



**Njeru & another v Officer Incharge, Kamiti Prison & 3 others (Petition 75 of 2017)
[2023] KEHC 17218 (KLR) (Constitutional and Human Rights) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17218 (KLR)

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

PETITION 75 OF 2017

HI ONG'UDI, J

MAY 12, 2023

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL FREEDOMS
UNDER ARTICLE 19, 20, 23 AND 24 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

PETER KINYUA NJERU 1ST PETITIONER

PAUL MAKAU MBUVI 2ND PETITIONER

AND

THE OFFICER INCHARGE, KAMITI PRISON 1ST RESPONDENT

THE COMMISSIONER GENERAL OF PRISON 2ND RESPONDENT

THE DIRECTORATE OF PRISONS HEALTH SERVICES 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

The existing laws and policies, including the Prisons Act, the Persons Deprived of Liberty Act, and internal prison healthcare procedures, are adequate to address the health needs of prisoners.

The petitioners, two HIV-positive prisoners, alleged violations of their rights to health under the Constitution of Kenya, 2010, the HIV and AIDS Prevention and Control Act, and other international legal instruments. They claimed that prison authorities failed to provide adequate healthcare, particularly access to HIV and TB treatment, and sought declarations and orders compelling the authorities to improve healthcare for prisoners. The court dismissed the petition, holding that the petitioners did not sufficiently prove their claims, and that adequate healthcare policies and mechanisms already existed within the prison system.

Reported by John Ribia

Constitutional Law – fundamental rights and freedoms – prisoners’ rights – right to the highest attainable standard of health - whether denial of prisoners to treatment and access to ARVs was a violation of the prisoner’s right to highest attainable standard of health - whether there were laws and policies for the treatment of prisoners



with HIV/AIDS and TB which were appropriate to address the medical needs of the prisoners - Prisons Act (cap 90) sections 51 and 56; Persons Deprived of Liberty Act (Cap 90A) section 3 (1), 15, and 27; HIV And Aids Prevention And Control Act (Cap 246A) section 19; Constitution of Kenya, 2010, articles 19, 20, 21(2), 23, 24, 26, 27, 22, 29, 43(1)(a), and 51.

Brief facts

The petitioners, both inmates at Kamiti Maximum Prison and living with HIV, filed a petition alleging that the prison authorities had violated their rights by failing to provide adequate and consistent access to antiretroviral (ARV) drugs and treatment for other medical conditions such as tuberculosis (TB). The 1st petitioner also suffered from urethral stricture, for which he had not received timely treatment. The 2nd petitioner experienced delays in accessing ARVs after being transferred between prisons. The petitioners argued that those failures violated their rights to health, non-discrimination, and the right to life under the Constitution and sought several orders to compel the authorities to provide better healthcare and develop specific policies to address the needs of HIV-positive prisoners.

Issues

- i. Whether the petition met the threshold relating to precision in drafting and in setting out of claims of violations of constitutional provisions on human rights.
- ii. Whether denial of prisoners to treatment and access to ARVs was a violation of the prisoner's right to highest attainable standard of health.
- iii. Whether there were laws and policies of treatment of prisoners with HIV/AIDS and TB were appropriate to address the medical needs of the prisoners.

Held

1. The petition was sufficiently pleaded and raised clear complaints regarding the alleged violations of the petitioners' constitutional rights. It met the threshold for filing a constitutional petition.
2. The petitioners' rights to health and non-discrimination under articles 27, 43, and 51 of the Constitution were not violated. The respondents demonstrated that the petitioners had been receiving regular medical treatment both at the prison's Comprehensive Care Clinic (CCC) and Kenyatta National Hospital (KNH), including over 100 documented visits. The petitioners failed to prove that they were denied treatment or that their health had deteriorated due to the actions of the prison authorities.
3. The existing laws and policies, including the Prisons Act, the Persons Deprived of Liberty Act, and internal prison healthcare procedures, were adequate to address the health needs of prisoners, including those living with HIV. The court dismissed the petitioners' call for new policies, noting that the current legal framework already provided sufficient protection.
4. The petitioners had not sufficiently proven that they were entitled to the reliefs sought, including declarations of rights violations and orders for the development of new healthcare policies. The petitioners abused the court process by filing a similar claim before the HIV & AIDS Tribunal, which had already been dismissed.

Petition dismissed.

Orders

No orders as to costs.

Citations

Cases

Kenya

Aloise Onyango Odhiambo & 2 others v Attorney General & another Constitutional Petition 101 of 2015; [2019] KEHC 11979 (KLR) - (Mentioned)



Anarita Karimi Njeru v Republic Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1979] KLR 154 - (Mentioned)

Community Advocacy & Awareness Trust & 8 others v Attorney General Constitutional Application 243 of 2011; [2012] KEHC 5981 (KLR) - (Mentioned)

Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another Civil Appeal 240 of 2011; [2014] KECA 642 (KLR) - (Mentioned)

Evans Otiemo Nyakwana v Cleophas Bwana Ongaro Civil Appeal 7 of 2014; [2015] KEHC 8440 (KLR) - (Mentioned)

Federation of Women Lawyers Kenya (FIDA – K) & 5 others v Attorney General & another Petition 102 of 2011; [2011] KEHC 2099 (KLR) - (Mentioned)

Hassan Ahmed Ibrahim v Kenya National Bureau of Statics & 2 others Petition 327 of 2019; [2019] KEHC 4412 (KLR) - (Mentioned)

Kamal Jadva Vekaria v Director General, Kenya Citizens and Foreign Nationals Management Service Petition 534 of 2015; [2016] KEHC 7951 (KLR) - (Mentioned)

Kulraj Singh Bhangra v Director General & 2 others Petition 137 of 2014; [2014] KEHC 8497 (KLR) - (Mentioned)

Matemu v Trusted Society of Human Rights Alliance & 5 others Civil Application 29 of 2014; [2014] KESC 6 (KLR) - (Mentioned)

Muriri, Daniel Chacha v Attorney General Constitutional Petition 41 of 2011; [2012] KEHC 2279 (KLR) - (Mentioned)

Ndiritu, Anne Wambui v Joseph Kiprono Ropkoi & another Civil Appeal 345 of 2000; [2004] KECA 65 (KLR); [2005] 1 EA 334 - (Followed)

RM Suing Thro Next Friend JK & 2 others v Attorney General Civil Case 1351 of 2002; [2006] KEHC 3485 (KLR); [2008] 1 KLR (G&F) 574. - (Mentioned)

South Africa

Minister of Health v Treatment Action Campaign (2002) 5 SA 721 (CC) - (Mentioned)

United Kingdom

Andrews v Law Society of British Columbia [1989] 1 SCR 321 - (Mentioned)

Italy

Mendoza & others v Ministry of Public Health Resn No 0749 – 2003 – RA - (Mentioned)

Viceconte, Mariela Cecilia v Ministry of Health Welfare Case No 31. 777/96 - (Mentioned)

Statutes

1. Constitution of Kenya articles 19, 20, 21(2); 23; 24; 26; 27; 22;29; 43 (1) (a); 51 -(Interpreted)
2. Evidence Act (cap 80) sections 107, 108, 109, 112 - (Interpreted)
3. Health Act (cap 241) section 5(2) - (Interpreted)
4. HIV and Aids Prevention and Control Act (cap 246A) section 19 — (Interpreted)
5. Persons Deprived of Liberty Act (cap 90A) section 3(1); 15; 27 — (Interpreted)
6. Prisons Act (cap 90) sections 51, 56 —(Interpreted)
7. Prisons Council Rules, 1963 (cap 90 subleg) rules 26, 30, 65, 66(d)(k) — (Interpreted)

International Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 — article 16
2. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
3. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1976 — article 12; paragraph 1



Advocates

None mentioned

JUDGMENT

1. The petitioners jointly filed the amended petition dated April 18, 2020 claiming violation of their rights under articles 19, 20, 23 and 24 of the [Constitution of Kenya 2010](#). They therefore seek the following prayers:
 - i. A declaration that the rights and fundamental freedoms of the petitioner have been denied, infringed, violated and/or threatened by the respondents.
 - ii. A declaration that the petitioners and any other HIV positive prisoner while in custody and control of the Respondents have a right to proper and adequate medical attention, care and treatment on the grounds of their HIV and TB status.
 - iii. A declaration that the petitioners and any other HIV positive prisoners have a right to consult with and be examined by appropriately qualified specialized doctors at KNH or any other referral facility in the country as deemed appropriate.
 - iv. A declaration that the absence of a plan or its inadequate implementation to comprehensively implement HIV and TB treatment and to specific consistency access to medication for prisoners living with and affected by TB in all prisoners is unconstitutional, violating the rights of all persons detained, working in and visiting the prisons.
 - v. An order of *mandamus* compelling the respondents to immediately and timeously and consistently facilitate the petitioners' visit to Kenyatta National Hospital by providing transport to hospital for referral requests and for medical treatment for HIV and other eHealth conditions attendance as required and ordered by the Health care workers attending the prisoner.
 - vi. An order directing the respondents within 12 months of this order to develop a policy to comprehensively implement the right to treatment and access to HIV and TB medication for prisoners in all persons, which policy must include provision for adequate screening and diagnosis, access to treatment and medication on a timely manner, prevention, access to adequate food and nutrition.
 - vii. An order directing the 4th respondent to file with this court the plans aimed at developing the policy referred to in order (f) within 9 months of this order and subsequent thereto to the quarterly compliance status reports on the development of the policy until the policy is launched.
 - viii. The respondents to pay the petitioners' costs of and incidental to this petition.
 - ix. Such further, other and consequential orders as this honourable court may lawfully make.
2. Both petitioners are convicted inmates at Kamiti prison. They are persons living with the Human Immunodeficiency Virus (HIV). The 1st petitioner was also infected with Tuberculosis (TB). They have filed the petition on their own behalf and on behalf of convicts living with HIV and whose rights and enjoyments are alleged to have been violated and/or are threatened with violation by the conduct of the respondents.



The Petitioners' case

3. Both petitioners filed sworn affidavits dated April 18, 2020 and May 12, 2020 respectively. The 1st petitioner has averred that in June 2004 while confined at Embu prison he was tested and found to be HIV positive, counselled and placed on treatment. On December 18, 2009 he fell ill and was admitted at Embu Level 5 hospital where he was diagnosed with hemorrhoids posterior urethral structure and (TB). He was referred to Kenyatta National Hospital (KNH) for specialized treatment and care. He was immediately transferred to Kamiti Maximum prison where he stayed for a week before being taken to KNH despite the urgency.
4. He was admitted at KNH for a month followed by a discharge with a one month's dosage of the medication. He was required to continue attending the comprehensive care clinic at KNH for review, refill and care every other months. He avers that this never materialized due to the failure by the 1st & 3rd respondents to act. He was therefore not able to access the medication at KNH the whole of 2015. He was thus moved from line 1 of the ARV regime to line 2.
5. He further deposed that his failure to go to KNH interfered with his treatment for the posterior urethral structure and the TB. This led to complications eg productive coughing shortness of breath, chest pains and fever, and he was subsequently diagnosed with multi-drug resistant TB. The treatment for the same was taken in very difficult conditions. He was finally healed of the TB.
6. He deposed that for the period he is not able to access KNH he pays for the treatment of posterior urethra structure including purchasing the medication for the same and for opportunistic infections, whenever they occur. Further that failure by the respondents to provide him with adequate health care screening, diagnosis, and consistent access to HIV and TB treatment, is a violation of his fundamental rights and freedoms putting his life and that of other convicts at risk.
7. The 2nd petitioner deposed that he was arrested in 2009 and held at Thika remand prison. He was later convicted in 2010 and transferred to Kamiti Maximum prison. On June 2, 2011 he fell sick and was taken by the 2nd respondent to KNH where he was diagnosed with HIV and was placed on medication. This put him down and he was taken for counselling and he was healed. He was then placed on ARVs for the HIV, which he accessed through the comprehensive care unit, at the prison.
8. He further deposed that in January 2017 he was transferred to Naivasha maximum prison but was not able to access his ARV treatment for one month for lack of handover notes at the new prison. After two (2) months he was re-transferred to Kamiti maximum prison for a night. The next day he was transferred to Nyeri maximum prison where he was held for three (3) weeks, then re-transferred to Kamiti maximum prison. He averred that for the period he was held at Naivasha and Nyeri maximum prison he did not access this ARV drugs.
9. Upon his arrival at Kamiti maximum prison the 1st respondent segregated and confined him from March 2017 to February 2018 for reasons unknown to him. During this period he did not access his ARV treatment. In February 2018 chest complications set in, but his medical records could not be traced at the facility. He was referred to KNH for treatment, where he was placed on ARVs, and instructed to continue attending the HIV clinic. Despite this instruction plus an existing Court Order the 1st & 2nd respondents declined to escort him to KNH for his medication. Based on all this, he deposed that his fundamental rights and freedom plus those of other convicts were violated.
10. The respondents filed a replying affidavit through Superintendent Japheth Obondo Muhadia who is in charge of documents at Kamiti maximum prison. He averred that the petitioners after filing this



petition filed another case at the HIV & AIDs Tribunal on 30th January 2019 (JOM 1) seeking similar prayers. The suit at the tribunal was heard and dismissed *vide* a Judgment (JOM 3).

11. He deponed that the petitioners had received regular medical attention (JOM 2) whenever there was need. He added that Kamiti maximum prison has a Comprehensive Care Clinic (CCC) which takes care of HIV patients and provides for both first and second time ARVs, nutritional services, support groups etc. Such further arrangements have been made for patients with TB. They care for upto 100 cases. He averred that the Petitioners have never incurred any medical expenses for their treatment and that at no point had the facility run short of ARVs.
12. He deponed that the prison administration had facilitated the 2nd petitioner who suffers from Vertebral Spondylosis to visit KNH for physiotherapy review. The 1st petitioner has equally been facilitated to attend his clinic reviews for his rectal hemorrhoids. He annexed an officers' duty journal showing when the petitioners declined to be taken to hospital (JOM 4). On the transfer to Naivasha Maximum Prison he averred that the 2nd petitioner's medical notes were handed to the prison and the prisoner had also the duty to disclose his condition to the prison as such information is treated with confidentiality.
13. He averred that the 1st petitioner was confined under section 56 of the *Prisons Act* cap 90 laws of Kenya after committing two offences. For the first one he was heard and found guilty and punished (JOM 7) for having an unauthorized article contrary to section 66 K of the *Prisons Council Rules*. While for the 2nd one he was found guilty of using an abusive, threatening, and improper language contrary to section 66 (d) of the *Prisons (Prisons Council) Rules 1963*. On each offence he was to be confined for 7 days.
14. He deponed that the 1st petitioner was on Management for TB at KNH (report by Dr Paul Gitonga (JOM 11). There was no notification from KNH that he was on management for Drug Resistant TB, nor for his isolation. No patient contracted TB through interaction with the 1st Petitioner. He averred that they have complied with the law in handling the petitioners and their petition is frivolous and vexatious.

Parties submissions

The 1st & 2nd petitioners' submissions

15. The petitioners submissions were filed by Moka advocates and are dated October 12, 2021. In his introduction counsel submitted that HIV/AIDS is a serious health threat for prison populations in many countries and presents significant challenges for prison and public health authorities and national governments. It's his contention that like all persons, prisoners are entitled to enjoy the highest attainable standard of health, as guaranteed under International Law. He called for a standard of health care for prisoners, which is equivalent to that available in the outside community. Counsel gave a background to the petitioners' petition.
16. On whether the petitioners' right to health care have been violated counsel referred to articles 20(5), 21(2) & 43 of the *Constitution*, article 12 of the International Covenant on Economic, Social & Cultural Rights, section 19 of the *HIV, & AIDs Prevention and Control Act*. Paragraph 1 of General Convent No 14. Based on the above provisions counsel submitted that the respondents have various obligations and duties in ensuring that the right to the health of prisoners in their very many facilities is fully realized. Further that the continued denial of HIV & TB medication and access to facilities to the petitioners when the end result is known to be death is a violation of Article 26 of the *Constitution*.
17. Relying on General Comment No 9 of the United Nations Committee on Economic, Social, & Cultural Rights counsel submitted that if the respondents by any chance do not have adequate resources to treat prisoners with HIV & TB related diseases and complications they should make



appropriate financial arrangements to pay for and/or subsidize payment for treatment at public or private medical institutions where the treatment is easily available. Such decisions were made in the following cases:

- (i) [*Minister of Health v Treatment Action Campaign*](#) (TAC) (2002) 5 SA 721 (CC),
 - (ii) [*Marieta Viceconte v Ministry of Health Welfare*](#) Case No 31,777/97
 - (iii) [*Mendoza & others v Ministry of Public Health*](#) Resn No 0749 – 2003 – RA (January 28, 2004) among others.
18. Counsel submitted that the respondents should be ordered within 12 months after issuing the orders sought direct the respondents to develop a policy to comprehensively implement the right to treatment and access to HIV & TB medication for prisoners in all prisons. The implementation of the same must be supervised by the court.
19. The other issue is whether the actions of the respondents are discriminatory to the petitioners. In support he referred to section 5(2) of the [*Health Act*](#), articles 2(6) & 27 of the [*Constitution*](#); Article 16 of the [*African Charter on Human and People's Rights \(The Banjul Charter\)*](#), article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and General Comment No 14 of the Committee on Economic, Social & Cultural Rights, [*Andrews v Law Society of British Columbia*](#) (1989) 1 SCR 321 among others.
20. It is counsel's submission that it is well established that inequality treatment is not per se prohibited. See (i) [*Federation of Women Lawyers Kenya \(FIDA – K\) & 5 others v Attorney General and another*](#) Nairobi Petition No 102 of 2011 [2011] eKLR (ii) [*Community Advocacy & Awareness Trust & 8 others v Attorney General*](#) Nairobi Petition No 243 of 2011 [2012] eKLR. On whether a discrimination is fair or unfair hence illegal he argued that the same has to be weighed against the rationality test. Reliance was placed on the case of [*RM v Attorney General*](#) [2008] 1 KLR (G&F) 574. He thus submitted that the respondents' acts of not taking the petitioners who are in need of medical care to hospital are discriminatory and amount to unequal treatment.
21. Finally, counsel submitted that the petitioners had proved their case showing that their constitutional rights have been violated by the respondents and they are entitled to the orders sought.

The 1st, 2nd, 3rd & 4th respondents' submissions

22. The respondents' submissions dated January 31, 2023 were filed by counsel Patricia Chibole. She raised five (5) issues for determination. On whether the petition had been pleaded with specificity counsel answered in the negative while relying on the cases of; (i) [*Anarita Karimi Njeru v Respondent*](#) (No1) – [1979] KLR 154 (ii) [*Mumo Matemo v Trusted Society of Human rights Alliance*](#) [2014] eKLR. She argued that the entire petition alleges violation of rights and freedoms, but does not specifically tie the allegations to any constitutional provisions, nor how they were violated, infringed or threatened by the respondents. Further that there is no evidence to support any of the allegations as no documents were annexed to the supporting affidavits. To support this she cited the cases of: (i) [*Kulraj Singh Bhangra v Director General, Kenya Citizens & Foreign Nationals Management Service*](#) [2014] eKLR (ii) [*Kamal Jadra Vekaria v Director General, Kenya Citizen & Foreign Nationals Management Service*](#) ([2016] eKLR (iii) [*Daniel Chacha Muriri v Attorney General*](#) [2012] eKLR.
23. On whether the petition offends sections 107 & 108 of the [*Evidence Act*](#) counsel submitted that the burden of proof lies on the person who invokes the aid of the law. This is supported by the cases of: [*Evans Nyakwana v Cleophas Bwana Ongaro*](#) [2015] eKLR, [*Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another*](#) [2014] eKLR and [*Hassan Ahmed Ibrahim v Kenya National Bureau of*](#)



- Statics & 2 others [2019] eKLR. She submitted that on the allegation that the petitioners used their money for treatment, there were no medical bills and receipts attached in support.
24. It's the respondents case that they acted within the powers conferred to them by law in handling the petitioners cases. They relied on:-
- (a) The Prisons Act cap 90 Laws of Kenya
 - (b) The Prisons (Prisons Council) Rules 1963
 - (c) The *Kenya prisons Standing Orders* and
 - (d) The Constitution of Kenya 2010 .
25. Counsel while referring to rule 65 of the Prisons (Prisons) Rules 1963 explained that there is a Medical Officer at every prison and the officer attends to the respective prison on a daily basis or at regular intervals. If there was any lapse the 1st petitioner ought to have raised the issue but he did not. She added that Kamiti maximum prison has a CCC where two clinics are held weekly (Mondays & Wednesdays) for Medical officers to check on the inmates on every aspect. It's her submission that with the CCC at Kamiti maximum prison there is no need for the inmates to go to KNH for treatment, unless there is real need.
26. In reference to rule 30 of the said Rules she submitted that the officer incharge of Kamiti prison had provided medical reports showing the many times the 1st Petitioner had been to KNH for treatment in 2016 (106 times) 2017, (107 times) & 2019 (76 times). She further submitted that upon transfer to Naivasha maximum prison the 2nd petitioner's medical records were forwarded there, and he continued with treatment. Further that rule 26 of the said Rules provides for a daily visit by a Medical officer to the prisoners held in confinement which gave the 2nd petitioner an opportunity to explain himself if indeed he was not on ARV treatment. It's her contention that the petitioners failed to adduce evidence to prove their case.
27. On whether there are laws and policies to address the issues raised by the petitioners counsel referred to articles 43(1)(a) & 51 of the Constitution, Persons Deprived of Liberty Act 2014, Prisons Act, Prisons (Prisons Council) Rules 1963, sections 3(1) & 15 of the Persons Deprived of Liberty Act. It's her submission that there is sufficient Legal framework that ensures that the health concerns of prisoners are addressed.
28. It is counsel's submission that since 1999 when HIV / AIDs was declared a national disaster the government has endeavored to equip primary health facilities the Kamiti maximum prisons hospital being one of them. The CCC is well equipped to cater for HIV & TB. Counsel while referring to the case of Aloise Onyango Odhiambo & 2 others v Attorney General [2019] eKLR, section 27 of the Persons Deprived of Liberty Act, and rule 65 of the Prisons (Prisons Counsel) Rules 1963 submitted that there are clear mechanisms on how health complaints / challenges are to be addressed at the Prisons. It's her contention that these channels were never followed by the petitioners, as they never reported any complaints. Finally she prayed for dismissal of the petition with costs.

Analysis and Determination

29. I have carefully considered all the material placed before this court together with the Law. The issues I find falling for determination are:
- i. Whether the petition herein meets the threshold for filing of petitions.
 - ii. Whether the petitioners' rights under articles 27, 29, 43(1) & 51(1) were violated.



- iii. Whether there are laws and policies in place to address the issues raised by the petitioners and if so whether they have been adhered to.
- iv. Whether the petitioners are entitled to the reliefs sought.

Issue No (i). Whether the petition herein meets the threshold for filing of petitions.

30. The 1st – 4th respondents submitted that the petition had not been pleaded with specific particularity. The Court of Appeal in the celebrated case of *Anarita Karimi Njeru v Republic* [1976 – 1980] KLR 1272 stated this:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only) to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed. The same was reiterated in the *Mumo Matemu* case.

31. The petitioners claim of violation of the named articles of the *Constitution* is based on the alleged failure by the 1st & 2nd respondents to take them for treatment at KNH and to ensure continued supply of ARVs to them. They also claim that the 1st petitioner was discriminated against. They have cited the various articles of the *Constitution* allegedly violated. That being the position I find that from the pleadings this court has a clear view of what the petitioners’ complaint is all about. It is now for the court to analyse the evidence to see if the claims have been proved.

Issue No (ii). Whether the petitioners’ rights under Articles 27, 29, 43(1) & 51(1) were violated.

32. It is the petitioners’ case that by denying them treatment and access to ARVs the respondents violated their rights under the *Constitution*, HIV & AIDs Prevention and Control Act, *Health Act*, *African Charter on Human & Peoples’ Rights*, *International Covenant on Economic, Social & Cultural Rights (ICECR)* among others. On the other hand the respondents have denied all that saying the petitioners were given all the required medical attention.

33. The *Constitution of Kenya* makes known that the Bill of Rights is a fundamental component of the Nation’s Laws. article 20(1) & (2) of the *Constitution* states as follows:

“Application of Bill of Rights.

20.

- (1) The Bill of Rights applies to all law and binds all State organs and all persons.
- (2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.”

34. On the right to health article 43(1) of the *Constitution* provides:

“Economic and social rights.

43.

- (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;

35. The Petitioners have asserted that both of them suffer from HIV and are entitled to ARVs. From the documents presented to the Court by both the petitioners and the respondents there is no dispute that both petitioners are HIV patients. Section 19 of the [HIV & AIDs prevention & Control Act](#) states:

“Access to health care services (1) Every health institution, whether public or private, and every health management organization of medical insurance provider shall facilitate access to healthcare services to persons with HIV without discrimination on the basis of HIV status. (2) The Government shall, to the maximum of its available resources, take the steps necessary to ensure the access to essential healthcare services, including the access to essential medicines at affordable prices by persons with HIV or AIDs and those exposed to the risk of HIV infection.”

Further section 5(2) of the [Health Care Act](#) provides:

“Every person shall have the right to be treated with dignity, respect and have their privacy respected in accordance with the [Constitution](#) and this Act.”

36. The petitioners are convicts mainly housed at Kamiti maximum prison. The 1st petitioner has been in prison since June 2004 and that’s when he was tested and found to be HIV positive, while at Embu GK Prison. The 2nd petitioner was arrested in 2009 and held at Thika remand. Upon conviction in 2010 he was transferred to Kamiti maximum prison. On June 2, 2011 while at KNH he was diagnosed with HIV, and placed on treatment.
37. Besides the HIV infection the 1st petitioner had urethral structure & TB. The TB was however managed and he got healed. The petitioners do not deny that they have been on medication. They however state that it is only on certain occasions that they were not able to access medication because of the respondents. They confirm that they have been treated both at KNH and at Kamiti maximum prisons for some time.
38. The respondents in their evidence have stated that they carried out their mandate and ensured that the petitioners were treated for their various ailments. A medical report dated September 21, 2022 in respect of the 1st petitioner by Dr Paul Gitonga of Kamiti maximum prison (JOM 11) was annexed by Supt J. Obondo Muhadia to his replying affidavit. It confirms the averments in paragraphs 32 & 33 of the replying affidavit.
39. Another medical report by Dr JW Mwengei of Kamiti maximum prison dated December 1, 2020 (annexure JOM – 1) in respect of the 1st petitioner sets out a detailed breakdown of the clinics attended by him between 2017 & 2019 before he was transferred out of Kamiti maximum prison. They cover both KNH and the Kamiti maximum prison CCC. Another detailed report by the same doctor (annexture JOM – 1) is in respect of the 2nd petitioner. It is dated 1st December 2020. These two medical reports reveal that indeed the two petitioners were attending clinics at KNH and CCC. Infact this file is full of documents showing that the petitioners were being taken to hospital for treatments. The said documents were filed in response to inquiries by the court in 2017, 2018 & 2019 and they form part of the record.
40. The [Evidence Act](#) under section 107, 108 & 109 guides the court on the burden of proof.



Section 107 provides:

107. Burden of proof.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108:

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109:

109. Proof of particular fact. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Section 112:

112. Proof of special knowledge in civil proceedings. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

This position has never changed as can be seen from decided cases like;

- (i) *Anarita Karimi Njeru (supra)*
- (ii) *Evans Nyakwana v Cleophas Bwana Ongoro* [2015] eKLR

41. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2005] 1 EA 334 the Court of Appeal held that:

“As a general proposition under section 107(1) of the *Evidence Act* cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 & 112 of *the Act*.”

42. The initial burden lies on the petitioner. Once the respondent discharges that burden it rolls back to the petitioner. In the case of *Evans Nyakwana v Cleophas Bwana Ongoro (supra)* the court held thus:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden....is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in section 109 and 112 of law that proof of that fact shall lie on any particular person... The appellant did not discharge that burden



and as section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

43. In the instant case the respondent placed evidence before the court showing that the petitioners were given treatment at both KNH and CCC at Kamiti maximum prison hospital. Infact copies of the duty officers journal (annexure JOM – 4) shows instances when the petitioners declined to be taken to hospital. This is all evidence adduced by the respondents.
44. At this point after the respondents’ evidence the burden shifted to the petitioners to revert it. There was no attempt at all to do so. So what remains is the petitioners word against that of the respondents.
45. The petitioners claimed that their rights to equality and freedom from discrimination (article 27), right to freedom and security of the persons (article 29), rights of persons detained, held in custody or imprisoned (article 51(1)) were violated by the respondents. Counsel for the petitioners submitted at paragraph 49 that the respondents actions of not providing healthcare to the petitioners are discriminatory and amount to unequal treatment before the law.
46. The issue of discrimination and unequal treatment is anchored on the alleged failure by the respondents to provide medical care to the petitioner’s. This has already been dismissed by the court. Another issue raised by the 2nd petitioner is that he was unlawfully placed in confinement from March 2017 – February 2018 for reasons unknown to him. The respondents in the replying affidavit and records (annextures JOM 6 & 7) explain why the 2nd petitioner was confined as a punishment, and this was just for a few days. He had been found guilty of contravening provisions of the Prisons (Prisons Council) Rules, 1963 and section 51 of the Prisons Act. Again the petitioners did not counter this evidence. They did not also adduce any evidence to show that they had been paying bills for the medical treatment. Indeed the petitioners have not established any violation of their constitutional rights as claimed.

Issue No (iii). Whether there are laws and policies in place to address the issues raised by the petitioners and if so whether they have been adhered to.

47. Prayer (f) in the petition states:

“An order directing the respondents within 12 months of this order to develop a policy to comprehensively implement the right to treatment and access to HIV and TB medication for prisoners in all persons, which policy must include provision for adequate screening and diagnosis, access to treatment and medication on a timely manner, prevention, access to adequate food and nutrition.”
48. The law governing prison operations is anchored on the following:
 - i. The Constitution
 - ii. The Prisons Act Cap 90 Laws of Kenya
 - iii. The Prisons (Prisons Council) Rules, 1963 contained in the Persons Deprived of Liberty Act, 2014.
 - iv. The Kenya Prisons Standing Orders.



49. On the issue of challenges with health rule 30 of *the Rules* provides:

“The Medical Officer shall keep the following books and records, a case book showing the name, disease and treatment of every sick prisoner.”

Rule 65 of *the Rules* provides:

“The Medical officer Shall attend at the prison for which he is responsible either daily or at regular intervals.”

50. The *Persons Deprived of Liberty Act, 2014* provides as follows: Section 3(1)-

“Every person deprived of liberty is entitled to the protection of all fundamental rights and freedoms subject to such limitations as may be permitted under *Constitution*.”

Section 15

“A person detained held, in custody or imprisoned is on the recommendations of a Medical Officer of health, entitled to medical examination, treatment and healthcare, including preventive healthcare.”

51. Whatever the petitioners are claiming to be reduced into a policy is already catered for in the *Prison Rules*. The doctors know what to do with the special patients and that is why the Comprehensive Care Clinics (CCC) have been set up, at the various Prisons. At paragraphs 11 – 13 of the replying affidavit the deponent states:

11: That upon the declaration of HIV/AIDs as a national disaster in 199, the Government instituted mechanisms to ensure that HIV services are provided in primary health facilities within the country including Kamiti Maximum Prison.

12: That Kamiti Maximum Prison Dispensary has a full pledged comprehensive care clinic (CCC) that take care of HIV patients and various services such as provision of both first and second line ARVs, nutritional services, support groups among others provided.

13: That similar arrangements as stated in 12 above have been made for the care of patients at Kamiti Maximum Prison with tuberculosis.

52. All these facilitates are there to ensure that the prisoners rights are not violated. There is also provided under section 27 of the *Persons Deprived of Liberty Act* a mechanism for addressing complaints by prisoners. Additionally rule 65 of the *Prisons (Prisons Council) Rules 1963* makes provision for raising complaints. There is no evidence by the petitioners to show that they ever made a report of any manner to the incharge of the facility, Administrative officer of the facility, Governor – General or Commissioner.

53. Any complaints that were made in court were acted on by issuance of orders which were executed. I therefore do not see any need of directing for the formation of policies when there are sufficient laws and Rules to address any issues (including HIV/AIDs, & TB among others) concerning prisoners.

54. On record is evidence showing that the petitioners after filing this petition in 2017 did file petition No 002/2019 before the HIV & AIDs Tribunal at Nairobi. The same was heard, and a judgment (JOM 3)



delivered dismissing it. They should have appealed against that judgment if dissatisfied, instead of filing a similar petition herein. Once again the petitioners never responded to this. It was not even submitted on by their advocates. This is a clear abuse of the court process.

Issue No (iv). Whether the petitioners are entitled to the reliefs sought.

55. Based on the above findings I have come to the conclusion that the petitioners have failed to prove that they are deserving of the orders sought. The upshot is that the petition lacks merit and is hereby dismissed. There shall be no order as to costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 12TH DAY OF MAY 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

