THE ALL-KENYAN MOOT COURT COMPETITION

9TH EDITION (2021)

KENYATTA UNIVERSITY

SCHOOL OF LAW

THE MOOT CATEGORY COMPROMIS

Dates: 3rd – 5th June, 2021

Venue: Kenyatta University, School of Law

(Parklands Campus)

Theme: Combating Corruption for the Highest Attainable Standard of Health.

REPUBLIC OF TUNASTRAGO

IN THE HIGH COURT AT OMOKA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 17 OF 2021

IN THE MATTER CONCERNING THE ALLEGED VIOLATION OF THE CONSTITUTIONAL RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH AND EMERGENCY MEDICAL TREATMENT.

BETWEEN

NAUWO HUMAN RIGHTS COMMISSION…… PETITIONER

VERSUS

ATTORNEY GENERAL……1ST RESPONDENT

CABINET SECRETARY FOR HEALTH……2ND RESPONDENT

1. The Republic of Tunastrago is a developing country situated in the Eastern shores of the great Wakuu Continent bordering the Zama Ocean. Its Capital City, Omoka, is the seat of the Wakuu Continental Union (WCU). Tunastrago has a Gross Domestic Product (GDP) of approximately USD 87.91 billion. According to the census conducted in 2019, Tunastrago has a population of approximately 47.56 million people.

2. Touted as an emerging model democratic state, Tunastrago has been famed for promulgating the most progressive Constitution in Wakuu Continent in 2010. The 2010 Constitution has an expansive Bill of Rights, a devolved system of government and properly-crafted national values, principles of governance and a chapter on leadership and integrity. Its Constitution, legal, policy and regulatory framework and structure of government is analogous to that of Kenya.

3. Tunastrago has at all relevant times been party to the Charter of the United Nations, the Constitution of the World Health Organization, the 2005 WHO International Health Regulations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Convention Against Corruption and the African Union Convention on Preventing and Combating Corruption.

4. Despite the existence of a huge gap between the affluent and the indigent in the country, Tunastrago is still one of the leading economic powerhouses in the East and Central regions of Wakuu. Its progressive economic growth has been attributed to its open market economy and political stability which encourages

foreign direct investment in line with project '*Maono 2030'*. The national vision, 'Maono 2030' is aimed at actualizing the socio-economic rights of its citizens by the year 2030.

5. With a history of chronic corruption and misuse of public funds, the Legislature enacted new anti-corruption statutes including *inter alia*, the Public Procurement and Asset Disposal Act No. 33 of 2015, the Public Finance Management Act No. 18 of 2012 and the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The state also established the Tunastrago Ethics and Anti-Corruption Commission (TEACC) and other special agencies to aid in the war against graft.

6. In 2013, the country held its first elections under the 2010 Constitution. The Kimoja Coalition won by a simple majority under the proportional representation system and constituted a government characterized by populism and nationalism. The new vigorous government promised to alienate the state from elitist policies and the wide economic status gap. Various Civil Society groups and International Organizations lauded the new administration and joined in the call for reforms.

7. The new government shone a ray of hope to the historically marginalized citizens of Tunastrago. In his inauguration speech, the President was quoted saying, "Within the first few months in office, we will construct 11,000km of tarmac roads, improve existing and set up new health care facilities in every sub-

county, engage with the working population, especially our health care workers, in a bid to improve service delivery to our people."

8. In taking positive steps to realize the fundamental right to highest attainable standard of health and focusing on the contribution to economic development as envisioned in *'Maono 2030,'* the government introduced an amendment to the Health Act No. 21 of 2017 to cater to emerging issues.

9. In September 2018, the government launched the National Health Programme (NHP) that aimed at providing free health services to the citizens, building more hospitals, purchasing drugs and medical equipment and improving the working conditions of health care providers. The program was received with commendation both within and outside Tunastrago and was seen as a great stride towards achieving the right to the highest attainable standard of health in the country. The government opened procurement of hospital equipment to companies and organizations based in Tunastrago.

10. Chinku is a country located eight time zones from Tunastrago. In January 2019, the Chinku health authorities reported that a large number of cases of a respiratory condition resembling pneumonia had been identified in one of its town. Symptoms included uncontrollable coughing, difficulty in breathing, high fever, chills, and listlessness. The Chinku Ministry of Health quickly identified the cause of the disease as a previously unknown strain of virus, which they named "C-19," with the disease caused by it called "C-VID-19." Several of the patients

diagnosed with C-VID-19 were reported to be in critical condition, and by 31 January 2019, fourteen of them had died.

11. Tunastrago has historically had an active tourism industry. The country recorded an average of 120,000 tourist arrivals and gross tourism receipts of USD 338 million every year between 2006 and 2017. During this period 23% of the foreign tourists were nationals or residents of Chinku.

12. By 15 March 2019, the genome of the virus had been sequenced by epidemiologists in Chinku and the results were made public. The Chinku Health Ministry adopted multiple measures in a bid to contain the virus, to no avail. In the first half of March, reports of C-VID-19 surfaced in other parts of the country, as well as in Singa, Chinku's neighbor to the west. By 21 March 2019, Ministry scientists determined that the virus was capable of human-to-human transmission. They estimated the basic reproduction rate to be 1.2 to 1.4 and the incubation period to be 7 to 14 days. Experts at several of the research facilities studying the virus also determined that human-to-human transmission was possible during the incubation period, and that infected individuals who never developed symptoms were capable of spreading the virus to others.

13. On 22 March 2019, the WHO Director-General declared the outbreak of C-VID-19 a public health emergency of international concern ("PHEIC"). At the same time, the Director-General issued Temporary Recommendations in accordance with Articles 15 and 49 of the 2005 International Health Regulations. The concluding paragraph of the Recommendations stated: "Based upon the current

information available, we urge the general observance of social distancing and the use of face coverings in areas reporting infection, and the self-quarantine for at least 14 days of anyone who seems to have symptoms, to combat the spread of the disease. At this time, however, travel and trade restrictions are not recommended." WHO's Situation Report that day stated that four countries (Chinku, Singa, Pema and Msuti) had reported a total of 1389 confirmed cases and 114 deaths from C-VID-19.

14. As of 24 March 2019, some countries had implemented cessation of movement measures by prohibiting the entry of individuals manifesting symptoms or non-nationals from countries where the virus had already been reported. Tunastrago did not adopt any restrictions relating to C-VID-19. Instead, on 24 March 2019, the Tunastrago Ministry of Health began publication of a daily "Public Health Advice," which contained reminders, but not orders, to use face coverings and to practice social distancing. The daily bulletins also provided updates on the numbers of cases around the world reported by WHO, and regularly contained the recommendation that people experiencing symptoms of C-VID-19 should report themselves to local health authorities and self-quarantine for 14 days.

15. On 14 April 2019, WHO declared that C-VID-19 constituted a pandemic. WHO's Situation Report that day stated that 85 countries had reported a total of 24,980 confirmed cases and 452 deaths from C-VID-19. As of that date, however, Tunastrago did not have any confirmed cases of C-VID-19. Although WHO did not alter its position on travel and trade restrictions, by 16 April 2019, 35 countries

had adopted regulations limiting or barring the entry into their territories of individuals who had recently been in "high-risk countries," as designated by their own respective authorities.

16. By this time, Tunastrago government did not put any stringent measures and foreigners still found it easy to come into the country. However, rumors had started to pile up on cases of the virus in the country and that hospitals had already started receiving patients exhibiting C-VID-19 symptoms but there was no official communication from the Ministry of Health. The ministry publications maintained that there were still no cases within the country.

17. On 24 April 2019, Nina, a 38-year-old woman working as a nurse at Omoka National Hospital was heard in the Roroa Radio Show dubbed "Sauti ya *Walalahoi*" saying, "*Why is the government acting blind yet they know that this disease is within the country? Even at the hospital even the health care workers are afraid because they do not have the appropriate protective equipment. My friends, do not be deceived this disease is real and with us*! Just take care of yourself because this government will not do anything for you." She would in the subsequent weeks appear in the same show and give her version of the status of the pandemic.

18. The following day the government through the Cabinet Secretary-Ministry of Health, announced that there were eight confirmed positive cases within the country and that they were all under quarantine. Six of them were foreigners from Chinku and two were locals. The cabinet secretary indicated that they had

initiated contact tracing and further encouraged people to observe the public health advice.

19. In line with the National Health Program, the government committed that despite everything the best health care services would continue to be provided. The government also indicated that it had made procurement for the necessary personal protective equipment for health care workers. The tendering and procurement process for this equipment was, however, not announced to the public. The government also highlighted that there were also a number of donations of the same equipment that had been done by various donors such as the Wakuu Continental Union.

20. One week after the first cases were officially announced the Tunastrago Health Workers Union called for a press conference where they made it categorical that the Health workers were not being provided with the necessary protective equipment to help them attend to patients without fear of themselves being infected. They also mentioned that the actual C-VID-19 cases within the country were actually double what the government was announcing. By this time the ministry of health had announced that there were 112 C-VID-19 cases in the country and 11 deaths. The Union announced that health workers would go on a nation-wide strike should they not be provided with the necessary protective equipment and the payment of their allowances.

21. Following the continued increase in the number of positive cases, on 3 May 2019 the government announced a nation-wide curfew to start from 7pm to 5am

as a way of inhibiting the movement and interaction of people so as to reduce the further spread of the disease. The National Police Service was mandated with enforcing the curfew; thus, several police officers were deployed into the streets to patrol. The wearing of masks was made mandatory and social gatherings were banned.

22. Three weeks later, the Health workers strike materialized and there was a complete breakdown of the public healthcare system as medical workers downed their tools. With the widespread boycott by health care providers, leading to the closure of a number of government hospitals, the locals suffered greatly as they could not access any medical care. There were several people crammed up at hospital gates but there was no help availed to them; with some even succumbing to the illnesses such as malaria and HIV/AIDS for lacking medication. At the same time, the number of C-VID-19 infection cases were still on the rise.

23. The government claimed that the health care workers were taking advantage of the health crisis to further their personal ambition and self-interest. The government refused to grant the healthcare workers audience, claiming that they were ravenous overpaid civil servants who did not appreciate the efforts by the State. The county governments suspended the striking workers and swore not to increase the salaries of the handful that remained in service, not by even a shilling more.

24. The Tunastrago Health Workers Union went to court challenging the suspension and alleging a violation of their Labour rights. The case is yet to be

decided due to the backlog of cases in the operational courts within Tunastrago. As a result of the grossly understaffed public hospitals, tens of deaths occurred on the long queues outside the hospitals over a couple of weeks. The situating was getting more devastating by the day.

25. A leaked document from the Office of the Auditor General revealed that the tenders for the procurement of the personal protective equipment had been greatly inflated and awarded to companies owned by CSs and personnel within the Ministry of Health. Although the leaked documents were watermarked "unofficial" and released three weeks before the date set for the official release of the report by the Auditor General, the government committed to undertake investigations. The CS for Health, in an interview by a local television station said, "This ministry has many cartels rooted within the deep state. What do you want me to do?" Additionally, the money allocated to health care workers was alleged to have been looted and as a result, the government disregarded a collective bargaining agreement to increase the allowances of doctors and nurses working in hardship conditions.

26. With the allegations of corruption mounting parliament established a committee to investigate how the tenders for the procurement were awarded. The committee worked in liaison with the newly established Directorate of Criminal Investigations (DCI) and the TEACC. They embarked on the investigations into

corruption allegations in these contracts, however, they are yet to conclude the investigations and inquiry.

27. The government sent out a notice inviting the Tunastrago Health Workers Union Executive Committee to a meeting to address the ongoing strike and how best to address the needs of the health care workers and the health of the local population. The meeting was also to help come up with means to best sensitize the public on the precautionary measures against the C-VID-19 infection. An invitation was also extended to the various media houses. In attendance was Miss Nina who happens to be the Secretary General of the Tunastrago Health Care Workers Union and the Radio Host, Mr. Masong, of the Roroa Radio Show. The meeting was held at the Ministry of Health offices in Omoka County. At the end Nina, Masong and two other women were seen boarding a black jeep which was to take them back home.

28. A few days after the said meeting, concerns were raised as to the whereabouts of the four people. Family members reported that they had not been in touch with their kin since the day of the meeting. A missing person's report was made at the police station. Inquiries made by the police officers revealed that the four people were indeed seen in the meeting.

29. Weeks later, two bodies were found thrown in a bush. Later after DNA tests were carried out on the recovered bodies it was determined that, the two deceased persons were the missing women who were in company of Nina and Masong. The whereabouts of Nina and Masong, remain unknown. The government strongly

denied being involved in the death or enforced disappearance of the four people. This incident led to widespread condemnation of the government, with human rights organizations terming these as extrajudicial methods of silencing critics who spoke out against government impunity.

30. There were peaceful demonstrations held in different parts of the country where people were protesting the government's irresponsibility and crying foul for the infringement, denial and violation of their right to the highest attainable standard of health, the deep-rooted impunity of corruption within government offices meant to provide services to the people and the brutality meted on the locals by the members of the National Police Service in implementing of the curfew regulations.

31. In a quick attempt to remedy the already deplorable situation, the President made urgent requests for funding from the IMF and the Wasafi Union Economic Bloc, the regional economic bloc that Tunastrago is part of. Both bodies declined to send aid, citing unaccountability for previously disbursed funds. As a result of this, the funds allocated by the government to remedy this situation was anything but enough.

32. As of 4 June 2019, the situation had worsened more because of the prolonged closure of government hospitals and the lack of equipment and medicine in the hospitals. The death toll of C-VID-19 cases had risen to 1678 and more than 25,000 confirmed cases.

33. The Nauwo Human Rights Commission, after consultations with the families of the victims and the Tunastrago Health Workers' Union has filed a petition in the High Court at Omoka, asking the court to adjudicate on the following claims:

a) *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.*

b) *Whether the suspension of Health Care Workers is a violation of their right to work, industrial action and their right to a fair administrative action.*

c) *Whether the enforced disappearance and extra judicial killings of the four people is a breach of the Constitution of Tunastrago and all relevant international instruments Tunastrago is party to.*

d) *Whether the Tunastrago government has fulfilled its constitutional and international obligations with respect to the fight against corruption.*

Proceed to prepare arguments for both the Petitioner and Respondents.