

Joseph Enock Aura v Cabinet Secretary Ministry of Health and 11 Others; Kenya Medical Practitioners & Dentist Council & another (Interested Parties)¹

Constitutional Petition Number E473 of 2023

On 12th July 2024, the High Court in Nairobi issued a judgement that the Social Health Insurance Act 2023, Primary Health Care Act 2023 and the Digital Health Act 2023 are unconstitutional for lack of adequate public participation in the law making process and for violation of constitutional provisions. The Court ordered Parliament to undertake sensitization and ensure proper public participation before enacting the laws and amend the unconstitutional provisions according to the Court's judgement within 120 days.

The Court's decision emphasizes that public participation must be qualitative and quantitative. The Court also set the bare minimum standards and requirements for meaningful public participation in the law-making process to include proper sensitization, sufficient notice, access to information, inclusivity, transparency, integrity, consideration of public views and explanation for rejected views.

A. Facts of the Case

In October 2023, parliament enacted three laws, the Social Health Insurance Act 2023, the Primary Health Care Act 2023 and the Digital Health Act 2023 in order to realize the right to the highest attainable standard of health under Article 43(1)(a) of the Constitution of Kenya.

The Social Health Insurance Act 2023 purpose is to establish the framework for the management of social health insurance and to provide for the establishment of the Social Health Authority. The Primary Health Care Act 2023 purpose is to provide a framework for the delivery of, access to and management of primary health care. The Digital Health Act 2023 purpose is to provide for the establishment of the Digital Health Agency, to provide a framework for the provision of digital health services, and to establish a comprehensive integrated digital health information system.

Joseph Enock Aura (the petitioner) filed a petition dated 24th November 2023 against the Cabinet Secretary of the Ministry of Health and 11 other respondents and 2 interested parties challenging the constitutionality of the three laws on two fronts; the process leading to their enactment and their substance. He argued that there was no adequate public participation in the enactment of the three laws. He further argued that there was no concurrence of the Speakers of the two Houses of Parliament on the three laws which concern County governments. He also argued that the three laws contravened various provisions of the Constitution such as the right to emergency medical treatment, access to public services, human dignity, slavery, servitude, freedom of conscience and religion and thought, principles of public finance, national values and principles of governance. He sought various reliefs including a declaration of the unconstitutionality of the three laws.

¹ Aura v Cabinet Secretary, Ministry of Health & 11 others; Kenya Medical Practitioners & Dentist Council & another (Interested Parties) (Constitutional Petition E473 of 2023) [2024] KEHC 8255 (KLR) (Constitutional and Human Rights) (12 July 2024) (Judgment) <http://kenyalaw.org/caselaw/cases/view/294297/>

The respondents justified the enactment of the three laws by citing the need to fulfil the constitutional right to health under Article 43 (1)(a) and Article 24 of the Constitution which provides for limitations of rights and fundamental freedoms. The National Assembly, also a respondent in the case, argued that the petition should be stayed because two other similar petitions were pending in other Courts. However, the Court disagreed stating that the petition was not sub-judice because the parties and issues in the other petitions² were different and focused on employment issues and the NHIF, which were not central to this case.

After considering the parties' arguments, the Court identified the following issues for determination:

B. Issues and Determination

1. Whether there was breach of the Constitution on public participation in the enactment of the laws.

The Court found that the public was not adequately involved in making the three laws as required by Articles 10 and 118 of the Constitution. The Court also set the bare minimum standards and requirements for meaningful public participation as follows:

- i. Proper sensitization on the nature of legislation to be enacted or policy to be effected;
- ii. Adequate notice depending on the circumstances which must however be reasonable;
- iii. Facilitation of the public to ensure they are able to access information required in a convenient and practical manner; understand the same, have meaningful opportunity to attend, contribute and provide their views;
- iv. The views of the public should be considered and where they are to be rejected or declined, reason for such rejection and dismissal should be stated. This will obviate the public participation being a cosmetic or a public relations act;
- v. Public participation should be inclusive and should reflect a fair representation and diversity of the populace to be affected;
- vi. There must be integrity and transparency in the process.

2. Whether the process of passing the laws by Parliament was not done properly in contravention with:

- i. Statutory Instruments Act 2013

The Court held that the three laws are Acts of Parliament and are not governed by the Statutory Instruments Act 2013.

- ii. The National Assembly Standing Order No. 120

The Court held that although Parliament can reduce the period of publication of Bills under its Standing Orders, it must do so reasonably and fairly. In this case, the Court was not convinced that the discretion was exercised along these lines. According to the Court, when Parliament is exercising its discretionary power under the standing orders, it must follow the constitutional principles of governance under Article 10, particularly the need to ensure transparency, accountability and public participation in law making process. Parliament recognized the importance of the three laws, so it should have allowed more time for public notification and review. By reducing the publication period to just 6 and 3 days, Parliament did not exercise reasonable judgment given the nature of the Bills and their potential ramifications to all people in the country.

²NRB H.C Pet No. E413 of 2023 Dominic Masinya Oreo vs National Assembly and ELRC Pet. No. E 199 of 2023 Dominic Masinya Oreo vs National Assembly

The Court also pointed out that there was poor coordination between the Ministry of Health and Parliament in the law-making process. While the Ministry of Health was still collecting feedback on the three Bills, Parliament was already in the process of passing them to law. This raises the question as to whether the feedback collected by the Ministry of Health was genuinely considered or if it was just a formality to make it look like the public was involved.

iii. **Concurrence of the Speakers under Article 110 (3) of the Constitution**

The Court found that the two Houses of Parliament disregarded Article 110(3) of the Constitution in their rush to pass the three laws. Article 110(3) of the Constitution provides that before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill. The necessary concurrence of the Speakers of the two Houses of Parliament on the nature of the three Bills was lacking in violation of the Constitution Article 110(3). The enactment of the three laws should not have been rushed, especially at the expense of disregarding the Constitution. By doing this, the two Houses of Parliament did not show the necessary diligence and responsibility expected in the law-making process. By proceeding in haste, they skipped important procedural safeguards that ensure laws are made properly and legally.

3. Whether the laws offend the various provisions of the Constitution such as the right to dignity, integrity, freedom from servitude, slavery, conscience, religion and thought.

The Court found that the provisions of the laws would not infringe on the dignity of Kenyans or subject them to servitude and slavery. In the Court's opinion, the fund introduced by the Social Health Insurance Act is a form of tax. So, it would be misleading to state that unborn children will be loaned monies that will enslave them. The people to be given loans are those in the informal sector who will apply for such loans. Poor people and children will have their contributions paid for by the government.

4. Whether sections 26(5) and 27(4) of the Social Health Insurance Act 2023 are unconstitutional.

The Court found that sections 26(5) and 27(4) of the Social Health Insurance Act 2023 are unconstitutional to the extent that they do not exempt the right to access emergency medical services. This is because the requirements under sections 26(5) and 27(4) of the Social Health Insurance Act 2023 will make it hard for people to get emergency medical services. Section 26(5) of the Act makes registration of people a requirement to accessing public services. Section 27(4) provides that a person shall only access health care services under the Act where their contributions to the Social Health Insurance Fund are up to date.

5. Whether section 38 of the Social Health Insurance Act 2023 constitutes a violation of Articles 201 (Principles of public finance), 205 (Consultation on financial legislation affecting counties) and 206 (Consolidated Fund and other public funds) of the Constitution.

The Court found that the Commission on Revenue Allocation (CRA) was not consulted nor invited to make recommendations on the three laws which relate to financial matters concerning County governments in accordance with the Constitution Article 205. The Court held that the failure by Parliament to consult CRA on enacting legislation that relates to financial matters concerning County government was unconstitutional. The consultations are crucial for informed decision-making and ensuring fiscal responsibility and equity. It was therefore imprudent for Parliament to reduce CRA into a by-stander in such critical laws.

The Court also questioned the introduction of a new section 38 in the Social Health Insurance Act 2023 without the benefit of public participation. This section was changed after public participation had taken place

thereby preventing the public from discussing the section as it currently stands. The new section eliminates the requirement to return any unused funds from the Social Health Insurance Fund to the Consolidated Fund at the end of every financial year. The Court stated that the current section was introduced ignoring Article 201 (a) of the Constitution which emphasizes the need for openness, accountability and public participation in financial matters. The Court emphasized that Article 201 must be understood in the context of Kenya's history where public finance matters were a preserve of closed dialogue in opaque rooms only rubberstamped by Parliament. The Court then held that section 38 does not meet the standards of Article 201(a) of the Constitution and is therefore unconstitutional.

The Court appreciated the Cabinet Secretary's efforts to realize the economic and social rights under Article 43 of the Constitution and the commendable research and hard work put into making the three laws. However, the Court noted that while the laws aim to advance universal health care, the rushed manner in which they were enacted infringed on the national values and constitutional principles. Nevertheless, the breaches that tainted the laws are redeemable and can be corrected.

The Court then made the following final orders.

- i. Parliament should undertake sensitization, adequate, reasonable and sufficient public participation in accordance with the Constitution before enacting the said Acts and amend the unconstitutional provisions in terms with the Court judgement within 120 days.
- ii. In default of the (i) above on 10/11/2024 the Court issued a declaration that the entire Social Health Insurance Act 2023, Primary Health Care Act 2023 and the Digital Health Act 2023 are all unconstitutional.