

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 94 OF 2012**

**BETWEEN**

**MATHEW OKWANDA ..... PETITIONER**

**AND**

**THE MINISTER OF HEALTH AND**

**MEDICAL SERVICES .....1<sup>ST</sup> RESPONDENT**

**THE MINISTER SPECIAL**

**PROGRAMMES ..... 2<sup>ND</sup> RESPONDENT**

**THE MINISTER FOR**

**HOUSING ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner describes himself as a 68 year old patriotic Kenyan. He started his career as a store keeper in 1962 where he engaged in Trade Union activities culminating in his election as a Branch Chairman of the Kenya Distributor and Commercial Workers Union in 1994. He rose through the ranks of the trade union movement. He enjoyed an elevated status when he became a member of the National Executive Council of the Kenya Union of Commercial Food and Allied Workers Union. Due to his position he was influential in the Kenya's fight for multiparty democracy in the 1990s.
2. In 1996, the petitioner was diagnosed with diabetes mellitus, an illness that requires proper care, diet and medication. Diabetes Mellitus is characterized by a relative absolute insulin insufficiency. His complaint is that the cost associated with managing the illness is prohibitive given the fact that he has retired from active service and he has no means to take care of

himself. As a result his health is at the risk of imminent and further deterioration.

### **The Petitioner's Case**

3. The petitioner avers that in February this year he was diagnosed with a life threatening terminal disease, Benign Hypertrophy, which calls for special medical care and attention particularly in view of his advanced age. The petitioner's claim is that he is in dire need of urgent medical attention and he seeks the assistance of this court to enforce fundamental rights and freedoms under **Article 43** of the Constitution which protects social and economic rights.
4. The petitioner also claims that he is entitled to receive reasonable care and assistance as an older member of society pursuant to **Article 57**. Mr Okwanda also seeks free medicines and drugs to take care of his condition in addition to free treatment at the States prime hospitals. He also seeks a reasonable monthly stipend to rent a decent house, have food and water.
5. The petitioner avers that his requests are not unreasonable as the Constitution was intended to ameliorate his position and that of the poor and marginalized in society. The petitioner urged the court to be revolutionary in its finding and to grant the orders sought in the petition.
6. In the petition dated 26<sup>th</sup> March 2012, the petitioner seeks the following reliefs;
  - A. *A declaration that the petitioner herein is entitled to highest attainable standards of health which include the right to health care services including reproductive health, accessible and adequate housing and to have adequate good of acceptable quality, to clean and safe water in adequate quantities, to social security as laid out under Article 43 of the Constitution*

*and Article 11 of the International Covenant on Economics social and Cultural Rights as read with Article 2(5) and (6) of the Constitution.*

*B. A declaration that the state through the respondents named herein have a duty and obligation under the Constitution and International Law, more particularly the International Covenant on Economic Social and Cultural Rights to provide adequate and highest attainable standard of health, housing, social security and reasonable standards of sanitation tot eh petitioner herein.*

*C. Order compelling the respondents herein to exercise the duties and obligations of the State as espoused under Article 43 of the Constitution, Article 11 of the International Covenant on Economic Social and Cultural Rights as read with Article 2(5) and (6) and to provide the Petitioner herein with adequate and highest attainable standards of health, housing social security and reasonable standards of sanitation.*

*D. An order of declaration that the respondent have a duty and obligation to furnish the petition with the drugs and medication stipulated under paragraph 38 of the petition herewith or in the alternative the sum of Kshs.11,400 per month for the life time of the petitioner.*

*E. Any further orders, writs, declarations and writs that this Honorable Court may deem fit to grant in the interest of justice.*

*F. That the cost of this petition be provided for.*

7. Dr Khaminwa, learned counsel for the petitioner, submitted that this was a landmark case under our Constitution and a complete departure from our “tribal” life where problems of poverty, disease or lack of education were taken care of by the communities or family. He submitted that the State under the Constitution has taken over those responsibilities and the individual faced with poverty, without access to housing, water,

food, medicine is entitled to look to the State to alleviate his or her suffering. Dr Khaminwa further submitted that the petitioner fought for the change that led to promulgation of the Constitution and that like other Kenyans, he remains unemployed and relies on handouts from well-wishers. Counsel referred to various international instruments which emphasize on the State's obligations in economic and social rights. He urged the court to adopt a purposive and liberal approach to constitutional interpretation. The petitioner rejected respondent's submission that it lacked money to implement economic and social rights.

### **Respondents' Case**

8. The State opposed the petitioner's case on the basis of grounds of opposition dated 21<sup>st</sup> May 2012. The respondent contends that the petition lacks clarity and precision in setting out violation, that the petitioner does not disclose any reasonable cause of action and that the petition does not show how the respondent failed to perform their constitutional duties. Ms Makori, counsel for the respondent, stated that **Article 43** provides for progressive realization of social and economic rights and that the availability of resources is a key factor. She contended that in the circumstances, the Government is doing its best to meet its obligations under the Constitution.

### **Analysis and determination**

9. The provisions governing the economic and social rights are set out in **Articles 43** which provide as follows;

**43. (1) Every person has the right—**

- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;**
- (b) to accessible and adequate housing, and to reasonable standards of sanitation;**
- (c) to be free from hunger, and to have adequate food of acceptable quality;**

- (d) to clean and safe water in adequate quantities;*
- (e) to social security; and*
- (f) to education.*

*(2) A person shall not be denied emergency medical treatment.*

*(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.*

10. **Article 43** is to be read with **Article 20(5)** which provides as follows;

*(5) In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—*

*(a) it is the responsibility of the State to show that the resources are not available;*

*(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and*

*(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.*

11. Under **Article 21**, the State is obliged to take measures including the setting of standards to achieve progressive realization of the rights guaranteed under **Article 43**.

12. Apart from Constitutional provisions governing economic and social rights, **Article 2(6)** provides that treaties and conventions ratified by Kenya shall form part of the law of Kenya. Some of the relevant instruments include the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant*

*on Economic and Social Rights* (ICESR) amongst others. **Article 25.1** of the *Universal Declaration of Human Rights* (UDHR) provides that: “*Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services.*” The *Africa Charter on Human and People’s Rights* (ACHPR) guarantees every individual the right to enjoy the best attainable state of physical and mental health. The Charter requires States to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

13. I entirely agree with the eloquent and forceful submissions made by Dr Khaminwa on behalf of the petitioner that the success of our Constitution largely depends on the State delivering tangible benefits to the people particularly those who live at the margins of society. The incorporation of economic and social rights set out in **Article 43** sums up the desire of Kenyans to deal with issues of poverty, unemployment, ignorance and disease. Failure to deal with these existing conditions will undermine the whole foundation of the Constitution. In the case of *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others*, Nairobi Petition No. 15 of 2011 [2011]eKLR the High Court was called upon to determine whether a government policy restricting the number of pupils from private primary schools who could join national high schools was discriminatory and in violation of the right to education. The court held that, “*The inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution’s transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based*

*on socio-economic deprivation to one based on equal and equitable distribution of resources...*”

14. The scope, content and nature of State obligations under Article 12 of the ICESCR have been elaborated by the **Committee on Economic, Social and Cultural Rights (CESCR)**. The **CESCR General Comment No. 14** on *The Right to the Highest Attainable Standard of Health*, the right to health is defined in the following terms; “... a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable.” **The General Comment** recognises that the right to health is closely related to the economic rights and is dependent on the realization of the other rights including the rights to food, housing, water, work, education, human dignity, life, non-discrimination, equality, prohibition of torture, privacy, access to information and other freedoms.
15. The question then is whether in the circumstances before court, the respondents have fulfilled their obligation under **Article 43** as read with **Article 21**. The respondents have submitted that the realization of economic and social rights by the State is subject to the availability of resources at the State’s disposal. The issue of progressive realization of economic and social rights has been dealt with in a number of cases. In the case of **Mitu-Bell Welfare Society v Attorney General & 2 others, Nairobi Petition No. 164 of 2011 (Unreported)** Mumbi Ngugi J. observed that, “[53]The

*argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution, also ignores the fact that no provision of the Constitution is intended to wait until the state **feels** it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be ‘**progressive realization**’ of social economic rights, implying that the state must begin to take steps, and I might add **be seen** to take steps, towards realization of these rights. [78] Granted, also, that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection.... Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the social economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively, and how the petitioners in this case fit into its policies and plans.” (See also ***In the matter of the Principle of Gender Representation in the National Assembly and the Senate SCK Advisory Opinion No. 2 of 2012 [2013]eKLR, Jeffer Isaak Kanu v Ministry of Justice, National Cohesion and Constitutional Affairs & 3 others, Nairobi Petition 556 of 2012, New Vision Kenya & 3 Others v Independent Electoral and Boundaries Commission & 4 Others, Nairobi H. C. Constitutional Petition No.331 of 2012***).*

16. Therefore, even where rights are to be progressively achieved, the State has an obligation to show that at least it has taken some concrete measures or is taking conscious steps to actualize and protect the rights in question. The South African constitutional court in ***Soobramoney v Minister of Health (Kwazulu Natal) 1998 (1) SA 765 (CC)*** interrogated the question of right to access to health care and emergency treatment. The court was called upon to determine whether the health rights in section 27 of the Constitution entitled a chronically ill man in the final stages of



renal failure to an order obliging a public hospital to admit him to renal dialysis programme of the hospital. According to the guidelines for the programme the applicant was unqualified. The court in its judgment noted that the Ministry of Health had conclusively proved that there were no funds available to provide patients such as the applicant with the necessary treatment. The court also observed that if the overall health budget was substantially increased to fund all health care programmes this would diminish the resources available for the State to meet other social needs. The court stated as follows; *“The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than focus on the specific needs of particular individuals within society.”* This position was adopted in the **John Kabui Mwai case** (cited above) wherein the court observed that, *‘The realisation of socio-economic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need. One of the obstacles to the realisation of this objective, however, is limited financial resources on the part of the Government. The available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual.’*

17. Although the petitioner has submitted extensively on the nature of each of the economic social rights and the State obligation under the Constitution and international instruments, the duty of the court is to address the petitioner’s case and consider whether he has made out a case for relief. In other words, the issue for consideration is whether the petitioner has established that the State has failed in its obligation to, **“observe, respect, promote**

*and fulfill the rights and fundamental freedoms in the Bill of rights”*

18. The fact that the case is one that involves enforcement of economic and social rights does not relieve the petitioner of the responsibility to plead a case that discloses a violation of fundamental rights and freedoms with due particularity. The case of *Anarita Karimi Njeru v Attorney General* [1979] KLR 154 established the principle, that in matters concerning enforcement of fundamental rights and freedoms, a petitioner must plead with particularity that of which he complains, the provision said to be infringed and the manner in which the particular right is violated. This principle is correct. I think the gloss put on it by the *Trusted Society of Human Rights Alliance v Attorney General and Other Nairobi Petition 229 of 2012 (Unreported)* is more appropriate. In that case the court went further and noted that it was not necessary to set out the violations with mathematical precision but in a manner that will enable the respondent have notice of the allegations and defend himself or herself and to enable the court adjudicate the violation. In order to give effect to the provisions of **Article 48** which guarantee access to justice, the Court is obliged to go further and inquire about the petitioner’s grievance and see whether a case has been made out to warrant relief.
19. What the petitioner seeks in declaration A, B and C of the petition are really the State obligations and declarations to that effect will neither add nor subtract from the petitioners situation. As a matter of fact, no evidence was placed before the court to show that the State has breached its constitutional obligations in regard to the provision of health services in a manner that violates the State obligation to ensure 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.”*

20. The factual basis of the petitioner's case was limited to seeking specific relief for medication. Declaration D relates specifically to the petitioner's condition where the petitioner seeks an order to be provided with specific medicines for his condition. The respondents do not dispute the fact that the petitioner requires medical treatment. In cross examination, the petitioner stated that, *"I do not earn a pension. I normally go to Government Hospital. I have never been turned away. I pay for services."* In re-examination he stated that *"I attend Kenyatta Hospital. I pay Kshs.350/00 for every attendance."*
21. It must be recalled that the right guaranteed under **Article 43(1)(a)** is premised on establishment of a "standard." This standard must be judged in a holistic manner (see *Soobramoney case (Supra)* and *John Kabui Mwai case (Supra)*). On the basis of the material before the court, I find that at least the Government Hospitals provide healthcare to the petitioner at a cost. Whether the form of healthcare provided in these circumstances meets the minimum core obligation or the highest standard is not one that was the subject of evidence and argument before me. The issue of the prohibitive costs involved in accessing the treatment and whether such treatment should be free bearing in mind the necessity to progressively realize these rights was not explored in the depositions and therefore there is no basis upon which I can make a finding one way or the other. The petitioner's case was founded on a specific need rather than taking a holistic approach to the issue.
22. I however hasten to add that the issues raised by the petitioner are not frivolous. The petitioner has made lengthy submissions on the high prevalence of diabetes as compared to other infectious diseases like HIV Aids, Tuberculosis and malaria and which receive much more government attention and sponsorship as

opposed to diabetes. The petitioner also avers that there is shortage of diabetic drugs in hospitals. These issues were raised in written submissions and were not subject to forensic evaluation.

23. In the case of *Kenya Society for the Mentally Handicapped v Attorney General and Others Nairobi Petition No. 155A of 2011 (Unreported)*, the petitioner brought a case alleging that the economic and social rights of persons with mental disabilities had been violated. As the allegations were of general nature I stated as follows, “[18] *I think the petitioners have brought this case to address the whole spectrum of issues concerning persons with disabilities. In their submissions, the petitioners have dealt with the right to education, the right to health, the right to employment, access to justice, the right to justice and political rights. In a nutshell, what the petitioner requires is for the Court to direct the State to take steps to adopt its proposals for reform and promotion of persons with disabilities. The Court’s purpose is not to prescribe certain policies but to ensure that policies followed by the State meet constitutional standards and that the State meets its responsibilities to take measures to observe, respect, promote, protect and fulfil fundamental rights and freedoms and to a party who comes before the Court.*”
24. It is not unreasonable for the petitioner and other concerned Kenyans to demand that a concrete policy framework be rolled out and implemented to address the containment and treatment of various health afflictions. These, however, are matters of policy which the State is expected to address in light of its clear constitutional obligations. In the absence of a focused dispute for resolution by the court, I am reluctant to express myself on the broad matters raised in the submissions unless there is sufficient material that there has been a violation of the Constitution and the court is required to act to provide the requisite relief.

25. On the whole therefore, while I find that the petitioner's grievances are serious, it is with great sympathy that I find that I am unable to grant the reliefs sought in the petition. Consequently, the petition is dismissed with no order as to costs.

**DATED and DELIVERED at NAIROBI** this 17<sup>th</sup> day of May 2013.

**D.S. MAJANJA**  
**JUDGE**

Dr Khaminwa instructed by Khaminwa and Khaminwa Advocates for the petitioners.

Ms Makori, Litigation Counsel, instructed by the State Law Office for the respondents.