THE 9TH ALL-KENYAN MOOT COURT COMPETITION (AKMCC)

3RD – 5TH JUNE 2021

MEMORIAL FOR THE APPLICANT

THEME: Combating Corruption for the Highest Attainable Standard of Health

Word Count:3999

Team B: 803

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LIST OF ABREVIATIONS

WHO	World Health Organization
THWU	Tunastrago Health Workers Union
CS	Cabinet Secretary
CoT	Constitution of Tunastrago
CBA	Collective Bargaining Agreement
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
CESCR	Committee on Economic, Social and Cultural Rights
AG	Attorney General
HC	High Court
AUPCC	African Union Convention on Preventing and Combating Corruption

LIST OF SOURCES

I. National laws

1. The Constitution of Tunastrago 2010
2. Health Act No.21 of 2017
3. Labour Relations Act
4. Employment Act
5. Public Procurement and Asset Disposal Act
6. Public Finance Management Act

7. Anti-Corruption and Economic Crimes Act

II. International laws

1. International Covenant on Civil and Political Rights
2. International Covenant on Economic, Social and Cultural Rights
3. African Convention on Preventing and Combating Corruption
4. United Nations Convention Against Corruption
5. International Health Regulations
6. World Health Organization Constitution

CASE LAW

I. National Case Law

1. P.A.O & 2 others v Attorney General
2. J O O v Attorney General & 6 others
3. Moi Teaching and Referral Hospital v Kenya National Union of Nurses
4. Law Society of Kenya & 2 others v Attorney General & 2 others
5. Rose Owira & 32 others v Attorney General and another
6. Mary Chemweno Kiptui v Kenya Pipeline Company Limited

II. International Case Law

1. Paschim Banga Khet Majoor Samity v State of West Bangal

STATEMENT OF JURISDICTION AND ADMISSIBILITY

Jurisdiction

The High Court at Omoka, pursuant to Article 165 (3) (b) of the Constitution, has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.[1]

Article 23 of the Constitution also provides that the High Court has jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of, or a threat to, a right or fundamental freedom in the Bill of Rights.[2]

Pursuant to Article 165(2)(d) of the Constitution, the High Court has jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.[3]

Admissibility

Pursuant to Articles 22 and 258 of the Constitution, every person has the right to institute a suit in court claiming that a human right in the Bill of Rights has been denied, violated or infringed, or is threatened.

As respects the right to institute proceedings, persons acting in the interest of a group or class of persons and persons acting in the public interest have locus standi.

[1] Constitution of Tunastrago, Art 165(3)(b).
[2] Ibid, Art 23.
[3] Ibid, Art. 165(2)(d).

The matters before this court for determination are therefore admissible.

STATEMENT OF RELEVANT FACTS

1. Tunastrago did not implement any restrictions relating to C-VID-19 immediately after its declaration as a public health emergency of international concern. Even after the WHO declared that the C-VID-19 constituted a pandemic, the respondents did not put any stringent measures to restrict movement of foreigners into the country. Before the announcement of the first C-VID-19 cases in Tunastrago, there was word that there were a number of patients exhibiting C-VID-19 symptoms. The Tunastrago Health Workers Union (THWU) stated that the actual C-VID-19 cases within the country were double what the government was announcing.
2. The THWU mentioned the fact that health workers were not being provided with personal protective equipment. The respondents did not give the health workers audience therefore they proceeded to strike leading to a complete breakdown of the public healthcare system. A number of people succumbed to illnesses due to lack of medication. The government suspended the striking health workers and swore not to increase the salaries of the few who remained in service. The death toll in Tunastrago was on the kept on rising as a result of the grossly understaffed public hospitals.

3. The respondents claimed that they had made procurement for the necessary protective equipment for health workers. A document from the office of the Auditor General indicated that tenders for the procurement of the mentioned equipment had been greatly inflated and awarded to companies owned by CSs and personnel within the MoH. Money allocated to health care workers was alleged to have been looted and as a result, the respondent disregarded a CBA to increase the allowances of doctors and nurses working in hardship conditions. The respondents were also not given foreign aid because of unaccountability of previously disbursed funds.
4. After a meeting between the government and the THWU, Miss Nina, Mr. Masong and two other women in their company left in a black jeep. A few days later the four people were reported to be missing. The bodies of the women in the company of Nina and Masong were found in a bush. The whereabouts of Nina and Masong have not yet been established.

ISSUES

1. Whether the rights to the highest attainable standard of health and emergency medical treatment of the citizens of Tunastrago were denied, infringed and/or violated.
2. Whether the suspension of health care workers was a violation of their right to work, industrial action and their right to fair administrative action.

3. Whether the enforced disappearance and extrajudicial killings of the for people is a breach of the constitution and all relevant international instruments Tunastrago is party to.
4. Whether the Tunastrago government has fulfilled its constitutional and international obligations with respect to the fight against corruption.

SUMMARY OF ARGUMENTS

1. The rights to the highest attainable standard of health and emergency medical treatment of the citizens of Tunastrago were denied, infringed and violated. The state has an obligation to observe, respect, protect, promote and fulfill these rights.
2. The suspension of health care workers was a violation of their right to work and industrial action and their right to fair administrative action. Every person has the right to fair labour practices and every worker is guaranteed the right to participate in a lawful strike. The suspension in this regard was therefore a violation of their right to work and industrial action. The government also failed to issue a notice to the health workers before suspending them thus violating their right to fair administrative action guaranteed in the constitution and the Employment Act.
3. The enforced disappearance and extrajudicial killings of the four people was a breach of the Constitution and relevant international legal provisions. The state has an obligation to protect the right to life and the right to freedom and security of the person. Failure of the state in its obligation to protect this right was a breach of the constitution and other relevant international instruments.
4. The Tunastrago government has not fulfilled its constitutional and international obligations with regard to the fight against corruption. The principles of governance in accordance with the Constitution include transparency and accountability. The ACPCC also emphasizes on the principles of transparency and accountability. The respondent cannot account for previously disbursed funds from international organizations. There is also looting within the ministry of health and disregard of procurement procedures that the state has not been able to curb.

SUBSTANTIVE ARGUMENTS

ISSUE 1

WHETHER THE RIGHTS TO THE HIGHEST ATTAINABLE STANDARDS OF HEALTH AND EMERGENCY MEDICAL TREATMENT OF THE CITIZENS OF TUNASTRAGO WERE DENIED, INFRINGED AND/OR VIOLATED.

The Petitioner Submits that the rights to the highest attainable standard of health and emergency medical treatment were denied, infringed and violated.

a) Right to the highest attainable standard of health

Every person is entitled to the right to the highest attainable standard of health as provided for in the Constitution of Tunastrago.[4] In relation to this provision, Article 21 of the Constitution[5] read together with the Health Act places an obligation on the state to observe, respect, protect and promote this right.[6] The constitution also guarantees every citizen the right to access to information held by another person and required for the protection of another right.[7]

The WHO Constitution provides that the enjoyment of the right to health is fundamental for every person. The ICESCR requires its state parties to recognize this right and in respect to that, to create conditions which would assure to all medical service and medical attention in the event of sickness.[8] The CESCR general comment number 14 spells out clear instances on how and when violation of this right is deemed to have occurred.[9] The General Comment provides that the adoption of any

[4] Constitution of Tunastrago 2010, Art 43(1)(a).
[5] Ibid, Art 21.
[6] The Health Act No. 21 of 2017, s 4.
[7] Constitution of Tunastrago, Art 35(1)(b).
[8] ICESCR, Art 12.
[9] CESCR General Comment no. 14, para.

retrogressive measures incompatible with the core obligations under the right to health constitute a violation of that right.[10]It also provides that the right to Health requires the enjoyment of a number of facilities including conditions necessary for the attainment of the highest standard of health.[11]

The HC held in ***J O O v Attorney General***[12] that the right to healthcare encompassed availability of necessary equipment, facilities and medication.

The fact that Tunastrago did not adopt any restrictions relating to C-VID-19[13] was a failure of the state in its obligation to protect the right to the highest attainable standard of health. The government also had an obligation to give the people information regarding C-VID-19 in accordance with Article 35 of the CoT.

Failing to provide the health workers with the required protective equipment was a violation of their right to health. The strike by the health workers that materialized as a result of their poor working conditions also jeopardized the state of health of the citizens of Tunastrago. In this regard, the state failed in their obligation to protect the right to the highest attainable standard of health by not listening to the health workers.

The strike and the suspension of health workers led to closure of a number of government hospitals and this also denied the people their fundamental right.

The petitioner thus submits that the respondent violated the right to the highest attainable standard of health of the people of Tunastrago.

[10] Ibid, para 48.
[11] Ibid, para. 9.
[12] (2018) eKLR.
[13] Facts, para. 14.

b) Right to Emergency Medical Treatment

The Constitution of Tunastrago provides that a person shall not be denied emergency medical treatment.[14] This right is further guaranteed in the Health Act[15] which recognizes that emergency medical treatment includes stabilizing the health status of an individual.[16]

In addition to the right to emergency medical treatment, the constitution of Tunastrago also guarantees the right to life[17] which may be fundamentally violated in instances where the right to emergency medical treatment is denied, infringed or violated.

The HC in ***PAO & 2 others v Attorney General***[18] held that the right to emergency medical treatment encompassed access to essential drugs. The Supreme Court of India in ***Paschim Banga Khet Majoor Samity v State of West Bengal***[19] held that the state had violated the applicant's right to health due to the failure of public hospitals to provide emergency medical assistance.

Failure of the state to listen to the health workers complaints resulted in their strike. This led to a complete breakdown of the healthcare system and a number of government hospitals were closed down.[20] The people of Tunastrago could therefore not access emergency medical treatment. Suspension of health care workers at a time when there was a crisis in the country, the C-VID-19 pandemic, also worsened the situation at hand. It prolonged the closure of the government hospitals that were not operational at the time and as a result, the death toll of C-VID-19 cases kept on rising.

[14] Constitution of Tunastrago 2010, Art 43(2).
[15] The Health Act No. 21 of 2017, s 7(1).
[16] Ibid, s 2(b).
[17] Constitution of Tunastrago 2010, Art 26.
[18] (2012) eKLR.
[19] (1996) 4 SCC 37.
[20] Facts, para. 22.

The petitioner therefore submits that the respondents denied, infringed and violated the right to emergency medical treatment of the people of Tunastrago.

ISSUE 2

WHETHER THE SUSPENSION OF HEALTH CARE WORKERS WAS A VIOLATION OF THEIR RIGHT TO WORK, INDUSTRIAL ACTION AND THEIR RIGHT TO FAIR ADMINISTRATIVE ACTION

The Petitioners submit that the suspension of health care workers was a violation of their right to work, industrial action and their right to fair administrative action.

a) Right to work and industrial action

Every person has the right to fair labour practices[21] and every worker has the right to go on strike.[22] The Labour Relations Act provides that a person is not considered to have breached their employment contract by taking part in a protected strike.[23] Employees who take part in lawful strikes may therefore not be dismissed or disciplined by their employers.[24] The ICESCR also guarantees workers the right to strike.[25]

In the case of ***Moi Teaching and Referral Hospital v Kenya National Union of Nurses***[26] the court held that restricting the right to strike where attempts to resolve the issues at hand by the weaker party have hit a brick wall would mean that there would be no legal strike in the country and this would fundamentally violate the right to strike available to workers.

[21] The Constitution of Tunastrago, Art 41(1).
[22] Ibid, Art 41(2)(d).
[23] Labour Relations Act No. 14 of 2007, s 79(2)(a).
[24] Ibid, s 79(3).
[25] ICESR, Art 8.
[26] (2016) eKLR.

The health workers strike was warranted by the poor working conditions that they were subjected to. The government of Tunastrago had not provided the health workers with the necessary protective equipment needed to protect them from C-VID-19.[27] The participation of the health workers in a strike was lawful and could not be used by the Tunastrago government as grounds for a suspension.

The petitioner therefore submits that the suspension of health care workers was a violation of their right to work and industrial action.

b) Right to fair administrative action

The constitution provides that every person has the right to fair administrative action.[28] In the same regard every person has a right to be given written reasons for an action that is likely to adversely affect their right or fundamental freedom.[29] The Fair Administrative Actions Act also guarantees this right[30] and it provides that a person affected by an administrative action shall be given an opportunity to be heard and to make representations in that regard.[31]

In ***Mary Chemweno Kiptui v Kenya Pipeline Company Limited***[32] the court emphasized on the importance of the procedure prescribed in section 41 of the Employment Act. An employer is required to hear and consider any representations from the employee before summarily dismissing them on the grounds of misconduct or poor performance.[33]

[27] Facts, para. 20.
[28] Ibid, Art 47(1).
[29] Ibid, Art 47(2).
[30] The Fair Administrative Actions Act No.4 2015, s 4(1).
[31] Ibid, s 4(3).
[32] (2014) eKLR.
[33] Employment Act CAP 226, s41(2).

The Government of Tunastrago suspended the health workers without having given them a chance to represent their grievances contrary to the provisions of the Fair Administrative Actions Act. There was also no issuance of a notice before the suspension.

The petitioner thus submits that the suspension of health care workers was a violation of their right to fair administrative action.

ISSUE 3

WHETHER THE ENFORCED DISAPPEARANCE AND EXTRA JUDICIAL KILLINGS OF THE FOUR PEOPLE IS A BREACH OF THE CONSTITUTION AND ALL RELEVANT INTERNATIONAL INSTRUMENTS TUNASTRAGO IS PARTY TO.

The enforced disappearance and extra judicial killings of the four people is a breach of the constitution and all relevant international instruments Tunastrago is party to.

a) Enforced disappearance

Every person is guaranteed the right to freedom and security of the person.[34] The constitution also guarantees all persons the right to human dignity. Enforced disappearance is the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of

[34] Constitution of Tunastrago, Art 29.

the disappeared person, which place such a person outside the protection of the law.'[35] State parties to the United Nations Convention on the Protection of All Persons Against Enforced Disappearance have an obligation to conduct investigations in such instances.[36] In the case of ***Law Society of Kenya & 2 others v Attorney General & 2 others***[37] the court held that although Kenya had not ratified the convention, global concern over enforced disappearance necessitated deliberate efforts towards a solution. Any act of enforced disappearance is an offence to human dignity.[38] The state has an obligation to protect the right to freedom and security of the person as well as the right to human dignity.[39]

Miss Nina, Mr. Masong and the other two women in question disappeared after the meeting held by the government with the Tunastrago Health Workers Union Executive Committee. Apart from the inquiry on whether these people were in the mentioned meeting and the DNA tests carried out to identify the two women, there are no further investigations into the enforced disappearance alluded to.

The petitioner therefore submits that the enforced disappearance alluded to was a breach of the constitution and all the relevant international instruments Tunastrago is party to.

[35] United Nations Convention on protection of All Persons Against Enforced Disappearance, Art 2.
[36] Ibid, Art 3.
[37] (2018) eKLR.
[38] The Declaration on the Protection of all Persons from Enforced Disappearance, Art 1.
[39] Constitution of Tunastrago, Art 21(1).

b) Extrajudicial killings

Every person has the right to life and this right can only be limited as authorized by the constitution.[40] In respect to this right, a person shall not be deprived of life intentionally.[41] The ICCPR provides that every human being has the inherent right to life and no one shall be arbitrarily deprived of this right.[42]

In the case of ***Rose Owira & 32 others v AG and another***[43] the court held that a delay in investigations does not mean underperformance except when it is unreasonable. Unreasonable in the sense of length, time and reasons. It was held that the respondents failed to promptly conclude investigations into the deaths of the petitioners' kin.

The killing of the two women who were in the company of Nina and Masong was a violation of their right to life. The failure of the state to investigate or to take steps to prevent their death was a breach of their right to life.

The petitioners thus submit that the extrajudicial killings alluded to were a breach of the constitution and all relevant international instruments Tunastrago is party to.

ISSUE 4

WHETHER THE TUNASTRAGO GOVERNMENT HAS FULFILLED ITS CONSTITUTIONAL AND INTERNATIONAL OBLIGATIONS WITH RESPECT TO THE FIGHT AGAINST CORRUPTION.

The Petitioner submits that the Tunastrago government has not fulfilled its constitutional and international obligations with respect to the fight against corruption.

[40] Ibid, Art 26(1).
[41] Ibid, Art 26(3).
[42] ICCPR, Art 6(1).
[43] (2020) eKLR.

Good governance, integrity, transparency and accountability are among the national values and principles of governance of Tunastrago.[44] In respect to these principles, the Constitution of Tunastrago provides that state officers shall avoid any conflicts between personal interests and public affairs.[45] The constitution also requires that in the procurement of public goods or services, the state shall make use of a system that is fair, equitable, transparent, competitive and cost-effective.[46]

The Public Procurement and Asset Disposal Act sets out limitations on contracts with state and public officers. A state organ shall not enter into a contract for a procurement with a state officer of that state organ.[47] A Cabinet Secretary who knowingly holds a private interest in a contract, agreement or investment emanating from his ministry is guilty of an offence.[48] In the same regard, a public officer who fails to follow required procedures and guidelines of procurement of property, management of funds or incurring of expenditures is guilty of an offence.[49] Public officers involved in transactions in which standard goods are procured at unreasonably inflated prices are guilty of an offence.[50]

The public debt management office is required to monitor and evaluate all borrowing and debt-related transactions to ensure that they are within the guidelines and risk parameters of the debt management strategy.[51]

State parties to the African Convention on Preventing and Combating Corruption are required to be transparent and accountable in the management of public affairs.[52] The

[44] Constitution of Tunastrago 2010, Art 10(2).
[45] Ibid, Art 75(1).
[46] Ibid, Art 227.
[47] Public Procurement and Asset Disposal Act 2015, s59(1)(a).
[48] ACECA No.3 of 2003, s42(3).
[49] Ibid, s45(2)(b).
[50] Public Procurement and Asset Disposal Act 2015, s54(4).
[51] Public Finance Management Act, s63(f).
[52] African Convention on Preventing and Combating Corruption, Art 3.

convention also provides that as regards tendering procedures in the public service, state parties shall abide by the principles of transparency, equity and efficiency.[53]

The government of Tunastrago announced that it had made procurement for personal protective equipment for health workers but the procurement and tendering process had not been made public.[54] A document from the office of the Auditor General indicated that tenders for the procurement of the mentioned equipment had been awarded to Cabinet Secretaries and Personnel within the Ministry of Health.[55] It was also noted from the same document that contrary to the provisions of the Public Procurement and Asset Disposal Act, the procurement tenders had been greatly inflated. The government of Tunastrago was not able to get funds from the IMF and the Wasafi Union Economic Bloc owing to the fact that the government could not account for funds that had previously been disbursed.[56] Inability of the government to account for the previously disbursed funds was a failure of the state in its obligation to manage debt related transactions.

The petitioner thus submits that the respondent failed to fulfil its constitutional and international obligations with respect to the fight against corruption.

PRAYERS

The Petitioner thus prays that this honourable court:

1. Finds that the right to the highest attainable standard of health and the right to emergency medical treatment were violated;
2. Finds that the suspension of heath care workers was a violation of their right to work, industrial action and fair administrative action;

[53] Ibid, Art 7(4).
[54] Facts, para. 19.
[55] Ibid, para. 25.
[56] Facts, para. 31.

3. Finds that the enforced disappearance and extrajudicial killings of the four people was a breach of the constitution and all relevant international instruments Tunastrago is party to;
4. Finds that the Tunastrago government has not fulfilled its constitutional obligations in the fight against corruption;
5. Orders the respondents to reinstate the health care workers;
6. Orders the respondents to honour the Collective Bargaining Agreement in respect to increasing the allowances of doctors and nurses working in hardship conditions.
7. Grants any reliefs that the court may deem fit