualized through the [Access to Information Act](#) No. 31 of 2016 which came into force on 21st September, 2016 and under Sections 20 and 23, oversight and enforcement of the Act is given to the Commission on Administrative Justice, in particular Section 23(3) hence only appeals from the Commission can be brought to the court.



86. Consequently, it was the submission of the 3rd respondent that the petitioner failed to utilize the proper channel to ventilate his grievance hence the petition should be struck out for want of jurisdiction.
87. The 3rd respondent relied on the case of Mark Ndungu Ndumia Vs Law Society of Kenya & Others, Petition No. 93 of 2019 where the need to exhaust all alternative dispute resolution mechanism before invoking the jurisdiction of the court was upheld.
88. As to the issue of whether or not this petition is merited against the 4th respondent; the 3rd respondent submitted that there was no evidence that the letter seeking information by the petitioner reached it.
89. Further, the letter lacked proper particulars such as simba entry numbers that would have enabled 3rd respondent to retrieve archived information taking into account the number of years that had passed between when the consignment was allegedly cleared and the time information was being sought as well and tonnes of consignment that pass through the 3rd Respondent daily.
90. Moreover, having stated the consignment was smuggled, it would not have been possible to retrieve such information from the records of the 3rd Respondent. Consequently, the order of mandamus sought against the 3rd respondent would be in vain as the 3rd respondent cannot supply information relating to smuggled goods. Analysis and Determination
91. Having considered the pleadings and detailed submissions of all the parties, I opine that the following are the issues for determination in this petition: -
- i. Whether this court has jurisdiction to determine the issue of the petitioner's right of access to information given the facts of this case and the applicable law.
 - ii. If the answer to No. 1 above is in the affirmative; whether the petitioner's right of access to information was violated.
 - iii. Whether there was proof that Zoom Condoms comprised in batch No. DH1102 and which was found unfit for use by Uganda's National Drug Authority was smuggled into Kenya by the 1st respondent with the collusion of 2nd and 3rd respondents.
 - iv. Whether there was proof that Petitioner purchased the zoom brand of condom which ruptured in the process of using as a result of its substandard quality.
 - v. Whether the petitioner is a consumer whose rights under Article 46 of *the Constitution* and *Consumer Protection Act* were thereby violated.
 - vi. Whether the petitioner's rights to quality and reproductive health care under Article 43 (1) of *the Constitution* were violated.
 - vii. Whether the petitioner has proved loss and damage for which he is entitled to compensation and if so, the extent of quantum payable.
 - viii. Who pays for the cost of this petition?
92. The issue is whether this Court has jurisdiction to adjudicate over this matter. The 3rd respondent vehemently submitted that under Section 20 and 23 of *Access to Information Act*, the Commission on Administrative justice is granted the authority to oversee the implementation of the Act. That the act was specifically enacted to give effect to Article 35 of *the Constitution*. It submitted that a decision on refusal to supply information is required to be reported to Commission on Administrative Justice and it is only the appeal from the Commission should get to the Court for adjudication. The 1st respondent supported the position taken by the 3rd respondent.



93. The petitioner strongly opposed this contention insisting that there is no constitutional or statutory requirement that compels one to file a complaint to the Commission on Administrative justice before lodging the petition claiming violation of the right of access to information. In augmenting his position, the petitioner relied on the decision by Justice C Mwita, *Katiba Institute Vs President Delivery Unit & 3 Others* (2017) eKLR where he quoted an excerpt of from that judgment in which his Lordship stated: -

“... the respondent contended that the petition is premature basing their argument on Section 21 of the Act. Their take was that the petitioner should have first complained to the Commission of Administrative justice (CAJ) before filing the petition. I have read the Act but could not trace the provision making CAJ a condition precedent to triggering the jurisdiction of this court to deal with petitions filed seeking to challenge violations of right to access information under Article 35 of *the Constitution*. This court has unlimited jurisdiction under Article 165(3) (b) of *the Constitution* to determine the question whether a right or fundamental freedom in the Bill of Rights, has been deemed, violated, infringed or threatened. The respondent contention that the petition is premature is therefore untenable.”

94. It is trite law that once jurisdictional question has been raised, it has to be determined immediately as it enables the court to know if it has ability to deal with the matter before it or not. As was held in *Phoenix of E. A. Assurance Company Vs S M Thiga T/A newspaper Services* (2019) eKLR, ‘Jurisdiction’ is the authority or power of the court to hear and determine disputes or even take cognizance of the same.

95. The doctrine of exhaustion of remedies is anchored in Article 159 of *the constitution* of Kenya which requires that in exercise of judicial authority, court and tribunals shall among others, be guided by the principle of alternative dispute resolution.

96. Consequently, courts have been steadfast in upholding the principle that if there are other remedies; a party ought to exhaust the alternative remedies before approaching the Court for a resolution.

97. The Court of Appeal was categorical in *Geoffrey Muthiga Kabiru & 2 Others Vs Samuel Munga Henry & 1756 Others* (2015) eKLR, in restating this principle when it held as follows: -

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...”

98. Access to information is provided under Article 35 of *the constitution*. The mechanism for the exercise of this right is amplified and given effect by the *Access to Information Act* No. 31 of 2016. Section 3(a) and (b) sets out its objects to include the following among others: -

- a. Give effect to the right of access to information by citizens under Article 35 of *the Constitution*.
- b. Provide a framework for public entities and private bodies to proactively disclose information that they hold and provide the information on request in line with constitutional principles.

99. Under Section 8(1) of the *Access to Information Act*, applications are made in English or Kiswahili and the applicant is required to provide sufficient details for the public officer or any other official to understand what information is being requested.

100. In the present case, in so far as 1st and 2nd Respondent are concerned, it is not in dispute that they received the letter of the petitioner seeking information.



101. Nevertheless, for the 1st respondent, it considered that providing the information was prejudicial to its own interests as the letter by the petitioner though titled as request for information contained accusatory information and a veiled threat of legal action against the 1st respondent. It thus refused to give the information on account that it would be self-incriminatory and sought refuge in Article 50 (2) (f) of *the Constitution*. For the 2nd respondent, it simply engaged the petitioner to provide further details to enable it retrieve the information but the Petitioner did not do so and opted to file this Petition. As for the 3rd respondent, it stated that it did not get the letter that the petitioner sent. That sums up the first round of arguments on access to information which I will consider first.

102. Section 14 of the *Access to Information Act*, provides a mechanism for redressing the grievances relating to Access to Information. The section provides as follows: -

Section 14: Review of decisions by commission.

14.

(1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information: -

- a. a decision refusing to grant access to the information applied for;
- b.
- c.
- d. a decision to defer providing the access to information;”

103. I have only highlighted the relevant paragraphs because I consider them relevant in resolution of this particular issue.

104. The commission referred to in Section 14 is the Commission on Administrative Justice as Section 2, provides that: -

“Commission” means the commission on Administrative Justice established by Section 3 of the *Commission on Administrative Justice Act* (No. 23 of 2011).

105. In the present case, the outright refusal by the 1st respondent to supply the information falls under Section 14 (1) (a). Such a decision to refuse to supply the information is reviewable by the Commission at the request of the applicant in writing and can either be in respect to a decision made by a public entity or a private body. The Petitioner did not seek the intervention of the Commission against the 1st Respondent decision when it refused to supply the information requested.

106. As for the said 2nd respondent, the law at Section 8 (1) allowed it to be provided with sufficient details to be able to identify and retrieve the particular information that was required. The Petitioner felt 2nd Respondent was being elusive. In my view, that complaint fell within the competence of the Commission on Administrative Justice to inquire into as one of its functions under section 21 (1) is to ‘investigate, on its initiative or upon complaint made by any person or group of persons, violation of the provisions of the Act.’



107. As for the 3rd respondent, it was its position that it did not receive the letter that requested for the information. There was no contrary evidence given by the Petitioner to counter that assertion. That means that assertion was not controverted. The 3rd Respondent was thus under no obligation to act on a request it had not received.
108. Consequently, it is apparent that there is an elaborate statutory channel through which the right of access to information is actualized and any grievances for the denial redressed before invoking this court's jurisdiction. That was not exhausted by the Petitioner.
109. On this ground alone, I find that his claim that his right of access to information was violated had not crystalized. I would respectfully disagree with Justice C Mwitwa there is nothing in the [Access to Information Act](#) that shows a defined route that a person seeking information should take before coming to Court to litigate on violation. The fact that the High Court has unlimited jurisdiction under Article 165 (3)(b) does not take away the jurisdiction granted to other bodies by legislation. The decision by Justice Mativo in Lugo Vs. Director of Public Prosecutions (Petition 62 of 2020) 2022 KEHC 10574

“...The doctrine of ripeness and constitutional avoidance gives credence to the concept that [the Constitution](#) does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with the applicable legislation together with other legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to [the Constitution](#). The possibility of the elevation of any dispute to a constitutional issue is what is sought to be avoided by doctrine of ripeness and constitutional avoidance. It is borne out of realization that all legislative and common law remedies are part of the legal system...In other words a constitutional issue is not ripe until the determination of constitutional issue is the only course that give the litigant the remedy he seeks. Both Constitutional avoidance and ripeness avert determination of constitutional issues until it becomes necessary to the extent that it is the only course available to assist the litigants cause...”

110. In view of the foregoing, I decline to entertain the claim for violation of right on access to information as the defined statutory route through which this should have been facilitated was avoided by the petitioner.
111. In view of the above findings, issue number also 2 washouts and it was dependent on issue number 1; that is, whether the right of Access to Information of the petitioner was violated.
112. The 3rd issue is whether the condoms in batch number DH1102 that were tested and found unfit for use by Uganda's National Drug Authority were smuggled into Kenya by the 1st respondent in collusion with the 2nd and 3rd respondent.
113. The petitioner was categorical in asserting this fact as can be discerned in paragraph 25 of his supporting affidavit. He says: -

“That I came to learn that instead of the 1st respondent subsidiary destroying the impugned batch as ordered by NDA, the 1st respondent mischievously, illegally and unconscionably brought the same to Kenya where it marketed, distributed and sold the same in various business outlets including pharmacies and pubs.”

114. This was strenuously disputed by the 1st respondent, which although conceding that a consignment of zoom condoms in batch No. DH1102 that was imported from India to its subsidiary in Uganda



was found unfit for use, provided the certificate of destruction that NDA issued on 8th January, 2013 confirming destruction of the particular consignment. (Paragraph 41 of the replying affidavit annexure CP 13).

115. It also went further and explained that batch No. DH1102 did not signify that all condoms bearing that batch number were destined for Uganda, but that what was declared unfit was the particular consignment which was destroyed as ordered and none of those condoms was brought to Kenya. That all condoms brought to Kenya were examined and inspected at the point of origin by Societe Generale de Surveillance (SGS) that had entered into pre-export verification of conformity to standards agreement with 2nd Respondent hence met Kenya's specifications.
116. Firstly, it is trite law that he who alleges must prove. This is the essence of Section 107 (1) of the Evidence Act. It provides as follows:
- 107
- (1) Whoever desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
117. The Petitioner had an obligation to adduce evidence of smuggling or illegal diversion of the condemned condoms into Kenya. He assumed that by virtue of the fact that the condoms had similar batch number, that was it. However, this assumption was dislodged by the elaborate explanation of the 1st Respondent on how batch numbers are assigned during manufacturing and that they are not country specific but are issued based on the date of manufacture and expiry date. Nothing came from the Petitioner to counter this assertion. No complaint with any investigative agency was lodged anywhere in regard to the alleged smuggling or any report of investigation into the purported smuggling produced. It was just a barren allegation.
118. Secondly, the 1st Respondent countered the allegation that condemned condoms were smuggled to Kenya by producing a certificate that showed that the condoms that were found unfit by Uganda National Drug Authority were in fact destroyed. Those condoms could thus not have come to Kenya unless the certificate of destruction was misrepresentation of true facts as it would mean the destruction did not take place. The petitioner did not prove that fact.
119. I find no merit in the petitioner's claim that condoms that were destroyed in Uganda and certificate to that effect issued as are the ones that were smuggled into Kenya by the 1st respondent in collusion with 2nd and 3rd Respondent.
120. The next issue is whether the petitioner proved his claim that he: -purchased the zoom condom and that as he used it, the same ruptured in due to its substandard quality. As part of his evidence, the petitioner relied on to establish this assertion, he produced some packets of condoms which he exhibited in evidence.
121. This was hotly contested by the respondents who stated that purchase had not been proved; that there was no evidence that the condom that allegedly burst came from the packets produced and also, it had not been established that the bursting was due to its poor quality. In any case, the 1st Respondent affirmed that all its condoms that came to Kenya were tested at the origin by the Societe Generale de Surveillance (SGS) which had pre-export verification of conformity to standards (PVoC) programme with the 2nd Respondent as being compliant with Kenya's standards, a fact acknowledged by the 2nd Respondent. In contesting this fact, the Petitioner produced a letter from the Ministry of Health and stated that the Pharmacy and Poisons Board had confirmed not having cleared the condoms as well as the National Quality Control Laboratory.



122. In my humble view, proof of purchase can be established by any of the following ways: -purchase receiptevidence of the shopkeeper who sold the condom to him.evidence of the petitioner (if the court finds it credible).
123. The 1st two ways are out as there was as no evidence of purchase receipts tendered and none of the persons that sold the condoms was called to testify. This leaves the court with the evidence of the petitioner only. Is his evidence credible? Can he be trusted without any other independent corroborative evidence? This is a man who admits that he is married. That notwithstanding, he says he cheated on his wife with several women (not one), in different towns in various counties. This is a man whose quality of honesty is already shaky. He was unfaithful to his own spouse. Can any court rely on the sole evidence of such character without corroboration? There was no corroboration as the woman he had slept with when the condom allegedly burst did not testify. The particular condom that allegedly burst was not presented in Court as an exhibit. How can he then corroborate that there was any condom that burst or that he even wore any? He also alleges that the condom burst (if at all) due to its poor quality yet the said condom that burst was not subjected to any scientific examination to support the said assertion. Availing used packets of condoms means nothing, one can easily collect them from dustbins of entertainment joints any day. It neither proves the Petitioner used the condoms in the packets presented on the material day nor that the condom that burst while allegedly being used by the Petitioner was in any of those packets. Moreover, there was evidence that the condoms had been tested for conformity with the Kenyan Standards at the point of origin by the body that had pre-export verification of conformity standards with KEBS, a fact confirmed by the 2nd Respondent. The Petitioner tried to rope in the Pharmacy and Poisons Board and the National Quality Control Laboratory stating they were not involved. However, the Standards Act Cap 496 is quite clear on who is responsible for declaring Kenyan Standards. Under Section 9 (1), the National Standards Council under the Act is the one empowered to declare a Kenya Standard and once declared, the Minister on the advice of the Council is required to gazette it and no person shall henceforth manufacture or sell any commodity unless it complies with the specification. Under Section 21, where there is conflict between the provisions of a specification declared to be a Kenya Standard under Section 9 (1) and the specification made in any other written law, the Kenya Standard shall prevail. Under section 4 of the Act, it is the Kenya Bureau of Standards which has been given the mandate to among others to make arrangements or provide facilities for examination and testing commodities in accordance with the provisions of the Act, the power to overrule the use of standardization marks, not any other body as suggested by petitioner.
124. KEBS, (the 2nd Respondent) was categorical that the said condoms met Kenya's standards.
125. The claim that the petitioner's consumer rights were violated is thus clearly indefensible as the petitioner could neither prove purchase of the said condom nor the fact that he used it let alone the same being sub-standard. The alleged violation of consumer rights of the petitioner thus lacks merit. The claim that his right to highest standard of healthcare under Article 43 (1) was violated is also based on the same facts. Accordingly, it is equally unsustainable.
126. This court finds it futile to consider the remainder of the issues it that had framed as it is evident that this petition is headed nowhere. It deserves no further attention of this court. It is dismissed in its entirety with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

.....

L N MUGAMBI



JUDGE

