REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.250 OF 2015

BETWEEN

KENYA LEGAL AND ETHICAL NETWORK

ON HIV & AIDS (KELIN)……..…….…..…….1ST PETITIONER

CHILDREN OF GOD RELIEF INSTITUTE (NYUMBANI)…….....….2ND PETITIONER

J N K ……...……..……..……...3RD PETITIONER

M K ……..……..…….…....4TH PETITIONER

AND

THE CABINET SECRETARY MINISTRY OF HEALTH…….....1ST RESPONDENT

THE NATIONAL AIDS CONTROL COUNCIL…….....….2ND RESPONDENT

THE CABINET SECRETARY MINISTRY OF EDUCATION.....….3RD RESPONDENT

THE CABINET SECRETARY MINISTRY OF INTERIOR

AND CO-ORDINATION OF NATIONAL GOVERNMENT.....4TH RESPONDENT

THE ATTORNEY GENERAL…….…….…….....….5TH RESPONDENT

AND

MR ANAND GROVER…….……....……..…… AMICUS CURIAE

JUDGMENT

Introduction

1. On 23rd February 2015, the National Government through President Uhuru Kenyatta issued a directive to all County Commissioners and the 1st to 4th Respondents to collect up to-date data and prepare a report *inter alia* on all school going children living with the Human Immunodeficiency Virus (HIV) and

Acquired Immune Deficiency Syndrome (AIDS).

2. The directive specifically stated as follows:

> ***"All County Commissioners*** ***23rd February 2015***
>
> ***COORDINATION AND DELIVERY OF COMPREHENSIVE HIV/AIDS SERVICES TO COUNTIES***
>
> ***On 17th February 2015, I launched the Global Initiative Campaign for the promotion of strategies to help the world overcome the challenges of HIV/AIDS among adolescents. It was reported that out of the 1.6 million Kenyans living, 16% are adolescent and youth. This reality demands that very specific measures and strategies be put in place targeting this age group if the challenge of HIV/AIDS is to be overcome.***
>
> ***To enable the government, respond and provide appropriate service and support to the children living with HIV/AIDS, it is necessary that proper and accurate information is made available in regard to the status of affected children mainly in schools across the country. In this connection, you are instructed to work with [the] county director of education and county directors of medical services, to prepare a report with accurate and up to-date data on all school going children who are HIV positive. Information on their guardians and those taking care of them should also be availed in the report.***
>
> ***The above information should be provided from all schools in the counties down to the sub-county level. The data should cover the following aspects:***
>
> ***i. Number of children infected with HIV/AIDS***
>
> ***ii. Number of guardians and other care givers of children infected by HIV/AIDS***
>
> ***iii. Number of expectant mothers who are HIV positive; and***
>
> ***iv. Number of breastfeeding mothers who are HIV positive.***
>
> ***The information should be submitted in the attached format so as to reach this office by 15th March, 2015.***
>
> ***UHURU KENYATTA***
>
> ***PRESIDENT"***

The directive was copied to the Cabinet Secretary, Ministry of Interior and Coordination of Government, Cabinet Secretary, Ministry of Education, Science and Technology and Cabinet Secretary, Ministry of Health**.**

3. The Respondents proceeded to implement the directive through their officers in all the 47 Counties and the information required in the directive was allegedly to be collected in a prescribed data matrix.

4. It is against that background that the Petitioners have filed this Petition alleging that the act of collecting the names of persons living with HIV/AIDS in a format that links their names to their HIV status is unconstitutional and a violation of fundamental rights and freedoms under **Articles 27, 28, 29, 31, 43, 47** and **53** of the **Constitution**.

The Parties

5. The 1st Petitioner, The Kenya Legal and Ethical Issues Network on HIV/AIDS (KELIN) is a non-partisan, non-profit making organization and non-governmental organization, duly registered under the provisions of the **Non-Governmental Organization Act (Cap 134 Laws of Kenya),** working to protect and promote health related human rights in Kenya. It does so by facilitating access to justice for human rights victims through creation of partnerships with relevant stakeholders, building capacities and analyzing laws and policies to ensure they integrate human rights principles.

6. The 2nd Petitioner, The Children of God Relief Institute (Nyumbani) is a non-partisan, non-profit making organization duly registered as a company limited by guarantee under the **Companies Act (Cap 486 Laws of Kenya),** committed to building sustainable communities for children infected and affected by HIV.

7. The 3rd Petitioner, J.K, is a male adult Kenyan citizen who has lived positively with HIV for the past 25 years. He is on anti-retroviral therapy and is a founder member of the Kenya Treatment Access Movement (KETAM) and also a steering committee member of the Pan African Treatment Access Movement (PATAM).

8. The 4th Petitioner, M.K, is a female adult Kenyan citizen. She has lived with HIV virus for the last 11 years and is on anti-retroviral therapy and also has a son, A.K, who is 10 years old and also living with HIV.

9. The 1st Respondent, the Cabinet Secretary, Ministry of Health, is in charge of the formulation of policies and the setting of standards regarding health in the Country. The 2nd Respondent, the National Aids Control Council (NACC) is the entity in charge of advising the 1st Respondent on matters relating to HIV in the Country. The 3rd Respondent, the Cabinet Secretary, Ministry of Education, Science and Technology is in charge of the formulation of policies, programmes and the setting of standards on education, science and technology in the country. The 4th Respondent, the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government, also functions and serves at the County and Sub-County level. The 5th Respondent, the Attorney General is the principal legal advisor to the Government.

10. The Amicus Curiae, Mr. Anand Grover, is registered with the Bar Council of Maharashtrato in India as an advocate and is permitted to practice in all Courts throughout India. He is also a leading human rights lawyer and has been involved in issues related to law, human rights and HIV/AIDS for three decades. He was admitted as an Amicus Curiae on 10th July 2015.

The Petitioners' case

11. The Petitioner's case is contained in the affidavits sworn by Allan Achesa Maleche on 9th June 2015 and 22nd October 2015, an affidavit sworn by the 2nd Petitioner sworn on 22nd October 2015, the 3rd Petitioner's affidavit sworn on 22nd October 2015 and the affidavits of A.J and M.R sworn on 16th July 2015. They also filed written submissions dated 15th June 2015 and 19th May 2016.

12. In the affidavits, it is deposed that the Petitioners made a number of attempts to engage with the President on the concerns that arose out of the directive and its implementation. They also state that the Chairperson of the Commission on the Implementation of the Constitution (now defunct) and the Commission on Administrative Justice, separately issued advisory notes to the President and his Chief of Staff informing them that the implementation of the directive in the proposed manner would lead to a violation of **Article 31** of the **Constitution** as well as **Sections 18, 21, 22** and **23** of the **HIV Prevention and Control Act** as well as **Section 19** of the **Children's Act**.

13. Further, they deponed that the International Community of Women Living with HIV (ICW-Global) and the Global Network of People living with HIV (GNP+) also wrote a letter to the President concerning the directive. They state that despite these efforts, the letters remained unanswered by the relevant Government agencies hence the filing of this Petition.

14. In a nutshell the Petitioners' case is that the implementation of the directive leads to forced or compulsory testing which action specifically violates the provisions of the **HIV and AIDS Prevention and Control Act.** Further, the directive leads to disclosure of information regarding one's HIV status which violates the right to privacy, right to equality and freedom from discrimination, as well as the right to dignity of the targeted persons. They therefore contend that the directive is unconstitutional *ab initio* and any process or function undertaken as a result thereof is unlawful.

15. Mr. Maleche, learned Counsel for Petitioners, in his submissions stated that in issuing the directive, the President did not adhere to the provisions of **Article 10** of the **Constitution** in regard to public participation. That the efforts of the Petitioners and other stakeholders, including independent constitutional commissions, to engage on the issue with the President have failed. On that submission he relied on the cases of; ***Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 Others (2013) eKLR***, ***Coalition for Reform and Democracy and another v Republic (2015) eKLR*** and ***Keroche Breweries Limited and others v Attorney General (2016) e KLR***. These cases generally dealt with the significance of public participation in governance.

16. He further claimed that the President is under a solemn obligation to respect, uphold and defend the Constitution and on that submission he relied on the case of ***Michael Sistu Mwaura Kamau and others v The Ethics and Anti-Corruption Commission and others Petition No. 30 of 2015*** where it was held that directives issued by the President must be made subject to the Constitution and its expectations.

17. On the issue of violation of the right to privacy as provided for under **Article 31** of the **Constitution**, Mr. Maleche submitted that persons living with HIV are exposed to stigma associated with HIV related conditions and that the manner in which the directive was to be implemented involved moving raw data from the lowest level at the Location through the Chief and through numerous Government personnel in the Office of the President and without guidelines on privacy and that such an action would be a violation of the right to privacy.

18. It was Counsel's further submission that **Section 22(1)** of the **HIV and AIDS Prevention and Control Act** prohibits against disclosure of any information concerning the result of an HIV test to any other person and that the law only allows disclosure in certain circumstances and particularly if written consent has been obtained. On the said submission, he relied on the case of ***YBA v Brother Nicholas Banda and others Tribunal Case No 007 of 2012***, where it was held that the requirement by an employer that an employee ought to submit medical records amounted to a violation of the right to privacy. He also relied on the Constitutional Court of South Africa case of ***NM and others v Smith and Others 2007 (5) SA 250(CC)*** where it was held that the publication of the HIV status of the Applicants in that case was a violation of their right to privacy.

19. Mr. Maleche furthermore submitted that the directive violates the **International Guidelines on HIV/AIDS and Human Rights 2006** and in his view, paragraph 20 of the said Guidelines prohibit mandatory HIV testing or registration except in cases of blood, organ or tissue donations. In addition, that paragraph 21 thereof obligates States to ensure that testing occurs with informed consent, and information on HIV status is not disclosed to third parties without consent. He also stated that the guidelines obligate States to ensure that in the process of compiling epidemiological data, individuals are protected from arbitrary interference with their right to privacy in the context of media investigation and reporting.

20. In addition, according to Mr. Maleche, the directive discriminates against people with HIV because it singles them out by seeking to acquire information regarding their health status in violation of their right to equality and freedom from discrimination. That the directive fails to meet the standard of disclosure provided for in **Section 22(1)** of the **HIV and AIDS Prevention and Control Act** and he relied on the Constitutional Court of South Africa case of ***Hoffman v South African Airways [2000] (1) SA 1***, where the Court held that failure to employ a person based on their HIV status was discriminatory.

21. As regards violation of the right to human dignity, Mr. Maleche contended that disclosure of one's HIV status undermines a person's human dignity and that the directive required school going children living with HIV or their guardians to disclose their HIV status without regard to their right to make such a

decision, thus violating the right to human dignity.

22. It was Mr. Maleche's further submission that the directive violates freedom and security of persons and that the disclosure may cause mental suffering to school going children, and also violates their right to be free from cruel, inhuman and degrading treatment.

23. According to Mr. Maleche, the right to health is related to the right to privacy and that it is important to maintain one's confidence in the health care system when seeking health services. He claimed further that the implementation of the directive in the prescribed matrix form and failure to observe the right to privacy infringes upon the health of persons living with HIV. On that submission, he relied on the European Court of Human Rights case of ***M.S v Sweden Application No. 5 74 of 1996 judgment of 27 August 1997*** where the importance of the protection of personal data, including medical data, in the person's enjoyment of their right to privacy was enumerated.

24. It was also the Petitioners' submission that the directive, in seeking to utilize a pre-determined formula for obtaining the HIV status of all school going children, without taking into consideration the different societal context of these children, violates the best interest of the child as provided for under **Article 53(2)** of the **Constitution**.

25. Mr. Maleche submitted therefore that it is the duty of this Court to interrogate policies and decisions of the Executive in order to ensure that they are consistent with the Bill of Rights. That the Court, upon finding that the directive violates the fundamental rights and freedoms as alleged, has the power to grant an appropriate relief including ordering the Respondents to destroy the data collected pursuant to the directive. If not, he claimed that the Court should order the Respondents to store the collected data in a manner that does not link the names of the school going children with their HIV status and Counsel also urged the Court to consider directing the Executive to develop privacy guidelines in the form of regulations so as to guarantee the right to privacy in line with the provisions of the **Constitution** and the **HIV and AIDS Protection and Control Act.**

26. In their Petition dated 15th June 2015, the Petitioners therefore seek the following orders;

> ***(a) A declaration that the directive dated 23rd February 2015, issued by the National Government through H.E Uhuru Muigai Kenyatta, the President of the Republic of Kenya, is a breach of the Petitioner's constitutional rights under Articles 10(1), (b), (c) and 2(a), 20, 21, 24, 27, 28, 29(1), 31, 43(1)(a), 46(c), 47(2) and 53(2) of the Constitution.***
>
> ***(b) A declaration that the actions and omissions of the Respondents in relation to the directive dated 23rd February 2015, violate the fundamental rights and freedoms of the Petitioners, the persons they represent and their families under Articles 10(1) (b), (c) and 2(a), 20, 21, 24, 27, 28, 29(1), 31, 43(1)(a), 46(c), 47(2) and 53(2) of the Constitution.***
>
> ***(c) An order compelling the 1st – 4th Respondents to destroy all data in their possession, collected as a result of the directive dated 23rd February 2015, linking names of persons living with HIV and their HIV status, within a period of 14 days.***
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> ***(d) In the alternative and without prejudice to prayer (c), that the Court issues an order compelling the 1st -4th Respondents, within 14 days to codify the names collected as a result of the directive dated 23rd February 2015 [and] be stored in a manner that does not link their names and their HIV status in a public document.***
>
> ***(e) An order compelling the 1st Respondent to put in place within 90 days of the Court's judgment, the privacy guidelines, in form of regulations as required by Section 20 of the HIV and AIDS Prevention and Control Act, on the collection and storage of data relating to HIV incorporating the following:***

(i) Detailed guidelines on the management of HIV/AIDS information by all persons who render HIV testing services, especially VCT centers;

(ii) Detailed guidelines on the management of HIV/AIDS information in hospitals and other medical institutions;

(iii) Detailed guidelines on the recording, collection, storage and use of HIV/AIDS information by government agencies for public health and other epidemiological purposes;

(iv) Detailed guidelines on the dissemination and/or sharing of HIV/AIDS information between family members and relatives or within the home setting;

(v) Detailed guidelines on the collection and use of HIV/AIDS information in the workplace;

(vi) Detailed guidelines on the collection and use of HIV/AIDS information in schools, colleges and institutions of higher learning; and

(vii) Detailed guidelines on the collection and use of HIV/AIDS information in prisons and other correctional institutions.

(f) This Honourable Court issues an order directing the 1st – 4th Respondents to issue a circular, within 14 days of the Court's judgment, informing their officers, employees and or agents that the directive issued on 23rd February 2015 is unconstitutional, is null and void for all intents and purposes.

(g) This Honourable Court issues an order directing the 1st and 2nd Respondents to conduct public awareness campaigns to educate citizens [and] persons living with and affected by HIV about their rights, stigma and discrimination and other matters relating to HIV in line with sections 4-8 of the HIV/AIDS Prevention and Control Act.

(h) This Honourable Court issues an order directing the Respondents within 90 days of the court's judgment to file an affidavit in this Court detailing out their compliance with prayers (e), (f) and (g).

(i) This Honourable Court be pleased to issue an order that since this Petition is in the public interest, each party should bear their own costs.

(j) This Honourable Court be pleased to issue such further or other orders as it may deem just and expedient for the ends of justice.

The Respondents' case

27. In response to the Petition, the Respondents filed an affidavit sworn on 11th August 2015 by Dr. Nduku Kilonzo, the Director of the 2nd Respondent.

28. She states that HIV and AIDS was declared a national disaster in 1999 and that an estimated 1.6 million people are living with HIV in Kenya, 16% of whom are adolescents and youth. She avers that HIV/AIDS is the leading cause of adolescent death in Africa and that 30% of new HIV infections in Kenya are in the adolescent group. That approximately 9, 720 adolescents and young persons below the age of 24 years in Kenya have since died of AIDS.

29. According to Dr. Kilonzo, the number of children born with HIV in Kenya in 2013 was approximately 13, 000 and an estimated 38% of children living with HIV are on anti-retroviral (ARV)

treatment and an estimated 11,000 children aged 0 - 14 years of age, living with HIV die each year due to poor access to (ARV) therapy.

30. It is Dr. Kilonzo's further averment that the Respondents have implemented programmes to address the underlying challenges, including limited education on HIV and also limited access to ARVs for school going children and young people, experience of stigma and discrimination against young people living with HIV and also states that the impugned directive was therefore issued by the President in an effort to provide the political will necessary to engage multiple stakeholders such as development partners, persons living with HIV and the private sector in order to address the aforesaid challenges.

31. Dr. Kilonzo has added that a workshop to sensitize all County Commissioners prior to the implementation of the directive in order to brief them on the privacy and confidentiality requirements in terms of existing guidelines and statute – the **HIV Prevention and Control Act** was indeed conducted contrary to allegations by the Petitioners.

32. Dr. Kilonzo further avers that the Respondents undertook certain other measures prior to the directive including conducting public awareness on HIV/AIDS and that all the initiatives undertaken by the Respondents have been within the law. That there are several guidelines that have been developed to provide privacy and confidentiality in the implementation of services, research and data collection in varied settings and claims that if there has been non-compliance with any statutory provisions in the said regard, that would not render the directive unconstitutional. And if there has been violation of the right to privacy, the same would have occurred in very few and isolated cases that would not warrant the drastic orders now sought.

33. It is also her contention that the availability of names of people with chronic care conditions including HIV in a register does not breach any law or amount to profiling of those persons so as to promote stigma. That there are in fact available, in various registers in hospitals and HIV care clinics, names of persons living with HIV for the purposes of follow up, care and ARV treatment.

34. She further states that the largest network of people living with HIV in Kenya, - the National Empowerment Network of People Living with HIV/AIDS (NEPHAK) is not party to the Petition and therefore the Petitioners' views do not necessary represent those of all persons living with HIV. In any event, she claims that there is an active engagement between the 2nd Respondent and NEPHAK, on management of the collected data with a view of ensuring that the rights of the persons living with HIV are protected.

35. Lastly, she states that if the Court upholds the Petition, it would in essence be fueling the existing stigma on HIV that the Respondents have worked so hard to eliminate.

36. In addition to the above, the Respondents' case was argued by Mr. Kamunya, State Counsel, and it was his contention that the main purpose of the directive was to enable the Government provide better health care service and support for the targeted group which in essence enables realization of the right to health. The directive, he claimed, also specifically ensures better health services and support for school going children living with HIV and does not violate their best interests in any way.

37. He further submitted that the directive sought information that would help the Government take very specific measures and strategies that would enable it cater for adolescents and youth affected with HIV/AIDS and would also enable the Government respond and provide appropriate service and support to school going children living with HIV/AIDS. As to the format in which the information would be provided, he claimed that the same was attached to the directive and the rhR RHW format provided was important as it demanded accountability from the administrators in that they would be compelled to provide concrete details on proof of existence of persons affected by HIV/AIDS. In his view, mere numbers (data) would be prone to manipulation or guesswork and it was therefore his further view that, if the information required was provided in the required format, it would enable the Respondents target an exact person in need as well as enable the Respondents achieve the global campaign goals on HIV/AIDS.

38. As to whether the directive violated the provisions of **Article 10** of the **Constitution**, Mr. Kamunya submitted that the Respondents ensured elaborate public involvement in the implementation of the directive and that the Government in doing so included various stakeholders such as development partners, key Non-Governmental Organisations (NGOs) and persons living with HIV. That NEPHAK has been involved in the public participation process, and is not a party to the Petition because it is fully aware of the Respondents' efforts in lawfully implementing the directive. It is their case therefore that there was adequate public participation in the entire process and that all interested parties were afforded a reasonable opportunity to be informed about the directive and contribute their views on the same.

39. On the alleged claim for violation of protection against discrimination, Counsel submitted that there has not been any credible evidence of any discrimination presented to this Court and so the same should be dismissed.

40. Regarding the claim of violation of **Article 29(f)** which prohibits cruel, inhuman and degrading treatment, the Respondents contend that the data sought was not to be extracted forcibly and so such a claim cannot stand.

41. Lastly, Mr. Kamunya submitted that the Court cannot issue the reliefs sought for various reasons. Firstly, that it would be difficult to destroy the data collected which has not been availed to this Court. Secondly, this Court cannot order the Executive to develop guidelines on privacy and confidentiality, as that would amount to stepping into the Executive's mandate. On that submission, he relied on the case of ***Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and 7 Others (2012) e KLR*** where it was held that the role of the Courts was to ensure that policies enacted by the State, meet constitutional standards and that the Court cannot direct the Executive in the manner in which it would perform its functions. And finally that the Court cannot direct the Respondents to conduct public awareness campaigns to educate persons living with HIV, since that would also be a policy issue.

42. In a nutshell Mr. Kamunya claimed that the Petitioners have not demonstrated any violation of fundamental rights and freedoms and urged the Court to dismiss the Petition with costs.

The Amicus Curiae' brief

43. The Amicus Curiae, Mr. Anand Grover, filed submissions dated 11th May 2016 and his case is that the International Guidelines on HIV/AIDS and Human Rights (International Guidelines) promulgated by the office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS reinforces the view that unlawful disclosure of an individual's HIV status would violate the right to privacy. Further, in his view, a breach of confidentiality of an individual's HIV status would automatically violate right to privacy and in that regard he relied on the Constitutional Court case of ***NM and Others v Smith and another (2007) ZACC 6*** where the Court held that it was imperative and necessary that all private and confidential medical information be protected against unauthorized disclosure. He also relied on the European Court of Human Rights' decision in ***I v Finland Application No. 20511/03*** where the Court held that disclosure of a woman's HIV positive status constituted a violation of **Article 8** of the **European Convention on Human Rights**. Further reliance was placed on the Inter-American Commission on Human Rights' case of ***J.S.C.H and M.G.S v Mexico judgment of 4 February, 2009*** where it was held that disclosure of the HIV status of a person constituted a violation of the right to privacy.

44. It is therefore his position that disclosure of HIV related information without written consent of the person is prohibited and that the recording, collection and storage of information relating to one's HIV status can only be in accordance with the regulations prescribing privacy guidelines issued by the Ministry of Health. Further, that the Ministry of Health has not issued those guidelines as is required under **Section 20** of the **HIV/AIDS Prevention and Control Act**. In any case, he states that even if there was consent in collecting and recording the data, without the guidelines, there was no guarantee that the data would be free from disclosure.

45. He further submits that the practice of linking an individual's name with his HIV status while

collecting information has been rejected by international bodies, on the ground that linking the individuals name with the person's HIV status increases the likelihood of disclosure of his HIV status. It was his submission therefore that disclosure of one's HIV status without consent amounts to a violation of the right to privacy.

46. In addition, he contends that the implementation of the directive would allow administrators to access medical records of school going children, as well as pregnant and nursing mothers yet only medical staff should have access to such information.

47. In his view, the implementation of the directive would therefore push for compulsory testing of school children to determine their HIV status and given that testing would be done without consent, such an action would amount to degrading treatment or punishment and thus a violation of the **Constitution**.

48. It is his further submission that the disclosure of an individuals' HIV status without informed consent violates the right to health and that while the directive attempts to increase Kenya's HIV response with respect to children and pregnant women, it has failed to protect the confidentiality of the children and women, whose HIV related personal medical information would be openly collected and stored by the Government. As a result, he states that there is a likelihood that confidentiality of the said data will be compromised, hence a violation of the right to health.

49. Mr. Grover also claims that the directive is discriminatory because it singles out school going children for appropriate services and support while excluding the whole population of non-school children living with HIV and yet there is no rationale for such classification. That the fact that the directive singles out school going children also violates the right to equality and freedom from discrimination of non-school going children living with HIV. Furthermore, in his view, the fact that the directive targets pregnant and nursing mothers demonstrates that while the Government is concerned about preventing mother to child transmission of HIV, it ignores the mothers and is thus arbitrary and discriminatory for violating the right to equality and freedom from discrimination.

50. The Amicus Curiae concludes his submission by stating that it is possible for the Government to collect the information necessary to address HIV among children and adolescents without requiring that the names and personal information of people living with HIV and their parents or caregivers should be given.

Determination

51. The dispute before me as I understand it is whether the directive violates any of the constitutional rights and freedoms of school going children living with HIV as well as expectant and breastfeeding mothers. If the answer is in the affirmative, I will have to determine the appropriate relief to which the Petitioners are entitled to.

52. Before turning to the issue of violation of fundamental rights and freedoms, it is necessary however to deal with the allegation made that the President issued the impugned directive without public participation.

Whether there was public participation

53. The Petitioners contend that relevant stakeholders were not involved in the process of implementing the directive and it is their case that even after the directive was issued, together with other stakeholders in the HIV Aids field and independent constitutional commissions, they took all possible measures to engage the President to rectify the directive especially on how it was to be implemented but that their views were ignored. The Respondents also dispute the allegation that there was no public participation and in her affidavit, Dr. Kilonzo claims that following the launch of the "All in Campaign", they put in place initiatives to ensure public participation in implementing the directive.

54. The obvious question in that regard is therefore whether, before issuing the directive, the President

was entitled to seek the participation of any part of the Kenyan public. The question is important because Public participation is a golden rule running throughout the **Constitution** in regard to governance and one of the national values and principles of governance in **Article 10** thereof is that of 'inclusiveness' and 'participation of the people'. Public participation is also equally recognized and underlined as a tenet of democracy in international instruments on human rights. For instance, **Article 21** of the **Universal Declaration of Human Rights (UHDR)** provides that; '***everyone has the right to take part in the government of his country, directly or through freely chosen representatives'***. **Article 13** of the **African Charter on Human and People's Rights (ACHPR)** also provides; ***'every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law'.*** And **Article 25(a)** of the **International Covenant on Civil and Political Rights (ICCPR)** provides that; '***every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives.'***

55. There is also no doubt that citizens are entitled to participate in public affairs through debate and dialogue with their representatives. Indeed, **Articles 118(b)** and **196(1)(b)** of the **Constitution** require Parliament and County Assemblies, to facilitate public participation in their legislative and other businesses as well as those of their committees.

56. It is tempting at this stage to ask why the **Constitution** specifically imposes this duty on Parliament and County Assemblies as they are elected by the people to represent them in the law making process. The answer is not far to find because sovereign power of the people is exercised directly through their participation and through their democratically elected representatives. In that context, this Court has dealt with the question as to why Parliament should facilitate public participation in the legislative process - See the cases of ***Kenya Small Scale Farmers Forum & 6 others v Republic (supra), Robert N. Gakuru and others v The Governor Kiambu County and 3 Others Petition No. 532 of 2013*** and ***Nairobi Metropolitan PSV Saccos Union Ltd & 25 others v County of Nairobi Government and 3 Others Petition No. 486 of 2013.***

57. It is further not lost to me that public participation in the legislative process is crucial in a democratic society generally and the question I set out to answer elsewhere above is whether the Constitution imposes an obligation on the President to facilitate public participation before issuing a directive like the one before me. I can only answer that question in the negative.

58. I say so because **Article 129(1)** of the **Constitution** stipulates that the executive authority of the President is derived from the people of Kenya. **Article 129(2)** then stipulates that executive authority is to be exercised in a manner compatible with the principle of service to the people of Kenya and for their well being and benefit. The President, as head of the Executive, does not have any legislative authority save assenting to Parliamentary Bills. Admittedly, he has executive powers to issue directives and coordinate the functions of ministers and government departments pursuant to the provisions of **Article 132(3) (b)** and **(4)(a)** of the **Constitution** and none of the parties contested that issue. Having established therefore that nowhere in the Constitution is an obligation imposed on the President to facilitate public participation while undertaking his duties, it is clear that he had no obligation to do so prior to issuing a policy directive such as the one in issue.

59. I should add that if such an obligation were to exist every time the President was to exercise his executive authority, especially in the most urgent of situations as they will arise from time to time, it would be difficult for him to utilize his executive powers. In stating so, I am conscious of the fact that an executive directive is a serious order and the President ought to issue one in the most deserving of situations and upon taking into consideration the full effect of the directive on the well being of the people of Kenya. It is for that reason that the President has an adviser – the Attorney General, who is mandated under **Article 156(4)(a)** to be the Principal Legal Adviser to the Government and to ensure that the Executive, including the President, always act within constitutional parameters. Be that as it may, if a directive violates any Constitutional provision, it ought to be challenged in Court as there is no doubt that the President is bound by the provisions of the Constitution and his actions must be within the four

corners of the Constitution.

60. The above finding notwithstanding, I note that in her affidavit Dr. Kilonzo in her affidavit explained at para. 19 as follows;

> ***19. That following the launch of the 'All in campaign, the following initiatives were put in place by the Respondents as outlined below, and prior to the institution of this Petition;***
>
> ***(a) The 1st Respondent, Cabinet Secretary, Health, through the National AIDS and STI Control Programme (NASCOP) in the Ministry of Health set up an adolescents and children HIV treatment acceleration working group in March 2015. The multi-stakeholder team, whose objectives include scaling up HIV testing and counselling to identify 90% of HIV infected children and adolescents, enrolling and retaining 90% of these on treatment, has held monthly meetings. The stakeholders include government, development partners, key implementing NGOs, and persons living with HIV.***
>
> ***(b) The 2nd Respondent, NACC, set up [a] multi-stakeholder committee to develop a campaign to end stigma and discrimination among children and adolescents in May 2015 and that the Committee has representation of the government, development partners, key communication NGOs and persons living with HIV; that the committee had met prior to the institution of the Petition.***
>
> ***(c) The 2nd Respondent had set up a multi-sectoral committee in November 2014 to develop an operational plan to accelerate and fast-track action across different sectors that have a bearing on children and adolescents including education, labour and social security.***

I also note that the annexture marked '**NKI'** is an invitation letter to the Principal Secretary, Ministry of Health, from the 2nd Respondent for a sensitization workshop on the implementation of the directive. The workshop was held on 19th March 2015 in Nakuru and Annexture **'NK2'** refers to a communication strategy for a mass media campaign on anti-stigma and acceleration of treatment and care for children and adolescents in Kenya.

61. In addition, I have also seen an email from the Director of the 2nd Respondent dated 6th March 2015 which was an invitation for a meeting meant to develop consensus on privacy guidelines that would fast track the collection of data required in the impugned directive. Among the recipients of the email is Mr. Allan Maleche, the Executive Director of the 1st Petitioner and Counsel for the Petitioners. Mr. Maleche states in his affidavit that during the meeting, he informed the stakeholders that they could not address the guidelines without addressing the constitutional and human rights issues raised by the directive and it was allegedly resolved at the meeting that Dr. Kilonzo would write an advisory opinion to the 1st Respondent highlighting the legal issues on the breach of the right to privacy if the directive was to be implemented in the suggested manner.

62. A further meeting was held on 27th March 2015 where the 1st Petitioner, NEPHAK and the 2nd Respondent attended together with members of the Commission for the Implementation of the Constitution (CIC), to provide suggestions with regards to the directive. Thereafter, letters were done and exchanged between the Petitioner and the 2nd Respondent touching on the issue of violation of the right to privacy.

63. As can be seen therefore, there was a level of public participation in the implementation of the directive and in that regard, in the case of ***Doctors for Life International (supra),*** it was held that the right to public participation guarantees a positive right to participate in public affairs and in ***Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC)*** Sachs J stated that:

"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 issues and to have an adequate say."

64. I am in agreement and given that what is before me is a policy directive and as I said earlier there is no obligation imposed on the President to ensure there is public participation, I shall not get into the issue as to whether the participation was adequate or not. The obvious issue that should arise in this Petition is therefore whether the directive violates any of the fundamental rights and freedoms as alleged. I now turn to examine that issue.

Whether the directive violates fundamental rights and freedoms

Right to privacy

65. The Petitioners contend that the manner in which the directive was implemented violated the right to privacy of school going children, breastfeeding and expectant mothers living with HIV in two ways. Firstly, that the directive was implemented without privacy guidelines to guide the collection of the data. Secondly, the said data would be collected without consent of the affected person. Thirdly, that the collection of the data as envisaged from the directive would directly link the individual's name with their HIV status thus amounting to disclosure of that person's status and therefore a violation of the right to privacy.

66. On their part, the Respondents contend that they were keen on implementing the directive within the established legal framework under the **HIV and AIDS Prevention and Control Act** and as regards the guidelines, they submit that a national steering committee has already been set up and whose mandate is to develop guidelines on privacy in the collection of data. They also contend that the directive does not require forcible collection of information on HIV status of individuals or publication of the information sought.

67. In that context, the right to privacy is provided for under **Article 31** of the **Constitution** in the following terms;

Every person has the right to privacy, which includes the right not to have –

(a) Their person, house or property searched.

(b) Their possessions seized

(c) Information relating to their family or private affairs unnecessarily required or revealed; or

(d) The privacy of their communications infringed. (Emphasis added)

68. The import of the right to privacy as regards a person's personal space was discussed in ***Bernstein and Others v Bester NNO and Others*** which was quoted with approval in **Petition No.122 of 2015 Prof. Tom Ojienda v The EACC and Others** where it was stated thus;

"A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere, the individual's activities then acquire a social dimension and the right to privacy in this context becomes subject to limitation".

69. I agree with the exposition of the law above and I should add that **Article 31(c)** of the **Constitution** must be understood in this context – it protects against the unnecessary revealition of information relating to family or private affairs of an individual. Private affairs are those matters whose disclosure will cause mental distress and injury to a person and there is thus need to keep such information confidential. Taken in that context, the right to privacy protects the very core of the personal sphere of an individual and basically envisages the right to live one's own life with minimum interference. The right also restricts the collection, use of and disclosure of private information.

70. In order to determine whether there is a violation of the right to privacy, the Constitutional Court of South Africa in the case of ***Mistry v Interim National Medical and Dental Council of South Africa (1998) (4) SA 1127 (CC)*** stated that the Court ought to take into account the fact; (i) whether the information was obtained in an intrusive manner, (ii) whether it was about intimate aspects of an applicants' personal life; (iii) whether it involved data provided by an applicant for one purpose which was then used for another purpose and (iv) whether it was disseminated to the press or the general public or persons from whom an applicant could reasonably expect that such private information would be withheld.

71. With those principles in mind, the question therefore is whether there is a violation of the right to privacy in the present instance and in that regard, the Petitioners' claim is that the manner in which the directive was implemented, without privacy guidelines being developed and would provide the process of collecting data, violates the right to privacy. In that context, **Section 20** of the **HIV and Aids Prevention** and Control Act provides thus;

> ***20 (1) The Minister for the time being responsible for matters relating to health may, in regulations, prescribe privacy guidelines, including the use of an identifying code relating to the recording, collecting, storing and security of information records or forms used in respect of HIV tests and related medical assessment.***
>
> ***(2) No person shall record, collect, transmit or store records, information or forms in respect of HIV tests or related medical assessments of another person otherwise than in accordance with the privacy guidelines prescribed under this section***.

The law above therefore grants discretion to the Minister in-charge of health matters to prescribe regulations that would be used in the recording, collection and storage of data in respect of HIV tests. Were such guidelines developed prior to the issuance of the directive and were they absolutely necessary?

72. Dr. Kilonzo in her affidavit stated that indeed guidelines to provide privacy and confidentiality in the implementation of services in research and data collection had been developed and attached to her affidavit as annexture ***'NK6'*** is a document titled; ***"National Guidelines for HIV Testing and Counselling in Kenya"***. The guidelines were allegedly published by the Ministry of Health and Sanitation in 2008 and in Chapters 12 and 13, I have seen that some of the portions therein deal with data management. I did not hear the Petitioners to complain that the guidelines were not sufficient or did not meet the required standards. I only heard them to claim that there were no guidelines and that the Court should compel the Respondents, and in particular the 1st Respondent, to develop the guidelines contemplated under **Section 20** above. In Mr. Maleche's view, the said guidelines should include;

> ***(a) Detailed guidelines on the management of HIV/AIDS information by all persons who render HIV testing services, especially VCT centers;***
>
> ***(b) Detailed guidelines on the management of HIV/AIDS information in hospitals and other medical institutions;***
>
> ***(c) Detailed guidelines on the recording, collection, storage and use of HIV/AIDS information by government agencies for public health and other epidemiological purposes;***
>
> ***(d) Detailed guidelines on the dissemination and/or sharing of HIV/AIDS information between***

family members and relatives within the home setting;

(e) Detailed guidelines on the collection and use of HIV/AIDS information in the workplace;

(f) Detailed guidelines on the management of HIV/AIDS information in schools, colleges and institutions of higher learning; and

(g) Detailed guidelines on the management of HIV/AIDS information in prisons and other correctional institutions.

73. While the above guidelines go way outside the purview of the present Petition and despite having been served with Dr. Kilonzo's affidavit, the Petitioners have failed to address this Court on the adequacy or otherwise of the guidelines already in place. That being so, this Court cannot get into the arena of a discussion of the question whether the guidelines are sufficient or not. In essence therefore I do not find any merit in the Petitioners' complaint on that issue.

74. In any event, Dr. Kilonzo in her affidavit stated that a National Steering Committee on Fast- Tracking a high Impact HIV Response among adolescents and young people was set up in 1st July 2015. The Committee's mandate is to *inter alia* provide advisory and guidance on policy, legal and operational matters to the Ministry of Health and oversee the execution of the fast-track plan. She further claimed that under item number 5 thereof, the committee is to ***'advice the Cabinet Secretary on confidentiality guidelines in relation to management of data for children and adolescents as needed'.*** Even if therefore the current guidelines are not sufficient, there are certainly plans to develop the guidelines in more detail and the Petitioners have the opportunity to present their views in that regard. As stakeholders, they are also expected to work closely with NACC to ensure that their views are heard before the intended guidelines are developed.

75. Secondly, the Petitioners complained that the data would be collected without consent and therefore a violation of the right to privacy. In that regard **Section 13 (1)** of the **HIV and Aids Prevention and Control Act** prohibits against compulsory testing for HIV purposes. **Section 14** provides for consent in the following manner;

14(1) Subject to subsection (2) no person shall undertake an HIV test in respect of another person except –

(a) With the informed consent of that other person;

(b) If that person is a child, with the consent of a parent or legal guardian of the child. Provided that any child who is pregnant, married, a parent or is engaged in behavior which puts him or her at risk of contracting HIV may in writing, directly consent to an HIV test.

76. The above provision of the law is clear and requires no more than a plain reading and that is that a person must consent to HIV testing before a test can be administered on him. In that regard, the impugned directive did not specifically provide for compulsory HIV testing, but required for the data of *inter alia* school going children living with HIV to be provided. In that regard I cannot help but ask myself one obvious question – how was the aforesaid data to be collected?

77. In answer thereto, I note that the directive stipulated that the County Commissioners were to work with – "***county director of education and county directors of medical services, to prepare a report with accurate and up to date data on all school going children who are HIV positive. Information on their guardians and those taking care of them should also be availed in the report. The above information should be provided from all schools in the counties down to the sub-county level."***

78. The directive it would therefore seem, anticipated that the data would be provided from all schools at the County and Sub-County level. The obvious fact to note in that regard is that schools are not

custodians of health information and I do not know how schools were to provide the information of this nature, given that such information is only available at health facilities. The Respondents did not also provide insights on how that information was to be collected from the schools and all they said was that there was not going to be forcible extraction of the information. In the event all I can surmise, reasonably so, is that to the extent that there is no evidence that any consent was obtained prior to the collection of data, I am satisfied that the directive would have amounted to compulsory testing which would be a violation of the right to privacy.

79. Lastly on this limb, the Amicus Curiae submitted that the collection of the data as envisaged from the directive would directly link the individual's name with his HIV status and thus a violation of the right to privacy. In this regard, **Section 21** of the **Act** provides that;

> ***No person shall, in any records or forms used in relation to;***
>
> > ***(a) A request for a HIV test by persons in respect of themselves;***
> >
> > ***(b) An instruction by a medical practitioner to a laboratory for an HIV test to be conducted;***
> >
> > ***(c) The laboratory testing for HIV or HIV antibodies; or***
> >
> > ***(d) The notification to the medical practitioner of the result of the HIV test;***
>
> ***Include any information which directly or indirectly identifies the person to whom an HIV test relates excepts in accordance with the privacy guidelines prescribed under Section 20.***

80. **Section 22** of the Act also prohibits disclosure of information concerning the result of an HIV test and disclosure of the results of the HIV tests of an individual or any information that directly identifies a person to whom HIV test relates. Any disclosure would therefore violate the confidentiality of the records as stipulated under **Section 20** of the Act and thus a violation of the right to privacy.

81. With that understanding in mind, I note that the directive, as issued, had a format as to how it was to be implemented. It required that the number of children infected with HIV/AIDS, the number of guardians and other care givers of children infected by HIV/AIDS, the number of expectant mothers who are HIV positive and the number of breastfeeding mothers who are HIV positive, ought to be disclosed. However, when it came to the implementation of the directive, the data to be collected, in terms of the matrix, would directly link the target groups with their HIV status. In that regard, I have seen annexture ***A.A.M 003*** attached to the affidavit of Mr. Maleche which is a copy of the data collection matrix intended to be used by the Respondents. The matrix has eight columns. It requires the following; – name of the student, name of school where enrolled, county, district, division, location and sub-location. The school going children would therefore be linked to their home area and the schools they are enrolled and I note that **Sections 21** and **22** of the **Act** have endeavoured to protect the disclosure in the aforesaid manner and the data matrix as designed therefore very clearly violates the right to privacy.

82. Having found as I have, I also heard the Respondents to claim that the data so acquired pursuant to the directive, would not be published and therefore there cannot be a violation of the right to privacy. It may well be true that the data would not be publicly published but it is my finding that the manner in which the data was being collected is an infringement on the right to privacy and while the efforts of the Government are commendable, I am in agreement with the Amicus Curiae that the Government should formulate other means of collecting the intended data without threatening or breaching the right to privacy of the targeted group. I will make necessary orders in that regard later.

Protection from cruel, inhuman and degrading treatment

83. The Petitioners also alleged that the right to be free from cruel, inhuman and degrading treatment as protected under **Article 29(d)** and **(f)** of the **Constitution** has been violated because of the compulsory

HIV testing. In that regard, I have already found elsewhere above, while discussing the right to privacy, that the Respondents had failed to explain how the intended data would be collected and that finding led me to agree with the Petitioners and the Amicus Curiae that the manner in which the directive was implemented amounted to compulsory testing. What other action would then amount to cruel, inhuman and degrading treatment?

84. In **Joseph Njuguna Mwaura and 2 Others v R [2013] e KLR**, the Court of Appeal stated thus:

> ***"Cruel and unusual punishment as 'punishment that is torturous degrading, inhuman, grossly disproportionate to the crime in question or otherwise shocking to the moral sense of the community.' Inhuman treatment is defined as 'physical or mental cruelty that is so severe that it endangers life or health.'***

85. Can it be said that the directive and/or its implementation amounted to such treatment as would amount to the most heinous of all actions abhorred in the Bill of Rights? I think not. The directive, I have held, was made in breach of the right of privacy but I do not see how it in any way amounted to a breach of **Article 25(a)** as read with **Article 29(f)** of the **Constitution.**

Right to equality

86. **Article 27** of the **Constitution** provides for the right to equality and protection against discrimination. The relevant provisions of the equality clause, contained in **Article 27** provides thus:

> ***(1) Every person is equal before the law and has the right to equal protection and benefit of the law***
>
> ***….***
>
> ***(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***
>
> ***(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).***

87. The Petitioners in the above context contend that the directive discriminates against people living with HIV because it singles them out for data collection. Further, that the directive fails to meet the required standard of disclosure and according to the Amicus Curiae, the directive is also discriminatory because it only targets school going children, pregnant and nursing women living with HIV as opposed to non-going school children and other persons living with HIV. On their part the Respondents contend that the Petitioners have failed to prove that the directive amounts to unfair discrimination.

88. To my mind, whereas it is not contested that people living with HIV face stigmatization in society, in the present Petition, it has not been proved that they have been discriminated in any manner in relation to the collection of the data. Indeed, I must agree with the Respondents that the Government's intention in this regard was noble as it would enable it provide appropriate services and support to the targeted group. The data so collected would also enable it plan and provide enhanced services to the affected persons and indeed, **Section 19 (2)** of the **HIV and AIDS Prevention and Control Act** provides that;

> ***The Government shall, to the maximum of its available resources, take the steps necessary to ensure access to essential health care 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.***

89. To meet the above expectations, the Government, in issuing the directive, intended it to have the effect of positive discrimination to ensure that those living with HIV have their needs addressed and I say so subject to my findings on other rights violated. I am therefore in agreement with the Respondents that

the first step to ensuring the provision of essential healthcare services and medicine would be the acquisition of accurate data as to who is entitled to it. In any event, the Petitioners seemed to applaud the Government's efforts in curbing HIV/AIDS through the 'All in Campaign' and therefore it baffles me as to how they would turn around and claim that the target groups are being discriminated against.

90. In that context, **Article 27(6)** and **(7)** provide as follows;

> ***"(1) …***
>
> ***(2) …***
>
> ***(3) …***
>
> ***(4) …***
>
> ***(5) …***
>
> ***(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.***
>
> ***(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need."***

91. There cannot be doubt in my mind that HIV positive school going children and pregnant mothers with HIV are certainly disadvantaged and require actions that would alleviate their suffering and this can only be done if they are identified and given health services subject to protection of other rights that they are entitled to.

92. In effect, I do not see that the right to non-discrimination was violated in the present case.

Right to Health

93. The Petitioners claim that a significant component of the realization of the right to health is respect for the right to privacy. That it is crucial that data of persons seeking health services be confidential so as to encourage them to seek health services. They further submit that the failure of the directive in observing the right to privacy in its implementation, violates that right and therefore as a consequence, it also violates the right to health.

94. The Respondents on the other had submitted that the State has undertaken several initiatives and policies in realizing the right to health specifically for persons living with HIV and that the directive was part of that initiative which was also intended to enable the Government provide better health care services and support for the targeted group thus realizing the right to health.

95. In the above context, **Article 43(1)(a)** of the **Constitution** provides that;

> ***"Every person has the right to the highest attainable standard of health, which includes the right to health care services including reproductive health care".***

This right is also incorporated in **Article 12** of the **International Covenant of Economic, Social and Cultural Rights (ICESCR), Article 24** on the **Convention on the Rights of the Child, Article 16** of the **African Charter on Human and People's Rights and Article 14** of the **African Charter on the Rights and Welfare of the Child.**

96. Further, the Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No.

14 declared that;

> ***"the right to health 'is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights; including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement."***

I also note that Mumbi Ngugi J in ***P.A.O and 2 Others v The Attorney General (2012) e KLR*** recognized the nexus between the right to health and other fundamental rights and freedoms in the following terms;

> ***"In my view, the right to health, life and human dignity are inextricably bound. There can be no argument that without health, the right to life is in jeopardy…one's inherent dignity as a human being with the sense of self-worth and ability to take care of oneself is compromised".***

97. In addition to the above, under General Comment 8, the CESCR states the normative content of the right to health as follows;

> ***"The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health."***

96. I am in agreement with the above expositions of the law and therefore the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health. In addition, paragraph 12 (c) of General Comment 12 which deals further with the normative content of the right to health stipulates that;

> ***"All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned."***

It follows therefore that an integral part of the right to health is the right to have personal health data treated with confidentiality.

99. Having said that, I have already found that disclosure of the results of HIV tests of an individual and the providing of any information that directly identifies a person to whom HIV test relates, violates the confidentiality of the medical records as stipulated under **Section 20** of the **Act.** That is all that can be said of the matter because the intention of the directive was to put in place ***"specific measures and strategies***" to target the affected persons with a view to ensuring that their right to health services was guaranteed. The directive *per se* and its implementation was therefore in fact focused towards granting that right as opposed to taking it away. In the event, I do not see how the right to health was violated as alleged.

Right to human dignity

100. The Petitioners contend that the implementation of the directive impairs the human dignity in so far as it denies people living with HIV the respect to take the decision of revealing their status.

101. I note that the inherent dignity of all people is a core value recognized in the Constitution and it is guaranteed under **Article 28** thereof. It also constitutes the basis and the inspiration for the recognition that is given to other specific protections that are afforded by the Bill of Rights. That is why in ***S v Makwanyane and another (1995) ZACC 3,*** the Constitutional Court of South Africa held that the rights

to life and dignity are the most important of all human rights, and the source of all other human rights.

102. Further, in the case of ***C.O.M v Standard Group Ltd and another (2013) e KLR*** it was held that the disclosure of a person HIV's status by another violated the dignity and psychological integrity of that person and applying these principles to the present Petition, it is my finding that disclosure of HIV status in the contemplated data matrix does not violate *per se* the right to dignity. I say so because once I have found that it is the right to privacy that was principally violated by the implementation of the directive, I do not see how the right to human dignity was itself violated when in fact the intention of the directive was to guarantee the right to health services by the targeted groups hence an assurance of longer lives to them. The provision of ARVs would certainly guarantee that right but within the bounds of respect of their right to privacy.

In the event, I do not find a violation of the above right.

The best interest of the child

103. **Article 53(2)** of the **Constitution** provides that, "***the child's best interests are of paramount importance in every matter concerning the child".*** This is reiterated in **Section 4(2)** of the **Children's Act 2001**, which states that;

> ***"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".***

104. The principle of best interests of the child was also for example well expressed in the case of ***S v M (2007) ZACC 18*** where the Constitutional Court of South Africa stated that;

> ***"A truly principled child-centered approach requires a close and individualized examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned".***

105. Applying this principle to the instant case, the Petitioners have applauded the efforts of the Respondents in developing policies geared towards elimination of HIV/AIDS. They are also happy with the intent of the directive that is meant to ensure better health services and support to school going children with HIV. However, I must agree with them that the manner in which the directive is being implemented defeats the best interest of the child. I say so because the linking of a child's name with his/her HIV status in the data matrix, in my view, does not protect the best interest of the child and despite the good intentions of the Respondents, it is not in line with the best interests of the child to have the child's status disclosed without protecting the identity of the child. Breach of the right to privacy is in essence a violation of this principle.

Violation of other fundamental rights and freedoms

106. The Petitioners further allege that consumer rights as provided for under **Article 46(1)(a) – (c)** of the **Constitution** had been violated. They also claimed a violation of fair administrative right under **Article 47** of the **Constitution**. Sadly, the Petitioners failed to plead with some degree of precision how these rights were violated. That being so, I will not delve into those issues in an evidential vacuum - See ***Annarita Karimi Njeru v Republic (1972) KLR 1472.***

Conclusion

107. I have come to the end of this judgment. It is not contested that the impugned directive sought for information that would enable the Government take specific measures and strategies to enable the State cater for *inter alia* the welfare of school going children affected by HIV/AIDS. The President, in issuing the directive, was certainly acting with the intention of furthering the provision of appropriate service and

support to those children and expectant HIV positive mothers. However, I have found that while none of the Petitioners had any qualms with the directive *per se* and its intentions, their difficulties lie in its implementation and from what I have stated elsewhere above, the question is, what reliefs are available to the Petitioners?

108. I have found that the implementation of the directive violated the rights to privacy and the best interests of the child. It follows therefore that prayers (a) and (b) as reframed by me will be issued in that regard. As regards prayer (c) the Petitioners seek an order compelling the 1st to 4th Respondents to destroy all data in their possession, collected as a result of the directive. I have reflected on this particular prayer. It is not clear to me whether any data was collected at all and if so, whether NACC has it in its custody. Nonetheless, from what Dr. Kilonzo stated in her Affidavit and noting that the directive was to be implemented by 15th March 2015, most likely than not, it was implemented. If so, to destroy the data would be akin to throwing away the baby with the bath water. On one hand, the data is useful in putting in place specific measures and strategies to target the affected persons and to ensure that they individually receive the treatment and care that they deserve. On the other hand, disclosure of their identities and HIV status is certainly a violation of the law. The Court must therefore strike a balance and the more pragmatic order to make would be one that obligates the Respondents to remove only the identities (including their locations) of the affected persons but retain the remaining general data for purposes of statistics to be used in addressing their needs in the fight against HIV and AIDS. That is why prayer (d) of the Petition is an attractive alternative to prayer (c). That prayer must therefore be granted as I shall reframe herebelow.

109. In Prayers (e) (f), (g) and (h) the Petitioners have asked the Court to direct the Respondents to undertake certain measures set out therein. As attractive as the Prayers may sound, they cannot be issued as framed because the principle of separation of powers prohibits this Court from getting into the arena of the policy making power of the Executive. The Court cannot particularly direct the Executive on which policies to enact and or the manner in which it is to undertake that policy-making mandate. In addition, I have addressed the issue of guidelines under **Section 20** of the **Act** and I need not repeat my finding thereto. It follows that those Prayers cannot be granted.

110. Finally, I cannot conclude this Judgment without stating that the fight against HIV and Aids requires strategic and informed decisions by the State and all stakeholders involved in it. Continuous dialogue would therefore be necessary but all must act within the framework of the Constitution and relevant statutes.

111. As to costs, let each Party bear its own costs as obviously the issues raised in this Judgment are of great public interest.

Disposition

112. Having held as above, the Petition is determined in the following terms only;

(a) A declaration is hereby issued that the directive dated 23rd February 2015, issued by the National Government through H.E Uhuru Muigai Kenyatta, the President of the Republic of Kenya, is a breach of the Petitioner's constitutional rights under Articles 31, and 53(2) of the Constitution.

(b) A declaration is hereby issued that the actions and omissions of the Respondents in relation to the directive dated 23 February 2015, violate the fundamental rights and freedoms of the Petitioners, the persons they represent and their families under Articles 31 and 53(2) of the Constitution.

(d) An order is hereby issued compelling the 1st - 4th Respondents, within 45 days of this Judgment to codify the names collected as a result of the directive dated 23rd February 2015 and the same be stored in a manner that does not link the names of persons named therein with their

HIV status in a public document.

113. As for costs, let each party bear its own costs.

114. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2016

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 7TH DAY OF DECEMBER, 2016

EDWARD MURIITHI

JUDGE