



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO.282 OF 2017**

**ASSOCIATION OF KENYA MEDICAL LABORATORY**

**SCIENTIFIC OFFICERS.....PETITIONER**

**VERSUS**

**MINISTRY OF HEALTH.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Petitioner's Case**

1. The petitioner herein moved this court through a petition dated 8<sup>th</sup> June 2017 supported by supporting affidavit of Michael Abala sworn on 6<sup>th</sup> June 2017; the Chairman of Association of Kenya medical laboratory scientific offices; the petitioner, a key state-holder in the provision of medical laboratory services, contend that the 1<sup>st</sup> Respondent spearheaded the development of the Task Sharing Policy Guidelines 2017-2030, now in the process of being implemented, without the involvement of the Petitioner, which violates the principle of public participation under Article 10(2) (a) of the Constitution of Kenya 2010. The petitioner further finds faults in the said policy guidelines in that they allow non-laboratory staff to conduct tests that require highly skilled laboratory staff such as:-

- i) Conducting rapid tests – pregnancy, molar 1a, RBS.**
- ii) Conducting point of care diagnostics.**
- iii) Interpretation of laboratory results.**
- iv) Conducting PCR and confirming HIV status.**
- v) HIV/TB con-infection-perform microscopy.**
- vi) Antenatal care (ANC) – malaria tests, urinalysis, VDRL, etc.**
- vii) The guidelines also suggests no laboratory staff are needed at levels 1 and 2 facilities.**

2. The petitioner further contend, that the policy guidelines are in the process of being implemented and as a result there are already under spread cases of misdiagnosis of patients. It is further contended the guidelines put into jeopardy the right of Kenyans to access the highest attainable standards of health care and demoralizes trained medical laboratory professionals who now feel discriminated against the guidelines. The petitioner urges the guidelines are discriminative against its members of the association, in allowing non-laboratory staff to conduct tests that require highly skilled laboratory staff and as such it denies them means of livelihood.

**Respondent's response**

3. The Respondents in response filed grounds of opposition dated 26<sup>th</sup> June 2018 and a Replying affidavit sworn by Dr. Jackson Kioko, on 20<sup>th</sup> September 2018 attaching annexures **JK-1-JK-2**. The Respondents contend, that the Government of Kenya through the 1<sup>st</sup> Respondent has constitutional duty to provide an enabling environment for the realization of the rights to health provided under Article 43 of the

Constitution of Kenya 2010. It contends further, that the number of health practitioners does not commensurate the Kenyan population, and therefore, the need to address the acute shortage. The Tasking sharing policy is therefore a major milestone towards achieving universal health coverage and access to effective and evidence based essential health services thus significantly reducing high mortality rate.

4. It is further the 1<sup>st</sup> Respondent's contention, that be that as it may, the guidelines have been developed through a wider consultation and collaborative process involving broad number of institutions in various sectors in Kenya and abroad. It is further contended, that the petitioner had not met the constitutional threshold as laid down in **Annarita Karimi Njeru vs Republic (1979) eKLR** case and urged the court to disallow the petition herein.

#### Petitioner's submissions

5. Mr. Manyonge, appearing for the petitioner highlighted his submissions dated 15<sup>th</sup> February 2019, submitting that the Task Sharing Policy Guidelines (2017–2030) were developed without meaningful and quantitative public participation; hence going against the National values and principles of government. It is his contention, that the petitioner being a key stakeholder in the provision of medical laboratory services in the country, ought to have been consulted by the 1<sup>st</sup> Respondent. That according to the petitioner, the 1<sup>st</sup> Respondent's actions were in violation of Article 10 of the Constitution of Kenya 2010 and section 5 of the Statutory Instruments Act on public participation.

6. To buttress this argument, the learned counsel, relied on the case of **Nairobi Metropolitan PSV Sacco Union Ltd & 25 others vs County of Nairobi Government & 3 others (2013) eKLR, Commission for the Implementation for the Constitution vs Parliament of Kenya & 2 Others (2013) eKLR, Robert N. Gakuru & Others vs Governor Kiambu County & 3 others, Doctors for life International vs The Speaker National Assembly & others (CCT12/05) (2006) ZACC 11 and Matatiele Municipality & others vs President of the Republic of South Africa & Others (2) (CCT73/05A) (2006) ZACC 12: 2007 (1) BCLR 47 (CC)** which discussed in depth the qualitative and meaningful public participation.

7. The counsel further submitted that the guidelines subject members of the petitioner to unfair labour practices contrary to Article 41 of the constitution by rendering trained and skilled laboratory staff jobless. The guidelines further violate **section 19(1) of the medical Laboratory Technician and Technologists Act**, which requires laboratory technicians or technologist to be registered. It is further the counsel's submission, that, in any event, the bodies, that regulate medical officers and laboratory technicians, are different and the unqualified persons listed under the guidelines do not fall under the definition in the Act.

8. In support of the above proportion, the counsel for the petitioner sought to rely on the case of **Republic vs Kenya Medical laboratories Technicians and Technologist Board Ex-parte Archdiocese Nairobi Kenya Registered Trustees (2018) eKLR**, which discussed the legislative intent of the medical practitioners and Dentists Act and the Medical Laboratory Technicians and Technologists. He concluded by submitting, in his view, the guidelines contravene the right to the highest attainable standard of health and is contrary to **Article 43(1) and Article 46 of the Constitution**, urging the court to find the guidelines unconstitutional.

#### Respondent's submissions

9. On the other Mr. Sekwe, learned Counsel appeared for the Respondent and in his submissions urged, that the petitioner is a private and amorphous group whose membership is purely voluntary and the fact, that its view was not sought does not per se nullify the policy guidelines on the basis of lack of public participation. He further contended, that the petitioner has not tendered any evidence to show that they sought audience with the 1<sup>st</sup> Respondent and were denied. That to buttress its argument, it relied on the case of **Commission for the Implementation of the Constitution vs Parliament of Kenya & 2 others**, where Justice Majaja was unable to find and hold that an act was unconstitutional because the parties failed to demonstrate to this court how the National Assembly failed to achieve public participation within the constitutional parameter.

10. Mr. Sekwe, learned Advocate, for the Respondent, went on further and submitted, that it does not matter how the public participation was effected, but what is needed is that public was accorded some reasonable level of participation as was held in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs County of Nairobi & 3 others (2013) eKLR** by Lenaola J (*as he then was*) who quoted with approval the case of **Minister of Health vs New Clicks South Africa (PTY) Ltd & Others (2006) (2) SA 311**.

#### Analysis and Determination

11. I have very carefully perused and considered the pleadings filed herein, written submissions by both counsel, as well as, their rival oral submissions, and I find for proper and conclusive determination of the petition herein, two issues arise for consideration and determination namely:-

a) **Whether the Task Sharing Policy Guidelines (2017-2030) met the constitutional parameters of public participation under Article 10 of the Constitution of Kenya?**

b) **Whether the said guidelines subjected the petitioner to unfair labour practices under Article 41 of the Constitution of Kenya 2010 and whether the Task Sharing Policy Guidelines (2017-2030) is inconsistent with section 19(1) of the Medical Laboratory Technician and Technologist Act?**

c) **Whether the provisions of Article 43(1) (A) and 46 of the Constitution have been violated?**

**A) Whether the Task Sharing Policy Guidelines (2017-2030) met the constitutional parameters of public participation under Article 10 of the Constitution of Kenya?**

12. Before dealing with this issue, it is proper to find out what "participation" is defined as. **The Black's Law Dictionary, Tenth Edition at page 1294** defines "**participation**" as "**the act of taking part in something; such as partnership, a crime, or a trial. 2. The right of an employee to receive part of business's profit-sharing.**"

The public participation is not a mere consultation or public relation exercise without a meaningful purpose.

13. The petitioner avers, that there was no consultation with the relevant stakeholders before enacting of the policy guidelines. The members of the petitioner, urges the Guidelines subjected them to unfair labour practices in, that the highly skilled laboratory staffs are competing for work with non-laboratory staff according to the Guidelines.

14. The petitioner, therefore challenge the constitutionality of the Act mainly because of the alleged lack of public participation.

15. Public participation is one of the national values and principles in the Constitution of Kenya 2010, which must be observed by all persons, state organs and public officers in the exercise of their responsibilities. **Article 10(1) and (2) (a)** of the Constitution states:-

**"1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—**

**(a) Applies or interprets this Constitution;**

**(b) Enacts, applies or interprets any law; or**

**(c) Makes or implements public policy decisions.**

**(2) The national values and principles of governance include— Const2010 Constitution of Kenya, 2010 14 (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people."**

16. It is pleaded in the petitioner's petition as well as, submitted, that the process, that midwived the impugned policy Guidelines, did not take into account public participation and therefore the whole process violated one of the key national values and principle of governance. The petitioner further urges, that the Task Sharing Policy Guidelines 2017-2030 were developed without meaningful and qualitative public participation, by failing to invite the petitioner being a key stakeholder in the provision of medical laboratory services in the country and the petitioner ought to have been consulted by the 1<sup>st</sup> Respondent, as they developed the guidelines.

17. The burden of proof, that there was public participation lies with the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent other than alleging Task sharing guidelines have been developed through a wider consultation and collaborative process involving broad number of institutions in various sectors in Kenya and abroad, has not demonstrated that indeed the petitioner was amongst the consulted institutions as its name is not amongst the list made by the 1<sup>st</sup> Respondent in respect of the institutions consulted. The allegation that the petitioner is a private and amorphous group, whose membership is purely voluntary should not be a justification for the 1<sup>st</sup> Respondent to have decided not to involve the petitioner in the public participation. The 1<sup>st</sup> Respondent does not deny, that the petitioner was not involved in any way in the development of the guideline, notwithstanding that the 1<sup>st</sup> Respondent is enjoined by **Article 10 of the Constitution** to ensure, that national principle of public participation is discharged when exercising their powers and performing their duties.

18. The 1<sup>st</sup> Respondent stated that the task sharing guidelines have been developed through wider consultation and collaborative process involving a broad number of institutions and various sectors in Kenya and abroad and attached documentary evidence thereto; however it should be noted under **Article 259(1) of the Constitution of Kenya 2010** it is provided:-

**"1) This Constitution shall be interpreted in a manner that—**

**(a) Promotes its purposes, values and principles;**

**(b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**

**(c) permits the development of the law; and**

**(d) Contributes to good governance."**

Under the aforesaid **Article 259(1) of the Constitution** one of the values and principles requiring to be promoted is public participation.

19. **Article 2 of the Constitution** decrees, that the constitution is the supreme law and binds all persons, state organs, and public officers, whereas **Article 3 of the constitution** obligates every person to respect, uphold and defend the constitution. As the petitioner has challenged the legislature process on grounds, that the law/policy making process did not meet the constitutional standard of public participation, the Respondent is under a legal obligation to demonstrate, that the legislative process did not meet the constitutional standards of public participation.

20. Our constitution is emphatic in unambiguous terms, that where public participation is required, public views ought to be sought and

considered in the decision making process and as far as, is possible the product of any legislative process ought to be time reflection of the public participation so, that the final product has the seal of approval by the public. This proposition was made in case of **Doctors for Life International vs Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** as hereunder:

**"If legislation is infused with a degree of openness and participation, this will minimize dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."**

21. In **Robert N. Gakuru & Another vs Governor Kiambu County & 3 others [2013] eKLR**; the court stated;

**"In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1) (b) just like the South African position requires just that."**

22. In the case of **Doctors for Life International vs Speaker of the National Assembly and others (supra)** it was held that:-

**"The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key reasonableness of Parliament's conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament's conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public."**

23. Further in **Matatiele Municipality and others vs President of the Republic of South Africa and others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)**, Ngcobo, J held inter alia as follows:-

**"The representative and participative elements of our democracy should not be seen as being in tension with each other... What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process...."**

24. In **Nairobi Metropolitan Psv Saccos Union Limited & 25 others vs County of Nairobi Government & 3 others [2013] eKLR**, the court expressed itself on public participation as follows;

**"The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provision for public involvement."**

25. **Section 5 of the Statutory Instrument Act** requires a regulation-making authority to, before issuing a statutory instrument, to make appropriate consultations with persons who are likely to be affected by proposed instrument. **Section 5(3) (a) of the said Act** requires a regulation making authority to notify, either directing or through advertisement, bodies that, or organizations representative of persons who; are likely to be affected by the proposed instrument. The 1<sup>st</sup> Respondent did not demonstrate, that it complied with the Statutory Instrument Act nor did it demonstrate, that it issued such notifications nor did they demonstrate, that they discharged their duties to consult under the above-mentioned provisions of the law. It is not enough for the Respondent to aver the Task sharing guidelines have been developed through wider consultation and collaborative process and fail to show indeed that there was notification either directly or by advertisement to the bodies who are likely to be affected by proposed instrument.

26. Upon consideration of the petition by the petitioner, I am satisfied, that the petitioner is highly or likely to be affected by the guidelines, as the Guidelines allows non-laboratory staff to conduct test, that require high skilled laboratory staff by being allowed to:-

**"a) Conducting rapids tests-pregnancy, malaria, RBS;**

- b) Conducting point care diagnostics;
- c) Interpretation of laboratory results;
- d) Conducting PCR and confirming HIV status
- e) HIV/TB con-infection-perform microscopy
- f) Antenatal care (ANC)-malaria tests, urinalysis, VDRL etc
- g) The guidelines also suggests no laboratory staff are needed at levels 1 and 2 facilities."

27. I am of the view, that any public participation should meet the test of meaningful and qualitative public participation and not just mere cosmetic one. Consult should also be qualitative and meaningful and not just cosmetic. In the instant petition, there is undisputed evidence, that the alleged public hearing and consultation did not take place as required for the quantitative and meaningful consultation to be applicable and reliance. In **Doctor's for Life International vs The Speaker National Assembly and others (CCT12/05) [2006] ZACC 11** as adopted in **Robert N. Gakuru & others vs Governor Kiambu County & 3 others [2014] eKLR** the Court observed that:-

**"The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.....The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values "a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process....."**

28. Upon applying the above legal principles to the petition, I have no doubt that the Task Sharing Policy Guidelines are important to the public in terms of promoting the highest attainable standard of health which includes right to health care services and public participation is an important segment of decision making.

29. The 1<sup>st</sup> Respondent contend, the task sharing guidelines have been developed through a wider consultation and collaboration process involving broad of consultant. In the case of **Commission for the Implementation of the Constitution vs Parliament of Kenya & 2 others**, Hon. Justice Majanja held thus:-

**"Declaring a statute as unconstitutional, needless to say is a serious issue with deep-seated ramifications and the court should not be overly enthusiastic in pronouncing so unless clear grounds known in law have been clearly established."**

30. The mere fact that the petitioner is a private and amorphous group, and that its input was allegedly not sought does not perse nullify the policy guidelines on basis of lack of public participation as not everyone was required to participate but I find that the Respondent before raising such argument is required to demonstrate, that there was sufficient notification or advertisement of the meetings held involving the members of public. There is no evidence that the Respondent carried out direct or indirect publication of its meetings in the whole Republic of Kenya or in various parts of the country with a view to sanitize the public of its meetings so as to enable public raise their concern on the issues deliberated upon. I find failure to do resulted in denying the petitioner an opportunity to participate in the deliberations carried out by the Respondents and raise their concern on the policy guidelines. This is an issue of great concern as raised by the petitioner but it is not a mere commercial interest as urged by the Respondent but an health issue which has enormous positive impact in so far as it concerns accessibility of highest attainable standard of health. The petitioner concern is that by failure to have been afforded an opportunity to participate it was denied an opportunity to make their representation on the issues affecting them as key stakeholder in health sector. In the instant matter, the Respondent has not demonstrated it had achieved public participation within the constitutional parameters taking into account the listed number of the participants, the number of meetings and places where the public participation is alleged to have taken place. I find that the Respondent has not demonstrated that there was indeed elaborate and extensive consultation with the relevant stakeholders when developing the policy guidelines. I find also that the public was not accorded some treasonable level of participation for the court to say the same met the constitutional threshold.

31. In **Nairobi Metropolitan PSV Saccos Union Limited & 25 others vs County of Nairobi Government & 3 others [2013] eKRL** Justice Lenaola made reference to **Minister of Health vs New Clicks South Africa (PTY) Ltd and others (2006) (2) SA 311** where Sachs J expressed himself as follows:-

**"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."**

In the instant petition, I find though there was an element of public participation, it failed to meet the constitutional threshold, as the petitioner and other intended parties were not accorded a reasonable opportunity to know about the issue and to have adequate say or raise their concern. I am alive to the fact that a personal hearing is not expected of every concerned party but looking at the alleged list of

participants in various annexures attached to affidavit by the Respondent, I find, that there lacked participation of various sectors of public coupled with lack of notification of the members of public save just a few. This cannot qualify, in my view, to be an elaborate and extensive public partition.

32. Having considered the legal authorities relied upon, by the parties herein and evidence in the supportive affidavits, as well as, the annexures relied upon, I find that the Respondent has failed to demonstrate the Task Sharing Policy Guidelines (2017-2030) were developed with public participation. I therefore find that there was violation of an important constitutional step in the form of lack of public participation.

**B) Whether the said guidelines subject the petitioner to unfair labour practices under Article 41 of the Constitution of Kenya 2010 and whether the Task Sharing Policy Guidelines (2017-2030) is inconsistent with section 19(1) of the Medical Laboratory Technician and Technologist Act?**

33. The Petitioner urge, that the guidelines violates the provision of **Article 41 of the Constitutional of Kenya 2010** and subjects members of the petitioner to unfair labour practices in, that the highly skilled laboratory staff are competing for work with non-laboratory staff according to the Guidelines. It is the petitioner's contention that there is a legitimate expectation, once one has gone through the prerequisite training to qualify as a skilled laboratory staff. The guidelines tend to render the trained laboratory staff jobless; thus subjecting them to an unfair labour practices.

34. It is further petitioner's contention, that the Guidelines were developed with a total disregard to **section 19(1) of the Medical Laboratory Technician and Technologist Act** which provide:-

**"No person shall act as a laboratory technician or technologist in any health institution in Kenya unless such person is registered under this Act."**

The Guideline has purported to allow tests listed thereto to be conducted by a non-laboratory staff. The people listed to conduct tests as set out under (a) – (g) as earlier on listed in this petition, is clear that one need not be qualified laboratory technicians or technologists required under section 19(1) of the Medical Laboratory Technicians and Technologists Act to carry out the tests. It is further to be noted, that the body, that regulate medical and laboratory technician or technologists are not the same and are different such as MO (Medical Officers Dentist and Medical Specialists); NM (Nursing and Midwives); MLT (not defined) and Co (Clerical officers) do not fall under the definition provided under Medical Laboratory Technician and Technologists Act.

**(See Republic vs Kenya Medical Laboratory Technicians and Technologist Board Ex-parte Archdiocese Nairobi Kenya registered Trustees (2018) eKLR).**

35. The Respondent contend, that Kenya does not have adequate number of health workers as per international standards, hence there is need to address the acute shortage so as to adequately address the healthy needs of the population and especially in the rural areas where most of the health practitioners are not concentrated. It is Respondent's contention, that the Petitioner has not tendered any evidence to show that there existed persons who were acting in contravention of **section 19(1) of the Medical Laboratory and Technologists Act**; however it would be contrary to **section 19(1) of the Medical Laboratory Technicians and Technologists Act** for the Guidelines to purport to recognize and allow any person who is not registered to perform duties and provide services as a laboratory technician or technologist. This is, in my view, what the Guidelines are purporting to do and is against the relevant provisions of the law and the petitioner need not show, that there exists such persons, who the Guidelines exposes to such position. The Respondent urges the Guidelines are meant to address the chronic shortage of human personnel in health sector in Kenya, however, this cannot be achieved by provision of services by untrained and unprofessional persons. This would not achieve quality services in health. **Article 43(1)** of the constitution talks of highest attainable standard of health and this do not mean providing any health care services irrespective of its harmful effects; Kenyans should not be exposed to untold dangers by allowing untrained and unprofessional personnel to purport to provide health services.

35. The Guidelines allow MO (Medical Officers Dentists and Medical Specialists) NM (Nursing and Midwives) MLT (not defined) and CO (Clinical officers) to perform laboratory functions as qualified laboratory technician or technologists notwithstanding that they are not qualified.

36. I have considered **Article 41(1) of the Constitution** and the submission by the petitioner and the Respondent and I am satisfied, that the petitioner has demonstrated how Guidelines violates the provisions of **Article 41 of the Constitution of Kenya** dealing with right to fair labour practices. I am also satisfied it has been demonstrated that the Task sharing policy Guideline (2017-2030) in inconsistent with section 19(1) of the Medical Laboratory Technical and Technologist Act.

**C) Whether the provisions of Article 43(1) (A) and 46 of the Constitution have been violated?**

37. It is the petitioner's contention, that the Guideline contravenes the right to the highest attainable standard of health as enshrined under **Article 43(1) of the Constitution of Kenya 2010**. **Article 43(1)** provides:-

**"(1) Every person has the right—**

**(a) To the highest attainable standard of health, which includes the right to health care services, including reproductive health care;**

**(b) To accessible and adequate housing, and to reasonable standards of sanitation;**

**(c) To be free from hunger, and to have adequate food of acceptable quality;**

**(d) To clean and safe water in adequate quantities;**

**(e) To social security; and (f) to education."**

38. The Respondent contention is that it is important to note the Guidelines enables mid-level health care professionals such as nurses, clinical officers, pharmaceutical technologists, laboratory technologists, as well as, community health workers to safely conduct clinical tasks and procedures that would otherwise be restricted to cadres with higher qualifications.

39. **Article 43(1) of the Constitution** provides every person has the right to the highest attainable standard of health. This constitutional right is guaranteed under **Article 43(1) (a) of the Constitution**, which means the government is obligated under **Article 21(2) of the Constitution** which imposes a duty to Government to take legislature, policy and other measures, including the setting of standards, to achieve the progressive realization of the highest attainable standard of health guaranteed under Article 43 of the Constitution. Under **Article 46 of the Constitution** deals with consumer rights, which provides consumers have right to goods and services of reasonable quality and information necessary for them to gain full benefit for goods and services, to protection of their health, safety and economic interest. The same Articles impose duty on the Government to take legislative measure for consumer protection and for fair, honest and decent advertising.

40. The Task sharing policy Guideline (2017-2030) in so far as it allows non-laboratory staff to conduct tests, that require high skilled staff, it violates the right granted under **Article 43(1) (a) of the Constitution of Kenya 2010**, in that it infringes on the quality of medical treatment accorded to various patients, as it raises question over the caliber and authenticity of tests conducted by the non-laboratory staff. The consumption of the health services as per **Article 46 of the Constitution** may be compromised in, that the non-laboratory staff may not guarantee services of reasonable quality. The Government under **Article 21 of the Constitution** is obliged to take measures, including the setting of standard to achieve progressive realization of the right guaranteed under **Article 43 of the Constitution** without lowering the standard set thereto but set standards that must be reasonable and which may result in effective implementation of Article 43 and 46 as regards the right to health.

41. In the case of **Mathew Okwanda vs Ministry of Health and Medical Services & Others (2013) eKLR** the Court held that:-

**"Article 43 is to be read with Article 20(5) which provides as follows;**

**50. In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles-**

**b) In allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances."**

42. In the instant petition, it is urged that the government with a view to address the chronic shortage of human resources for health in Kenya, which has adversely affected provision of quality services in health, the government of Kenya, in the year 2017 came up with the National Task Sharing Policy as well as, Task Sharing Policy Guidelines for Health Service Delivery for task sharing initiative as advocated by World Health Organization (**WHO**). There is no doubt, that the national sharing policy is a major milestone towards achieving universal health coverage and access to effective and evidence based essential health services significantly. It may achieve reduction of high mortality ratio, as well as achieve national health targets in Kenya Health Policy under vision 2030 and sustainable Development Goals, but I am afraid, that may not be guaranteed and may remain a mere speculation unless the Guideline agrees to use qualified personnel.

43. The government moved on applying the Guidelines before applying necessary resources to effect legislative and regulatory resources. The state before implementing the Task Sharing Policy Guidelines 2017-2030, should have taken positive steps to align them with **Article 43 (1) (a) and 46 of the Constitution of Kenya 2010** to ensure full enjoyment of the highest attainable standard of health through provision of testing by qualified laboratory staff.

44. The content and nature of state obligations under Article 12 of **ICESCR** has been elaborated by committee on Economic, social and cultural rights (**CESCR**). **CESCR** General comment No. 14 on the Right to the Highest attainable Standard of Health; *"the Right"* to health is defined as follows:-

**"....a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable."**

45. The General comment clearly recognizes, that the right to health is closely related to the economic right and is dependent on the realization of the other rights including the right to food, housing, water, work, education, human dignity, life; non-determination equality, prohibition of torture, privacy, access to the formation, as well as, other freedoms. I therefore find that in view of the above, the enactment and implementation of the Task Sharing Policy Guidelines 2017-2030 is a violation of those rights to highest attainable standards of health. I also find that as far as the Task Sharing Policy Guidelines 2017-2030, seeks to allow non-laboratory staff to conduct tests, that require high skilled staff, is contrary to constitutional obligations to safeguard the health right of the consumer. This I find amounts to violation of **Article 46 of the Constitution** dealing with safeguards to consumer protection of both the health and economic interests as the Respondent seek to economically exploit the citizen and risk their health through exposing them to tests by unqualified staff. I find that if the Task Sharing Policy Guidelines 2017-2030 is implemented, it would be used to advance commercial interest, which I find do not override the interest of

the larger public. Under Article 46(1) of the Constitution, I find the consumer of the health services have constitutional right to products that protect their health, safety and economic interest and as such the Task Sharing Policy Guidelines (2017-2030) infringe on the health and consumer rights of the citizens who are the eventual customers.

46. In view of the above and having considered the rival submissions, the relevant Articles and authorities relied upon, as well as the Task Sharing Policy Guidelines 2017-2030, and despite that the Guidelines might have been made with good intentions and that it may be well meaning and intended to perform noble functions, the impugned sections of the Act cannot purport to donate powers to unqualified non-laboratory staff, when they have no mandate to execute. To that extent the impugned sections are unconstitutional. To that extent chapter 4, sections 4.2 and table 4.6 of the Task Sharing Policy Guidelines 2017-2030 allowing non-laboratory staff to conduct test, and which requires skilled laboratory staff is unconstitutional.

47. I draw guidance from the case of **Speaker of the National Assembly & others vs De Lille, M.P. & Another [297/298] [199] ZASCA**, where the Supreme Court of South Africa pronounced itself on constitutionality of a legislation executive action as follows:-

**"This enquiry must crucially rest on the constitution...it is supreme not parliament. It is the ultimate source of all lawful authority in the country. No parliament, however bona fide or eminent its membership, no president, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the constitution."**

I recognize, that notwithstanding, while the national government is free to perform its functions under part I of the fourth schedule, the said functions are limited to formulation of policies. These functions (policy formulation) however, must be performed through the structures recognized under the constitution and not run parallel to them. In the case of **Institute of Social Accountability & another vs National Assembly & 4 others (2015) eKLR**, this court pronounced itself on the matter where it was stated:-

**"[...] put another way, the national government, while free to infiltrate is policies at the county levels, must do so through the structures recognized under the Constitution and not run parallel them..."**

48. The primary duty of courts is to the constitution and law, which they are obliged to apply impartially and without fear, favour or prejudice. The constitution emphatically requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. In a situation where state policy is challenged as inconsistent with the constitution, the court is mandated to consider, whether in formulating and implementing the impugned policy, whether the state has given effect to its constitutional obligations. The court is required to clearly in unambiguous terms state whether the state has failed in its obligation to carry out its constitutional obligations. This is the only way the court can carry out its primary duty to the constitution and the law, without which the court would fail in its mandate. This will in this case enable the court balance the interest of the citizens as consumers of health services and the government as health service provider through the Respondents.

49. I am of the view, that the Respondents in enacting the Task Sharing Policy Guidelines (2017-2030), the Respondents should have been guided by dictum in the Supreme Court in **U.S vs Butlen, 297 U.S I [936]**, where the court stated in the dissenting judgment that;

**"The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government."**

50. In its majority opinion, the Court held that;

**"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."**

51. Having said that much and in view of all my findings herein above I find the petition to be meritorious and proceed to make the following orders as sought in the petition:-

**a) A declaration be as is HEREBY made that the Task Sharing Policy Guidelines 2017-2030 was developed without public participation and therefore violates the provisions of Article 10 of the Constitution.**

**b) A declaration be and is HEREBY made that the Task Sharing Policy Guidelines 2017-2030 violates the provisions of Article 41 of the Constitution in allowing non-laboratory staff to conduct tests that requires high skilled medical laboratory staff.**

c) A declaration be and is **HEREBY** made that the Task Sharing Policy Guidelines 2017-2030 violates the provisions of Article 43(1)(a) of the Constitution by allowing non-laboratory staff to conduct tests that require high skilled medical laboratory staff.

d) A declaration be and is **HEREBY** made that Task Sharing Policy Guidelines 2017-2030 violates the provisions of Article 46(1)(a)(c) of the Constitution by allowing non-laboratory staff to conduct tests that require high skilled laboratory staff.

e) A declaration be and is **HEREBY** made that Task Sharing Policy Guidelines 2017-2030 is inconsistent with Section 19(1) of the Kenya Medical Laboratory Technicians and Technologists Act.

f) An order of Judicial Review in the nature of Certiorari do issue to bring into this Honourable Court for purposes of quashing the Task Sharing Policy Guidelines 2017-2030.

g) A permanent injunction be and is **HEREBY** issued to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from purporting to deliberate upon, develop, and/or approve any Task Sharing Policy Guidelines without the public participation.

h) This is a matter of public interest and I order each party to bear its own costs.

Dated, signed and delivered at Nairobi this 29<sup>th</sup> day of April, 2019.

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**J .A. MAKAU**

**JUDGE**