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RESPONDENT MEMORIAL

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

'Combating Corruption for the Highest Attainable Standard of Health.'

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B) LIST OF ABREVIATIONS

AUCPCC	African Union Convention on Preventing and Combating Corruption
CS	Cabinet Secretary
DCI	Directorate of Criminal Investigations
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHR	International Health Regulations
GDP	Gross Domestic Product
MOH	Ministry of Health
NHP	National Health Programme
PPE	Personal Protective Equipment
PHEIC	Public Health Emergency of International Concern
SER	Socio-Economic Rights
TEACC	Tunastrago Ethics and Anti-Corruption Commission
UN	Unites Nations
UNCAC	United Nations Convention Against Corruption
WHO	World Health Organization

C) LIST OF SOURCES

I. INTERNATIONAL AGREEMENTS

1. 1945 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
2. 1966 International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976, 999 UNTS 171.
3. 1966 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3.
4. African Union Convention on Preventing and Combating Corruption (Adopted 1 July 2003, entry into force 5 August 2006).
5. International Convention for the Protection of All Persons from Enforced Disappearance (adopted 6 February 2007, entry into force 23 December 2010).
6. Constitution of the World Health Organisation, Basic Documents, Forty-fifth edition, Supplement, October 2006.
7. UN General Assembly, *United Nations Convention against Corruption: Resolution adopted by the General Assembly*, 21 November 2003, A/RES/58/4.

II. INTERNATIONAL INSTRUMENTS

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1. *Soobramoney v Minister of Health* (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)
2. *R. v. Oakes, [1986]* 1 SCR 103.
3. *Numsa v Bader* Bop 2003 24 ILJ 305 (CC).
4. *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).
5. Communication No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, CCPR/C/107/D/1791/2008.
6. Communication No. 2026/2011, *Sassene v. Algeria*, Views adopted by the Committee at its 112th session (7–31 October 2014), 15 December 2014, CCPR/C/112/D/2026/2011.

7. *Velásquez Rodríguez Case,* Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), 29 July 1988.
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10. Communication No. 161/1983, *Joaquín David Herrera Rubio et al. v. Colombia*, Views adopted by the Committee on 2 November 1987, CCPR/C/OP/2.
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IV. NATIONAL INSTRUMENTS

1. The Constitution of Tunastrago, 2010.
2. Employment and Labour Relations Court Act, No.20 of 2011.
3. Labour Relation Act, No. 14 of 2007.
4. Civil Procedure Act Cap. 21, No. 3 of 1924.

IV. JUDICIAL DECISIONS

1. *Nairobi High Court Petition No. E282 of 2020 David Ndii and & 4 Others -vs- The Attorney General & Others.*
2. *Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others* (2013) eKLR.

3. *Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission* (2011) eKLR.

4. *The Owners of Motor Vessel 'Lillian S' vs Caltex Oil Kenya Ltd* [1989] eKLR.

5. *Republic v Karisa Chango & Another* [2017] eKLR.

6. *Okiya Omtatah Okoiti &another; v KEMRI Board of Management, Director & 4 others; Salaries and Remuneration Commission (Interested Party) [2019]* eKLR.

7. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR.

8. *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others* [2011] eKLR.

9. *County Government of Uasin Gishu v. Kenya National Union of Nurses,* [2014] eKLR.

10. *Robert Alai Onyango v Cabinet Secretary in Charge of Health Petition No 21 of 2017 (HC),* [2017] eKLR.

11. *Dupoto Farms Limited v Kenya Electricity Transmission Company Limited & 121 others,* [2021] eKLR.

12. *John Biiy v Seth Panyako 1069 of 2017* (E&LRC).

13. *Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others,* [2016] eKLR.

14. *Benson Riitho v J. M. Wakhungu,* [2014] eKLR.

15. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others,* [2013] eKLR.

16. *Mathew Okwanda v Minister of Health and Medical Services & 3 others* [2013] eKLR.

V. JOURNALS

1. Gathongo JK and Ndimurwimo LA "*Strikes in Essential Services in Kenya: The Doctors, Nurses and Clinical Officers' Strikes Revisited and Lessons from South Africa*" PER / PELJ 2020(23) - DOI http://dx.doi.org/10.17159/1727- 3781/2020/v23i0a5709.

2. Orago N, *Socio-Economic Rights and The Potential for Structural Reforms: A Comparative Perspective on The Interpretation of The Socioeconomic Rights in The Constitution of Kenya*, 2010.
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4. Shrawat, Abhilasha, *Extra-Judicial Killing and the Role of International Criminal Court* (March 21, 2017). Available at SSRN: https://ssrn.com/abstract=2938358 or http://dx.doi.org/10.2139/ssrn.2938358.
5. Van der Walt, Le Roux and Govindjee Labour Law in Context 203.
6. Grogan Collective Labour Law 141.

VI. OTHER SOURCES

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https://www.standardmedia.co.ke/counties/Article/2001232717/apology-to-kenyans-as-doctors-strike-ends-with-return-to-work-formula.

D) JURISDICTION OF THE COURT AND ADMISSIBILITY & LOCUS STANDI

JURISDICTION

1. Jurisdiction is the power that the court has to hear and determine the issue before it.[1] It is extremely important and should be addressed first so as to ensure that the court is not acting in vain.[2] This jurisdiction is conferred upon the court of law by the Constitution, statutory law and judicial precedence.[3] In issues where a court has no jurisdiction, the court must down its tools once this is established.[4]
2. The High Court does not have the jurisdiction to hear and determine issue B. This is because it falls under labour relations and is therefore to be heard in the Employment and Labour Relations Court as per the Constitutional provisions.[5] Furthermore, Article 165(5) of the Constitution emphasizes that the High Court does not have the jurisdiction to listen to cases which fall under the purview of the courts listed in Article 162(2).[6] Section 12(1) of the Employment and Labour Relations Court Act also echoes the Constitution in according the court exclusive and original jurisdiction over matters on employment and labour relations.

[1] *Nairobi High Court Petition No. E282 of 2020 David Ndii and & 4 Others -vs- The Attorney General & Others.*
[2] *Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others* [2013] eKLR.
[3] *Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission* [2011] eKLR.
[4] *The Owners of Motor Vessel 'Lillian S' vs Caltex Oil Kenya Ltd* [1989] eKLR.
[5] Constitution of Tunastrago, art. 162(2).
[6] *The Owners of Motor Vessel 'Lillian S' vs Caltex Oil Kenya Ltd.*

3. Furthermore, the Respondent contests jurisdiction based on the doctrine of *lis alibi pendens*.[7] This means a court should not presume jurisdiction on a dispute on the

4. same cause of action when it is pending before another competent court.[8] This prevents an abuse of court process.[9] The Tunastrago Health Workers Union had already filed a case challenging the violation of their Labour Rights which is yet to be heard.[10] Therefore, if this issue is addressed in this court of law, there could be conflicting jurisprudence arising from these two courts of competent jurisdiction.[11] Thus, this is the wrong forum for the matter to be heard.
5. Without prejudice and in the unlikely event that this Honourable Court finds that it has jurisdiction, the Respondent submits on the merits of the case below as follows.

LOCUS STANDI

6. With regards to Locus Standi, both parties have standing before this Honourable Court. Articles 22 and 258 provide that any person may institute legal proceedings alleging breach of the fundamental rights and freedoms, and further provides that the proceedings may be instituted by any person acting in public interest.

[7] Civil Procedure Act, sec. 6.
[8] *Okiya Omtatah Okoiti &another; v KEMRI Board of Management, Director & 4 others; Salaries and Remuneration Commission (Interested Party)* [2019] eKLR, para. 29.
[9] *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others* [2011] eKLR.
[10] Fact Pattern, para. 24.
[11] *Okiya Omtatah Okoiti &another; v KEMRI Board of Management, Director & 4 others; Salaries and Remuneration Commission (Interested Party)* [2019] eKLR, para. 29.

E) STATEMENT OF RELEVANT FACTS

Tunastrago as a Nation

7. The Republic of Tunastrago is a developing country with its capital city as Omoka, which is the seat of the Wakuu Continental Union (WCU). It is located on the Eastern part of the Wakuu Continent and borders the Zama Ocean. The GDP of Tunastrago is at an approximation of 87.91 billion. As per the 2019 census, the total population is around 47.56 million. Tunastrago promulgated a new Constitution with an expansive bill of rights in 2010. The Constitution introduced a devolved system of Government and national values as well as principles of governance and a chapter on leadership and integrity.

Factors Leading to the Suit

8. Tunastrago is 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.

9. In January 2019, the health authorities of the country, Chinku identified a respiratory disease called C-VID-19. By January 31st 2019, numerous patients were in critical condition with 14 recorded to have died. By March 21st 2019, scientists determined

that the virus was capable of human-to-human transmission and that it had a reproduction rate of 1.2 to 1.4, with an incubation period of between 7 to 14 days. It could be transmitted in the incubation stage, and asymptomatic people are capable of transmitting the virus to others.

10. The WHO issued a status report on the virus on the 22nd of March 2019 which included requests for the observance of social distancing, and that infected persons should self-quarantine for 14 days. However, it did not recommend any trade and travel bans. Tunastrago did not issue any restrictions in relation to C-VID-19, but issued daily publications which advised citizens to wear protective masks and practice social distancing. In less than a month, 35 countries declared travel bans from high-infection-rate countries. Tunastrago, however, did not close its borders.
11. There were no reported cases of the virus in the country. However, rumours began circulating that hospitals were beginning to fill up with patients exhibiting the symptoms of C-VID-19. Nina, a nurse, appeared at the Roroa show, and confirmed these rumours, pointing out the inaction of the Government. The next day, the CS for health confirmed that there were 8 cases of C-VID-19; 6 were foreigners from Chinku and 2 locals. The Government began contact tracing and promised that it

had begun procurement of the necessary PPEs. The process of tendering and procurement was not made public.

12. As the number of cases increased, the wearing of masks was also made mandatory. The Government also issued a nation-wide curfew of 7 pm to 5 am to inhibit people's movement and curb the spread of the virus. The National Police Service was to enforce this. There were incidents of police brutality during the implementation of this curfew.
13. In response to the unavailability of the promised PPEs, Health Workers began to strike and down their tools. This led to the closure of numerous Government hospitals and locals succumbed to various illnesses due to the shortage of Health Care Providers. The Government condemned them and suspended all striking workers and refused to increase the pay for the remaining workers. This led to understaffing in the hospitals and many deaths.
14. An unofficial document from the Office of the Auditor General was leaked and revealed that the tenders for the procurement of the PPEs had been disproportionately inflated and awarded to companies that were owned by CSs and personnel within the Ministry of Health. It was also rumoured that the money allocated to Health Workers was looted. In response, the Parliament established an investigation committee which worked hand-in-hand with the DCI and the TEACC.
15. The Government also hosted a meeting with the Tunastrago Health Workers Union Executive Committee and various media houses. The main topic of discussion was

public sensitization on preventative measures against C-VID-19. Nina, Secretary General of the Tunastrago Health Care Workers Union, and the Radio Host, Mr. Masong, of the Roroa Radio Show, attended the meeting. When it ended, the two, along with two other women, were seen boarding a black jeep which was to take them home. However, they went missing. Two bodies, which were identified as the

two women who accompanied Nina and Masong, were found weeks later. Nina and Masong are still missing. Whilst the Government strongly denied any involvement in the death or enforced disappearance of the four people, it was widely condemned, and human rights organizations coined these incidents as extrajudicial methods used to silence those who spoke up against the Government.

16. The Government requested for more funds from the IMF and the Wasafi Union Economic Bloc. They were denied due to unaccountability for the previously donated funds. The situation worsened due to the closure of various Government hospitals. The death toll was 1678 and more than 25,000 confirmed cases.

F) ISSUES

17. The issues for determination are:

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.

G) SUMMARY ARGUMENTS

18. Summary of arguments:

a) The Government has not denied, infringed and/or violated the right to the highest attainable standard of health.

   i. The right to the highest attainable standard of health and emergency medical treatment is based on progressive realization.

   ii. The Government has taken then necessary steps towards ensuring the right to the highest attainable standard of health and emergency medical treatment of citizens.

b) The Health Care Worker's strike was not in accordance with the law. Therefore, the State is not violating any of their rights.

c) The enforced disappearance and extra judicial killings of the four people are neither a breach of the Constitution of Tunastrago, nor a breach of any relevant international instruments Tunastrago is party to.

d) The Government has fulfilled its obligations as is outlined by the Constitution and the international treaties and laws.

H) SUBSTANTIVE ARGUMENTS

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.

i. The Right to the highest attainable standard of health and emergency medical treatment is based on progressive realization.

19. The Constitution provides for the right to the highest attainable standard of health.[12] Article 21 recognizes that the rights under Article 43 cannot be provided for to a full extent and therefore advocates for progressive realization.

20. In ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021]***, the Supreme Court observed that Articles 21 and 43 require that there should be 'progressive realization' of SERs, implying that the State must begin to take steps, and be seen to take steps, towards realization of these rights.[13]

21. These rights are progressive in nature, but there is a Constitutional obligation on the State to assist the court by showing if, and how, it is addressing or intends to

[12] Constitution of Tunastrago, art. 43(1)

[13] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR, para. 146.

address the rights of citizens to the attainment of the SERs, and what policies, if any, it has put in place to ensure that the rights are realized progressively.

22. The standard of progressive realisation in the Constitution has been adopted from the ICESCR which provides that each State Party to the Covenant undertakes to take steps with a goal of achieving progressively the full realisation of the rights recognised in the present Covenant.[14]

23. The standard of progressive realisation was adopted as a flexibility device which acknowledges that the full realisation of SERs cannot be achieved in a short period of time due to the realities of the world and the difficulties, in terms of human and financial resources, faced by most of the developing countries.[15]

ii. The Government has taken positive steps towards ensuring the right to the Highest Attainable standard of health and emergency medical treatment of citizens.

24. The High Court ruled in ***Mathew Okwanda v Minister of Health and Medical Services & 3 others*** that the right guaranteed under Article 43(1)(a) is premised on the establishment of a standard.[16] The court based this standard for the achievement

[14] ICESCR, art. 2(1).
[15] Orago N, *Socio-Economic Rights and The Potential for Structural Reforms: A Comparative Perspective on The Interpretation of The Socioeconomic Rights in The Constitution of Kenya*, 2010, pg. 47.
[16] *Mathew Okwanda v Minister of Health and Medical Services & 3 others* [2013] eKLR, para. 21.

of SERs on the cases ***John Kabui Mwai v Kenya National Examination Council***[17] and ***Soobramoney v. Minister of Health [Kwazulu-Natal]***[18] which entail the Government

fulfilling its minimum core obligations. The minimum core obligation of the Government to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights within the treaty.[19]

25. The Government has taken steps towards the progressive realization of the right to the highest attainable standard of health. The State has begun this process through amending the Health Act No.21 of 2017[20] and introducing NHP.[21] The NHP aims at providing free health care services to citizens, building more hospitals, purchasing drugs and medical equipment, and improving the working conditions of Health Care Providers. This meets the minimum core obligation of the Government towards ensuring the rights to the highest attainable standard of health and emergency medical treatment.

[17] *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others* [2011] eKLR.
[18] *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).
[19] Gen Comm No 3, para. 1.
[20] Fact Pattern, para. 8.
[21] Fact Pattern, para. 9.

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.

27. The right to strike is recognized as a means through which employees can visibly exercise collective industrial action.[22] It is an important tool in the collective bargaining system.[23] It is acknowledged that this right is enshrined in the Constitution as a fundamental right.[24] However, this right is subject to limitations.[25] The Constitution also outlines that the application of Article 41 can be limited by legislation.[26] This limitation extends to essential services.[27] The Labour Relation Act describes an essential service to mean any service which when not functioning, endangers the life and health of a person or the population.[28] Further, the Fourth Schedule of the Act also shows that Hospitals are listed as an essential service.

28. The case of ***County Government of Uasin Gishu v. Kenya National Union of Nurses***, confirms that the right to strike is not an absolute right and it can be limited.[29] The

[22] Van der Walt, Le Roux and Govindjee Labour Law in Context 203. Also see Grogan Collective Labour Law 141.
[23] *Numsa v Bader* Bop 2003 24 ILJ 305 (CC).
[24] Constitution of Tunastrago, art. 41(1)(d).
[25] Gathongo JK and Ndimurwimo LA "*Strikes in Essential Services in Kenya: The Doctors, Nurses and Clinical Officers' Strikes Revisited and Lessons from South Africa*" PER / PELJ 2020(23) - DOI http://dx.doi.org/10.17159/1727- 3781/2020/v23i0a5709.
[26] Constitution of Tunastrago, art. 24(5)(d).
[27] Labour Relations Act, sec. 78(1)(f).
[28] Labour Relation Act, sec. 81(1).
[29] *County Government of Uasin Gishu v. Kenya National Union of Nurses,* [2014] eKLR, para. 13.

Labour Relation Act prohibits any strike or lockouts for employers and employees who provide an essential service.[30] Section 81(3) further confirms the above directive on prohibition of strikes in an essential service. Therefore, the Health Worker's strike is prohibited under the law and the Government's cause of action is well within its right.

29. The Respondent recognizes that the Constitution calls for the limitation to be reasonable and justifiable in an open and democratic society.[31] It also acknowledges that the onus of proving that this limitation is justifiable is upon the Respondent.[32] The two criteria that must be satisfied are as follows.

30. First, that the objective to be served by limiting these rights is adequately important to affirm the need to override these rights.[33] This is in relation to societal concerns which are substantial and pressing to public interest.[34] In normal circumstances, these illegal strikes have led to paralysis of health services for prolonged periods of time.[35] The doctor's strike of 2017[36] is a good example of the implications to the lives of patients that could arise from the striking of essential services.[37] This is further exacerbated by the C-VID-19 pandemic which has laid havoc on the nation.[38] The

[30] Labour Relations Act, sec. 78(1)(f).
[31] Constitution of Tunastrago, art. 24(1).
[32] *R. v. Oakes, [1986]* 1 SCR 103.
[33] Constitution of Tunastrago, art. 24(1)(b).
[34] *Dupoto Farms Limited v Kenya Electricity Transmission Company Limited & 121 others* [2021] eKLR.
[35] *John Biiy v Seth Panyako* 1069 of 2017 (E&LRC).
[36] *Robert Alai Onyango v Cabinet Secretary in Charge of Health Petition No 21 of 2017 (HC)* [2017] eKLR.
[37] See Chemweno and Ogemba 2017https://www.standardmedia.co.ke/Article/2001232717/apology-to-kenyans-asdoctors-strike-ends-with-return-to-work-formula.
[38] Fact Pattern, para. 21.

Health Worker's strike caused locals to suffer, with patients being unable to access treatment and numerous people succumbed to their ailments.[39]

31. Second, the means is reasonable and necessary.[40] This includes a proportionality test which establishes that there must be proportionality between the limiting measure and the objective.[41] The Health Worker's strike used an emergency situation to further their personal interest, despite the Government's efforts.[42] The State had committed to provide the best health care services and had taken steps to acquire the necessary PPEs as well as acquiring donations from various donors including the Wakuu Continental Union.[43] Furthermore, the Government began the conciliation process by setting up a meeting with the Tunastrago Health Workers Union Executive Committee to tackle the ongoing strike and how best to ensure the health of the people.[44]
32. Therefore, the worker's strike was an overreach and illegal. Suspension of the workers was therefore not a violation of their right to strike.

[39] Fact Pattern, para. 22.
[40] *S v Makwanyane and* Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), para. 103.
[41] *R. v. Oakes.* Also see *Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others* [2016] eKLR, at paras. 55-58.
[42] Fact Pattern, para. 23.
[43] Fact Pattern, para. 19.
[44] Fact Pattern, para. 27.

C) WHETHER HE 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.

i. The enforced disappearance of the four people is neither a breach of the Constitution of Tunastrago, nor a breach of any relevant international instruments Tunastrago is party to.

33. Article 2 of the ICPPED provides that an enforced disappearance is made up of three crucial elements. The arrest, detention, or abduction by agents of the State or by persons acting with the authorization or support of the State, followed by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law.[45] The disappearance of the four people cannot be termed as an enforced disappearance because it fails to incorporate the three necessary elements. Furthermore, the Government did not stand to gain anything from this act, as it had already began taking steps to reconcile with the Health Workers and address their needs and those of the population.[46] The issue, therefore, does not have any merits and does not have the required sufficient substantiation.[47]

[45] ICPPED, art. 2.
[46] Fact Pattern, para. 27.
[47] Communications No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, para. 8.3.

34. Firstly, the four were not in State custody or in the custody of agents of the State at the time that they disappeared. This is confirmed by the fact that they were last seen leaving the meeting held by the Government in a black jeep that did not belong to the Government.[48] Thus, the four cannot be said to have been arrested, detained, or abducted by the Government at the time of their disappearance.

35. Secondly, the fate or whereabouts of the four people were not actively concealed by the Government. Rather, the Government is fulfilling its obligation by continuing to investigate and take active steps towards uncovering the truth about the disappearance of the four people.[49] This is shown by the police beginning inquiries into the disappearance of the four people after a missing person's report was filed. The State is also actively divulging the progress of the investigation as is instructed by the ICPPED.[50] The identity of the two bodies was divulged after DNA tests were carried out.[51]

36. Furthermore, the State recognises its obligations under Article 6 and 12 of the Constitution which provide that every citizen should be able to reasonably access the rights and benefits that accrue from citizenship. Moreover, the High Court observed in ***Apollo Mboya v Attorney General***[52] that it is the obligation of the State to protect

[48] Fact pattern, para. 27.
[49] CCPR, *General comment no. 36, Article 6 (Right to Life)*, para. 58.
[50] ICCPED, art.24.
[51] Fact Pattern, para. 29.
[52] *Apollo Mboya v Attorney General & 3 others; Kenya National Commission On Human Rights (Interested Party) & another* [2019] eKLR, para. 36.

the right to life and the general duty of the State to secure the rights and freedoms to whom such persons are entitled.[53] It also recognizes that the ICCPR[54] requires it to take interest in the fate of every individual and observe the inherent dignity of every human being.[55] It is duty bound to prevent human rights violations.[56] The four people continue to remain under the protection of the State and the law. Hence, the State has taken steps towards investigating the disappearance of the four people in order to ensure their fundamental rights are protected.[57]

ii. The killing of the two women who accompanied Nina and Masong cannot be termed as an extra judicial killing.

37. Enforced disappearance is linked to a number of acts that amount to the violation of various rights[58] thus, it encompasses a vital threat to life.[59] Article 26(1) of the Constitution acknowledges the right to life. The ICCPR also recognizes this right.[60]

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[53] CCPR, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, para. 10.
[54] ICCPR, preambular paragraph 5.
[55] Communication No. 2026/2011, *Sassene v. Algeria*, Views adopted by the Committee at its 112th session (7–31 October 2014); Communications No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, para. 7.2
[56] *Velásquez Rodríguez Case,* 29 July 1988, para. 174.
[57] Fact Pattern, para. 28.
[58] Communication No. 2000/2010, *Yuba Kumari Katwal v. Nepal,* Views adopted by the Committee on 1 April 2015, para. 11.3.
[59]Communication No. 992/2001, *Bousroual v. Algeria*, Views adopted by the Committee on 30 March 2006, para. 9.2.
[60] ICCPR, art. 6(1).

The protection of the right to life is key to the enjoyment of other rights. Therefore, it is not subject to derogation.[61]

38. The State has fulfilled its obligation to respect this right by refraining from acting in a manner that would result in arbitrary deprivation of life.[62] The literal meaning of an extra-judicial killing is the killing of persons by Governmental authorities without the sanction of any judicial proceedings or legal process.[63] Custody is a common factor needed to prove extra-judicial killings.[64] The killing of the two women cannot be termed as an extra-judicial killing as they were not within the custody of the State at the time of their death. Furthermore, the allegations made by the Petitioner are not sufficiently substantiated.[65] Additionally, the Government denies playing any role in the killing of the two women.[66] The State recognizes that it has a duty to investigate all allegations against it in good faith and provide the information available to it no matter what it may be.[67] It is actively fulfilling this obligation by investigating these crimes against humanity.[68]

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[61] ICCPR, art. 4(2).
[62] CCPR, *General comment no. 36, Article 6 (Right to Life)*, para. 7.
[63] Shrawat, Abhilasha, *Extra-Judicial Killing and the Role of International Criminal Court* (March 21, 2017). Available at SSRN: https://ssrn.com/abstract=2938358 or http://dx.doi.org/10.2139/ssrn.2938358.
[64] Communication No. 161/1983, *Joaquín David Herrera Rubio et al. v. Colombia,* Views adopted by the Committee on 2 November 1987.
[65] Communication No. 1804/2008, *Khaled Il Khwildy v. Libya*, Views adopted by the Committee at its 106th session (15 October–2 November 2012, para. 7.2.
[66] Fact pattern, para. 25.
[67] UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, art. 4(2)
[68] Fact Pattern, para. 28.

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

39. The Government has fulfilled its obligations as is outlined by the Constitution and the international treaties and laws. In line with UNCAC, the Government has set in place preventative anti-corruption legislation.[69] These are, 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.[70] The Government has also established an independent body (the TEACC) [71] as is provided in the Constitution[72] as well as UNCAC.[73]

40. It is to be noted that the released document was marked as "unofficial" therefore, it should not be taken into consideration, as it is not the official release.[74] Furthermore, the looting of the money allocated to Health Care Workers is also alleged.[75] These allegations of corruption are yet to be proven and the DCI and TEACC are currently conducting investigations that are yet to be concluded. In line with caselaw established in the cases of ***Benson Riitho v J. M. Wakhungu***[76] and ***Mumo Matemu v***

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[69] UN General Assembly, *United Nations Convention against Corruption: Resolution adopted by the General Assembly*, art. 5.
[70] Fact Pattern, para. 5.
[71]Fact Pattern, para. 5.
[72] Constitution of Tunastrago, art. 79.
[73] UN General Assembly, *United Nations Convention against Corruption: Resolution adopted by the General Assembly*, art. 6.
[74] Fact Pattern, para. 25.
[75] Fact Pattern, para. 25.
[76] *Benson Riitho v J. M. Wakhungu [2014] eKLR.*

Trusted Society of Human Rights Alliance & 5 others,[77] the courts are not the forum to address and established the veracity of the allegations. This role (of finding out the truth about the allegations) is to be left to the specified bodies.[78]

[77] *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.*

[78] See also AfriCOG, *Integrity in Leadership?: An Assessment of Kenya's Performance in Enforcing Constitutional Values*, 2015.

I) PRAYERS

41. In light of the arguments posed above, it is our humble submission that the court finds that:

a) The rights to the highest attainable standard of health and emergency medical treatment of the citizens of Tunastrago have not been denied, infringed and/or violated.

b) The suspension of Health Care Workers is not a violation of their right to work, industrial action and their right to a fair administrative action.

c) The enforced disappearance and extra judicial killings of the four people is not a breach of the Constitution of Tunastrago and all relevant international instruments Tunastrago is party to.

d) The Tunastrago Government has fulfilled its Constitutional and international obligations with respect to the fight against corruption.