

An unhealthy state of affairs: The dilemma in the fight against corruption and the right to health

Onesmus W. Musungu*

Abstract

Corruption has found its place not only in the society at national level but also globally. Yetunde Aluko in her article 'Corruption in Nigeria: Concept and dimensions. Anti-corruption reforms in Nigeria since 1999'¹ opined that corruption has transcended national boundaries and is therefore not a preserve of any nation, race or section of the world. Some people believe that corruption is becoming a culture and hence a way of life. Corruption has been unlawfully entrenched in our society and has become part of the society's norms and culture. This article seeks to unravel the 'place' of corruption in our health facilities and how it has destabilised the health system leading to the poor implementation of Article 43(1) of the Constitution of Kenya (2010). This article suggests possible legal and societal approaches to curb the practice of corruption and ensure the right to health is progressively realised.

* The author is an LLB graduate from Kabarak University. He is currently a student undertaking his diploma in law at the Kenya School of Law. He is a member of the *Kabarak Law Review* Editorial Board 2021-2022.

¹ Yetunde Aluko, 'Corruption in Nigeria: Concept and dimensions. Anti-corruption reforms in Nigeria since 1999: Issues, challenges and the way forward,' *IFRA Special Research Issue* 2009 Vol 3.

1. Introduction

The Constitution of Kenya (2010) as well as ratified treaties make provision for the right to health.² The State has an obligation to guarantee the right to the highest attainable standard of health and is required to ensure that the right to the highest attainable standard of health is realised progressively.³ As the State positively tries to ensure the achievement of this right, corruption has strived hard to render its realisation impossible. It goes without saying that corrupt activities in the health sector have irreparably damaged the ability of health care systems to deliver high quality and effective services to those who are in need of it.⁴ Corruption in itself is a 'disease' that has affected health care provision. It has impoverished the population, increased inequality in access to medication and is responsible for health deterioration especially among vulnerable members of society.⁵

The guarantee of the right to health is an ambitious promise which is to be progressively realised by the State.⁶ This article will provide a brief overview of the right to health and its enshrinement in the Constitution of Kenya with specific reference to the main achievements and setbacks in the healthcare sector which have been caused by corruption. Additionally, this article will analyse the framework provided for in the Bill of Rights (Chapter Four) with regards to the right to health and health related rights.⁷

Corruption hinders the enjoyment of the right to health. The list of mega corruption scandals recorded in the health sector in Kenya as

² African Charter on Human and Peoples' Rights, Article 16; International Covenant of Economic, Social and Cultural Rights, Article 12. See also, Universal Declaration of Human Rights, Article 2. For applicability in Kenya, see Constitution of Kenya (2010), Articles 2(5) and (6).

³ Constitution of Kenya (2010), Article 43.

⁴ Judith Jepkorir, 'Combating corruption in the provision of the highest attainable standard of healthcare' *KenyaLaw.org Blog*, 30 July 2021.

⁵ Jepkorir, 'Combating corruption in the provision of the highest attainable standard of healthcare'.

⁶ Constitution of Kenya (2010), Article 43.

⁷ Constitution of Kenya (2010), Chapter Four, Bill of Rights.

documented over the years include; the National Hospital Insurance Fund graft corruption allegations by its officials,⁸ and promotion of unmerited staff to senior positions,⁹ the CovidMillionnaires scandal where the Kenya Medical Supplies Authority (KEMSA) allegedly squandered COVID-19 pandemic funds and donations.¹⁰

The above clearly shows that corruption has made it difficult for the State to discharge its mandate of fulfilling, respecting and protecting the right to health. The finances which had been set aside for purchase of medical supplies, hiring of more staff and development of infrastructure for purposes of enabling and facilitating the citizens in enjoyment of their right to the highest attainable health standards have been embezzled, the end result being death and losses in various forms.¹¹

Corruption is an insidious plague that has variant corrosive effects on societies.¹² Thus, curbing corruption would be a step further in realising basic human rights and fundamental freedoms.

This article contends that ending corruption is not easy, it will entail transforming our political, social and legal agenda. It suggests that Kenya should benchmark from such models and adopt human rights approaches to corruption as it will be discussed in this article.¹³ This paper will show that the Kenyan Bill of Rights contains pioneering provisions with regard to the realisation of the right to health for Kenyan citizens. This article will focus on the right to the highest attainable health standard and the impact of corruption on its realisation. It will examine the areas in which corruption is prevalent in the health sector and pro-

⁸ Cyrus Ombati and Roslyn Obala, 'Over 10 billion feared to be lost in new NHIF pay scandal' *The Standard*, 12 September 2022.

⁹ Anthony Mwangi, 'NHIF boss sued over staff promotion' *People Daily*, 12 September 2022.

¹⁰ Jepkorir, 'Combating corruption in the provision of the highest attainable standard of healthcare'.

¹¹ Judith Jepkorir, 'The effect of corruption on the right to health' *Amka Africa Justice Initiative*, 18 July 2022.

¹² Mathew Murray and Andrew Spalding, 'Freedom from official corruption as a human right', *Governance Studies at Brookings*, January 2015.

¹³ Jepkorir, 'The effect of corruption on the right to health'.

pose some recommendations to that effect for purposes of preventing corruption in the health sector.

2. Corruption

Corruption is an offence under the provisions of Sections 39 to 44, 46, 47 of the Anti-Corruption and Economic Crimes Act (No 3 of 2003, Revised in 2016). These provisions identify bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust or an offence involving dishonesty as grounds upon which one may be charged for corruption.¹⁴

Transparency International defines corruption as the unlawful and improper enrichment of officials in the public sector or those close to them through the misuse of public power entrusted to them.¹⁵

Corruption has been defined as 'a non-violent criminal activity which is committed with an objective of pocketing wealth illegally either by individuals or by a group of persons hence violating present laws which govern the economic activities of the government and its administration'.¹⁶ Yemi Akinseye describes corruption as the 'mother of all crimes'.¹⁷

From the above conceptualisations, it is evident that writers' and scholars' definitions vary. Therefore, we can allude to the fact that the definitions of corruption are straightforward but they vary depending on different intellectual approaches. Corruption knows no boundary, culture, or society and there is no profession or occupation that is immune from its practices.¹⁸ This threat has led to situations such as po-

¹⁴ Anti-Corruption and Economic Crimes Act (No 3 of 2003, Revised 2016), Section 2.

¹⁵ 'What is corruption?', *Transparency International*, 24 April 2022.

¹⁶ Ezenwa C Ngwakwe, 'An analysis of jurisdiction tuitions in Nigeria (2009)' in *Anti-corruption reforms in Nigeria since 1999: Issues, challenges and the way forward*, IFRA Special Research Issue, (2009) 3.

¹⁷ Yemi Akinseye George, *Legal system, corruption and governance in Nigeria*, New Century Law Publishers, 2000.

¹⁸ David Iyanda, 'Corruption: Definitions, theories and concepts' *Arabian Journal of Business and Management Review* (2012) (OMAN Chapter).

lice extortion, queues at public offices for those seeking public services, election irregularities, and ghost workers syndrome among others.¹⁹ Corruption is endemic in any system of government and since it is as old as the world it is viewed as a regular, repetitive and integral part of the operation of most political systems.²⁰ We cannot shy away from the fact that corruption threatens among other things several aspects of the right to health.²¹ This includes reproductive health care, clean and safe water, adequate food of acceptable quality, and reasonable standards of sanitation.²²

3. The right to health

3.1 Historical development of the right to health

The right to health is a fundamental human right. The exercise of other rights is dependent on it. The United Nations Charter foreshadowed the right to health in 1945 when it described one of its substantive purposes being to promote international cooperation in solving international problems of economic, social and cultural nature.²³ In the same year, the World Health Organisation (WHO) whose aim is to implement the human right to health was established.²⁴

The 1948 Universal Declaration of Human Rights (UDHR) recognises the right to an adequate standard of living. It states that ‘everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing and medical care...’²⁵

¹⁹ Iyanda, ‘Corruption: Definitions, theories and concepts’.

²⁰ James C Scott, ‘Comparative political corruption’ 70 *American Political Science Review* 1976.

²¹ 2012 Report to the General Assembly. These include management of financial resource, distribution of medical supplies and the relationship between health workers with patients. Also see ICHRP 53.

²² Constitution of Kenya (2010), Article 43.

²³ United Nations Charter, Preamble.

²⁴ ‘History of WHO’, *World Health Organisation*, 25 April 2022.

²⁵ Japhet Biegion, ‘The inclusion of socio-economic rights in the 2010 Constitution: Con-

The UDHR though a non-binding instrument, plays an important role as the normative foundation of the international human rights system.²⁶

In 1966 the International Covenant on Economic Social Cultural Rights (ICESCR), which recognises the right of everyone to enjoy the highest attainable standard of physical and mental health was adopted.²⁷ The UN Committee on Economic, Social and Cultural Rights has interpreted the right to health by encompassing it in General Comment 14 (2000).²⁸

In 2002, the UN Commission on Human Rights (now replaced by the UN Human Rights Council) appointed a UN Rapporteur to report on the enjoyment of the highest attainable standard of physical and mental health.²⁹ The protection of the right to health at the international level is emphasised by other instruments which include: the Convention on the Right of the Child (CRC),³⁰ the Convention on the Rights of Persons with Disabilities (CRPD), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Development of the right to health in Africa is attributable to the inception of the African Charter on Human and Peoples' Rights (ACHPR) which was adopted in 1981.³¹ Right to health is enshrined in Article 16 of the ACHPR which provides that every individual shall have the

ceptual and practical issues' in Japhet Biegon and Godfrey Musila (eds) *Judicial enforcement of socio-economic rights in the 2010 Constitution: Conceptual and practical issues*, Kenyan Section of the International Commission of Jurists, 2011.

²⁶ Biegon, 'The inclusion of socio-economic rights in the 2010 Constitution'.

²⁷ International Covenant on Economic Social Cultural Rights, 3 January 1966, 993 UNTS 3, Article 12.

²⁸ United Nations Economic and Social Council, General Comment No 14: The right to the highest attainable standard of health. UN Doc E/C.12/2000/4 (11 August 2000).

²⁹ Office of the High Commissioner for Human Rights: Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health UN Doc E/C /4 Res 31/2002.

³⁰ 'United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health', *United Nations Human Rights Office of the High Commissioner*, May 2021.

³¹ Guiseppa Pascale, 'The human right to health in Africa: Great expectations, but poor results' *Voelkerrechtsblog*, 24 June 2016.

right to enjoy the best attainable state of physical and mental health.³² Further, it states that African Union (AU) member states should take necessary measures to protect the health of their people and to ensure that medical services, goods, and facilities are available, accessible, and of good quality.³³

It is also important to note that the international law guarantees aforementioned are binding in Kenya as per provisions of Article 2(5) and (6) of the Constitution (2010).

3.2 Right to health and the rule of law

The rule of law is a fundamental concept within the Kenyan legal framework. The principle implies that all persons, officials and institutions, including the State itself, are accountable under the laws which are equally enforced, independently adjudicated, and which conform to international human rights standards.³⁴ It is deeply rooted in public involvement where all persons within the meaning of Article 260 of the Constitution of Kenya, are equally accountable to just, fair and equitable laws and are further entitled without any discrimination, to equal protection before the law.³⁵ The right to health places an obligation on the state to guarantee every person the right to health.³⁶

As a state party to the ICESCR, Kenya is required to submit a report to the UN Committee on Economic Social and Cultural Rights showing the steps it has taken to ensure respect, protection and fulfilment of the right of health. This ensures accountability. The process of reforming a country's public health laws illustrates the obligation of states to fulfil

³² African Charter on Human and Peoples' Rights, Article 16.

³³ African Charter on Human and Peoples' Rights, Article 16.

³⁴ *Advancing the right to health: The vital role of law*, World Health Organisation, Geneva, 2017, 77.

³⁵ Declaration on the high-level meeting of the General Assembly on the rule of law at national and international levels, 30 July 2013, A/Res/67/1, para 2.

³⁶ Constitution of Kenya (2010), Article 43(1)(a).

the right to health.³⁷ The obligation to respect, protect or fulfil the right to health in a systematic and sustainable manner by the state will be trampled on if the rule of law is not respected.³⁸

The implementation or enforcement of the law is susceptible to corruption.³⁹ Corruption in the health sector threatens progress towards national health goals.⁴⁰ The principles of good governance which revolve around upholding the rule of law, help to guard the law reform process against corruption and failures by the government to faithfully serve the public interest.⁴¹ Thus, it is important to allude to the fact that corruption weakens the accountability of State officials, reduces transparency in the conduct of functions of state institutions and permits the breach of right to health to go unpunished.⁴²

Health care provision systems depend on the efficient combination of human resources, financial resources, supplies, and competent delivery of services.⁴³ Corruption and mismanagement of funds is illustrative of lack of integrity and accountability by those entrusted with the role of managing resources. It takes into account accountability to the public for decisions and actions by state officers. Accountability connotes that state officers exercise powers delegated to them in good faith. However, without transparency, this would likely fail. Additionally, Article 201 of the Constitution provides that public money should be used in a prudent and responsible way. This is supplemented by the guiding principles stipulated in Section 3 of the Public Procurement and Asset Disposal Act (PPADA) which prescribes maximum value for money as a key principle in procurement. Further, it is an offence for an indi-

³⁷ United Nations Economic and Social Council, General Comment No 14: The right to the highest attainable standard of health. United Nations Doc E/C.12/2000/4 (11 August 2000) para 8.

³⁸ *Good governance practices for the protection of human rights*, Office of the United Nations Commissioner for Human Rights, New York 2007, 1-2.

³⁹ *Advancing the right to health: The vital role of law*, 74.

⁴⁰ *Advancing the right to health: The vital role of law*, 74.

⁴¹ *Advancing the right to health: The vital role of law*, 74.

⁴² *Good governance practices for the protection of human rights*, 59.

⁴³ Maureen Lewis, 'Governance and corruption in public health care systems' Centre for Global Development Working Paper No 78, 2006.

vidual to engage in corrupt activities as stipulated under Section 66 of the PPADA. These principles have not been appreciated in the Kenyan health sector since we have witnessed mismanagement of resources by public officers. This can be recalled from the NHIF saga and the #Covid-Millionaires saga, which have proven that provisions of leadership and integrity in Chapter Six of the Constitution are not well reflected upon by persons holding office in the health sector.

3.3 Legal framework to the highest attainable health standard

3.3.1 Domestic laws

Quite beyond argument then, the Bill of Rights in Kenya's constitutional framework is not a minor peripheral or an alien thing removed from the definition, essence and character of the nation. Rather, it is said to be integral to the country's democratic state and is the framework of all the policies touching on the populace. It is the foundation on which the nation and state is built. There is a duty to recognise, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights... The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State... respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.⁴⁴

Health care is a fundamental right that is indispensable for the enjoyment of other human rights, in particular the right to food, work, education, housing and water.⁴⁵ Article 43(1)(a) of the Constitution of Kenya 2010 took into account the right to the highest attainable standard of health, which includes the right to healthcare services, and reproductive healthcare.

Article 21(1) of the Constitution of Kenya 2010, requires the state to observe, respect, promote, protect and fulfil the rights and fundamental freedoms in the Bill of Rights. In *Kenya Society for the Mentally Handi-*

⁴⁴ *Attorney General v Kituo cha Sheria & 7 others*, Civil Appeal 108 of 2014, Judgment of the Court of Appeal 17 February 2017 eKLR, para 29.

⁴⁵ Margret Vidar, 'The interrelationships between the right to food and other human rights' in Wenche Barth Eide and Uwe Kracht (eds), *Food and human rights in development: Legal and institutional dimensions and selected topics*, Intersentia, 2005, 144.

capped v Attorney General and others,⁴⁶ the petitioner alleged violation of social and economic rights of persons with disabilities. While issuing its judgment, the Court held that its purpose was not to prescribe policies but to ensure that policies followed by the State meet constitutional standards and that the State should meet its obligations to take measures to observe, respect, promote and fulfil fundamental rights and freedoms.

The government of Kenya is obliged to ensure that there is progressive realisation of social and economic rights as stipulated in Article 21(2) of the Constitution which requires the state to take legislative, policy and other measures, including the setting of standards to achieve the progressive realisation of the rights guaranteed under Article 43. The Constitution of Kenya provides for a normative approach of the right to health. The right to health encompasses availability of health services which ensure that quality services within a state party are accessible.⁴⁷ Article 43(1) of the Constitution of Kenya guarantees every citizen the right to the highest attainable standard of health. Article 43(2) of the Constitution of Kenya further provides that every person is entitled to emergency medical care. For this provision to be fully realised, Article 21 is invoked in which it requires the state to take legislative policies and other measures to achieve the progressive realisation of the rights guaranteed under Article 43 of Constitution. State organs and public officers have constitutional obligations to address the needs of indigent persons and groups in the society.⁴⁸ It should be noted that, the state has been further obliged under Article 46 of the Constitution to protect consumer rights, including the protection of health, safety, and economic interest.⁴⁹

The High Court of Kenya has opined thus on the status of progressive realisation:

⁴⁶ *Kenya Society for the Mentally Handicapped (KSMH) v Attorney General & 7 others*, Constitutional Petition 155A of 2011, Ruling of the High Court 18 December 2012 eKLR.

⁴⁷ General Comment No 14, para 12.

⁴⁸ These include women, older members of society, persons with disabilities, children and youth, members of minority or marginalised communities, and members of particular ethnic and religious or cultural communities.

⁴⁹ Constitution of Kenya (2010), Article 46.

... Article 21 and 43 requires that there should be a 'progressive realisation' of social economic rights, implying that the state must begin to take steps towards realisation of these rights... 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 policies, if any, it has put in place to ensure that the rights are realised progressively, and how the petitioners in this case fit into its policies and plans.⁵⁰

Every citizen should enjoy access to medical services despite their economic status, culture or gender. In the case of *PAO and 2 others v Attorney General*, the Court categorically held that, the fundamental right to life, human dignity and health as protected and envisaged by Article 26(1), 28 and 43(1) of the Constitution encompasses access to affordable and essential drugs including generic drugs. The Court further stated that any legislation that tries to limit these rights will not suffice.⁵¹ In essence, the legislation will be null and void from its initiation.

When applying the rights 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 three principles which are provided for under Article 20(5) of the Constitution. Article 20(5) stipulates thus: first principle requires the state to show that the resources are not available. The second principle requires the state to give priority in allocating resources to ensure the widest possible enjoyment of the right or fundamental freedom having regard to the prevailing circumstances. Finally, the court, tribunal or other authority should not interfere with a decision by a state organ concerning the allocation of resources on the basis that it would have reached a different conclusion.⁵²

The provision of health services is distributed between the national government and the county governments to realise the right to health.

⁵⁰ *Mitu-Bell Welfare Society v Attorney General & 2 others*, Constitutional Petition 164 of 2011, Judgment of the High Court 11 April 2013 eKLR.

⁵¹ *PAO and 2 others v Attorney General, Aids Law Project (interested party)* Petition 409 of 2009, Judgment of the High Court, 20 April (2012) eKLR.

⁵² Constitution of Kenya (2010), Article 20(5).

The Fourth Schedule of the Constitution mandates the national government with the task of adopting health policies, building of national referral health facilities, capacity building and technical assistance to counties. On the other hand, the county governments should promote county health services. Section 15 of the Sixth Schedule of the Transition to Devolved Government Act (No 1 of 2012) provides in its preamble, the framework for transition to devolved government pursuant to Section 15 of the Sixth Schedule to the Constitution, and for the connected purposes. In *Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others*,⁵³ the learned judge was of the view that the inadequacies of provision of health services in the county is a matter of national concern and it is the obligation of the national government to ensure that every person's right to the highest attainable standard of health as stipulated under Article 43 of the Constitution is attained.

The right to health as per General Comment 14 stipulates that the right to the highest attainable standard of health does not create an entitlement for one to be healthy.⁵⁴ Nor does it hold states responsible for all potential causes of poor health, including the individual's choice to adopt unhealthy lifestyles. However, states have an obligation to respect, protect and fulfil the right to health. This includes adopting administrative actions that are over-arching in offering guidance to government action in the realisation of the highest attainable standard of health.

The right to health has substantive value to the population and as such, the government has an obligation to create conditions necessary for a healthy, productive and flourishing life.⁵⁵ With respect to the implementation of Article 43 of the Constitution of Kenya, Kenya is obliged under Article 21(2) to take legislative, policy and other measures, including the setting of standards to facilitate the progressive real-

⁵³ *Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others* Judicial review application 317 of 2013, Judgment of the High Court 18 December 2013 eKLR, para 86.

⁵⁴ International Covenant on Economic, Social and Cultural Rights, Article 12.

⁵⁵ *Advancing the right to health: The vital role of law*, 12.

isation of the rights guaranteed.⁵⁶ In the quest to align with the progressive realisation of the right to health, Kenya has adopted key legislative enactments after the Constitution of Kenya 2010 which revolve around health. These include: the Kenya Medical Supplies Authority Act (No 20 of 2013) which makes provisions for the creation of the Kenya Medical Supplies Authority (KEMSA) and for connected purposes in enhancing the full realisation of right to health; and the Public Health Officers (Training, Registration and Licensing) Act (No 12 of 2013), which makes provisions for training, registration and licensing of public health officers and public health technicians. The aim of all this is to achieve the right to health.

The Kenya Health Policy 2014-2030 extrapolates the improvement on the overall status of health in Kenya.⁵⁷ The policy aims to fulfil the right to health and to attain this, the policy seeks to employ a human rights based approach in health care delivery.⁵⁸ This policy focuses on six objectives which will help the government achieve its goals. The objectives are to: eliminate communicable conditions, halt and reverse the rising burden of non-communicable conditions, reduce the burden of violence and injuries, provide essential health care, minimise exposure to health risk factors, and strengthen collaboration with other sectors that have an impact on health.⁵⁹

3.3.2 International law relating to health

Article 2(6) of the Constitution of Kenya 2010 provides that any treaty or convention ratified by Kenya shall form part of the Laws of Kenya. In light of the above provision, Kenya is bound by several glob-

⁵⁶ Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) *Mapping the constitutional provisions on the right to health and the mechanisms for Implementation in Kenya; Case study report*, 10.

⁵⁷ Ministry of Health, 'Kenya Health Policy 2014-2030', *National Cancer Institute of Kenya*, 14 July 2022.

⁵⁸ Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), *Mapping the constitutional provisions on the right to health; Case study report*, 13.

⁵⁹ Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), *Mapping the constitutional provisions on the right to health, Case study report*, KELIN/EQUINET, 2018, 14.

al and regional agreements and treaty documents that enumerate the state's duty to realise the right to health. The Constitution of the World Health Organisation (WHO) defines health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.⁶⁰

Some of these adopted international instruments include; the International Covenant on Economic Social Cultural Rights (ICESCR) and the Universal Declaration of Human Rights. Article 12 of the ICESCR, is reflected in General Comment No 14. It obliges states parties to recognise everyone's right to the enjoyment of the highest attainable standard of physical and mental health. Article 12(1) illustrates a number of steps that states are required to conform to in achieving the full realisation of this right.

Article 25 of Universal Declaration of Human Rights (UDHR) states that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care.⁶¹

The Constitutional Court of South Africa defined progressive realisation in the *Grootboom case*, stating that when a right could not be realised immediately then the obligation is to take steps to ensure its realisation. The Court recognised that the goal of the Constitution is to ensure that the basic needs of all people in our society are effectively met and the requirement of progressive realisation meant that the state must take measures to achieve this goal. This includes the obligation to take progressive steps in ensuring accessibility.⁶²

In General Comment 3, the Committee on Economic Social and Cultural Rights⁶³ concluded that the concept of progressive realisation constitutes recognition of the fact that full realisation of all economic,

⁶⁰ Constitution of the World Health Organisation, 22 July 1946, Preamble.

⁶¹ Universal Declaration of Human Rights, Article 25.

⁶² 2000 (11) BCLR 1169 (CC) para 45.

⁶³ General Comment No 3: The nature of state parties' obligations, 14 December 1990, E/1991/23, para 9.

social and cultural rights will generally be impossible to achieve in a short period of time.

‘The nature of state parties obligation’ encompassed in General Comment No 3, elaborates that states are required to take appropriate measures towards the full realisation of the socio-economic rights to the maximum of their available resources.⁶⁴ The lack of resources can hamper the right to health which can be achieved progressively, this is denoted by the concept ‘resource availability’.⁶⁵ States are to strive to obtain such resources.

By the wording of the General Comment 14, the right to health has ‘core content’. The minimum core describes the minimum level in which the provision of the right falls. The state parties to ICESCR have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights stipulated in the Covenant, including essential primary healthcare.⁶⁶ The Committee on Economic Social and Cultural Rights in General Comment 3, enunciates that a minimum core obligation ensures the satisfaction of at the very least essentials of the rights of each state.⁶⁷

Article 16 of the African Charter on Human and Peoples’ Rights (‘Banjul Charter’) guarantees the right to enjoy the best attainable state of physical and mental health. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (‘the Maputo Protocol’) is vibrant with respect to ensuring that women access better healthcare.⁶⁸

⁶⁴ International Covenant on Economic, Social, Cultural Rights, Article 2(1).

⁶⁵ Biegon and Musila (eds) *Judicial enforcement of socio-economic rights in the 2010 Constitution*.

⁶⁶ Committee on Economic Social Cultural Rights, General Comment 14, para 43.

⁶⁷ Committee on Economic, Social and Cultural Rights, General Comment No 3, 14 December 1990, E/1991/23.

⁶⁸ Maputo Protocol, Article 14.

4. Corruption in the health care sector

A number of key factors, among them being poor governance and corruption, compromise the provision of adequate health.⁶⁹ Corruption affects all health systems, whether public or private, through embezzlement of funds from health budgets and or bribes extorted at the point of health service delivery.⁷⁰ As such the effect is enormous and the burden falls disproportionately on the citizens especially the poor.⁷¹

Incidences of corruption vary among societies and it can be rare, widespread or systemic.⁷² Where such incidences are rare, it is easy to detect, isolate and punish, and prevent the disease from spreading further.⁷³ It is difficult to curtail corruption when it is widespread.⁷⁴ Worse still, is that when such incidences are systemic it suggests that the system is adapted to corruption as the norm.⁷⁵

4.1 Corruption in procurement

Procurement is the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system.⁷⁶ The Organisation for Economic Co-operation and Development (OECD) in the *Compendium of Good Practices on the Use of Open Data for Anti-Corruption*⁷⁷ defines public procurement as the

⁶⁹ Kenya Anti-Corruption Commission (KACC), 'Sectoral perspectives on corruption in Kenya: The case of the public health care delivery', February 2010.

⁷⁰ KACC, 'Sectoral perspectives on corruption in Kenya'.

⁷¹ KACC, 'Sectoral perspectives on corruption in Kenya'.

⁷² U Myint, 'Corruption: Causes, consequences and cures' 7 *Asian Pacific Development Journal* (2000).

⁷³ Myint, 'Corruption: Causes, consequences and cures'.

⁷⁴ Myint, 'Corruption: Causes, consequences and cures'.

⁷⁵ Myint, 'Corruption: Causes, consequences and cures'.

⁷⁶ Public Procurement and Asset Disposal Act (2015), Section 2.

⁷⁷ OECD, *Compendium of good practices on the use of open data for anti-corruption: Towards data-driven public sector integrity and civic auditing*, 13.

purchase of goods, services and works by governments or state owned enterprises from the private sector.⁷⁸

In essence, public procurement is a process starting with procurement planning and proceeding, in sequence, to advertising, invitation to bid, bid evaluation, contract award and contract implementation. These phases occur in three processes: pre-tendering phase, tendering phase and post-tendering phase.⁷⁹

Procurement corruption encompasses: bribes, kickbacks, extortion, embezzlement, nepotism, patronage systems, fraud, false invoices, fraudulent invoicing, insider trading, collusion among suppliers and failure to audit performance on contracts which results in the raising of prices paid for goods or services, thus increasing inefficiency.⁸⁰ In the health sector, corruption manifests itself in the following areas: health facility construction, equipment and supply purchasing, pharmaceutical distribution and use, health worker education, falsification of medical research et cetera.⁸¹

High levels of corruption have been linked to weak health outcomes.⁸² Corruption in the health sector drastically reduces the availability of resources essential to health and lowers the quality, equity and effectiveness of healthcare services.⁸³ A survey conducted by the then Kenya Anti-Corruption Commission identified the procurement department and process as the most corrupt.⁸⁴

⁷⁸ 'Procurement corruption in the public sector and associated money laundering in the ESAAMLG Region, September 2019' Eastern and Southern Africa Anti Money Laundering Group, May 2021.

⁷⁹ E Mantzaris, 'Public procurement, tendering and corruption: Realities, challenges and tangible solutions' (2014) 7(2) *African Journal of Public Affairs* (2014) 67-79.

⁸⁰ Mantzaris, 'Public procurement, tendering and corruption: Realities, challenges and tangible solutions', 71.

⁸¹ T Vian 'Review of corruption in the health sector: Theory, methods and interventions' 23(2) *Health Policy and Planning* (2008) 94-98.

⁸² Karen Hussmann, *Health sector corruption; Practical recommendations for donors*, Chr. Michelsen Institute/Anti-Corruption Resource Centre (2020) 3.

⁸³ Karen Hussmann, *Health sector corruption*.

⁸⁴ KACC, 'Sectoral perspectives on corruption in Kenya'.

The Kenya Anti-Corruption Commission report identified corrupt practices within the health sector that are likely to impede the highest attainable standard of health.⁸⁵ The examples included manipulation of the tendering system, misappropriation of drugs and other supplies, procurement of sub-standard commodities and equipment, hoarding of supplies and inflation of prices, bribery, and embezzlement of funds, favouritism and misappropriation of procurement funds.⁸⁶

In 2012, the National Health Insurance Fund (NHIF) corruption saga revealed the depth of corruption in the health sector.⁸⁷ Millions of shillings released by the NHIF allegedly went down the drain.⁸⁸ In 2017, the US government suspended direct aid, worth \$21 million, to Kenya's Ministry of Health due to concerns over corruption.⁸⁹ Justifying this, the US Embassy said that it took the step because of the reports of corruption and weak accountability in the Ministry.⁹⁰ The Afya House scandal was based on an audit report that was leaked to the Kenyan media in October 2017. The audit showed that the Ministry had failed to account for 5 billion Kenyan shillings and diverted funds meant for free maternity.⁹¹ The Ministry of Health is clearly not in 'good health' because of this and other scandals that have plagued it.⁹²

Allan Maleche, the Executive Director of the Kenya Legal and Ethical Issues Network on HIV/AIDS (KELIN) stated:

We wish to draw the attention of the public to the fact that the Covid-19 billionaires scandal is not an isolated case of corruption in the health sector. For a long

⁸⁵ KACC, 'Sectoral perspectives on corruption in Kenya'.

⁸⁶ KACC, 'Sectoral perspectives on corruption in Kenya'.

⁸⁷ James Macharia, 'Kenya minister urged to resign over medical scam' *Reuters*, 8 May 2012.

⁸⁸ Macharia, 'Kenya minister urged to resign over medical scam'.

⁸⁹ Katharine Houreld, 'US suspends aid to Kenyan health ministry over corruption concerns' *Reuters*, 9 May 2017.

⁹⁰ Houreld, 'US suspends aid to Kenyan health ministry over corruption concerns'.

⁹¹ Houreld, 'US suspends aid to Kenyan health ministry over corruption concerns'.

⁹² Caroline Omari Lichuma, 'Economic wrongs and social rights: Analyzing the impact of systemic corruption on realization of economic and social rights in Kenya and the potential redress offered by the Optional Protocol to the International Covenant on Economic, Social Rights and Cultural Rights' *Transitional Human Rights Review* (2018) 63.

time, the health sector has been facing high instances of corruption which is negatively impacting on the realisation of the right to health. We are concerned that such corruption is robbing the country of critical funds meant to ensure citizens can access quality health services, vaccines for children, essential drugs for the vulnerable and marginalised, better health facilities, guaranteed healthcare personnel, quality health equipment and supplies, among others.⁹³

From the onset of the Covid-19 pandemic, select groups of businessmen locally and globally are turning their fortunes into Solomonic riches amid the gloom.⁹⁴ Innovators, manufacturers, contractors and e-commerce entrepreneurs are collectively sharing the biggest part of the Coronavirus billions.⁹⁵ *The Standard* revealed that when the Ministry of Health announced the spotting of the virus in the country, one state agency channelled close to Ksh. 2 billion to nine companies for the government's response to the pandemic.⁹⁶

Corruption violates the right to health in the public sector. In our public facilities, for instance, the right to health is violated when someone is required to pay a bribe to access health-care services which include access to medicine and medical treatment.⁹⁷

4.2 Lack of trust in KEMSA and its effect on HIV, Malaria and TB patients

Since July 2013, KEMSA has made significant progress in engaging with all the 47 counties under the model system of a KEMSA medical superstore, which involves mutually agreed Memoranda of Understanding (MoUs) and Service Level Agreements (SLAs).

⁹³ Kenya Legal and Ethical Issues Network on HIV/AIDS (KELIN), 'Corruption in the health sector is negatively affecting realisation of the right to health,' Press statement on 23 August 2020.

⁹⁴ Daniel Wesangula, 'Corona? What Corona? How businesses are making a kill amidst a pandemic,' *Sunday Standard*, 3 August 2020.

⁹⁵ Wesangula, 'Corona? What Corona? How businesses are making a kill amidst a pandemic'.

⁹⁶ Wesangula, 'Corona? What Corona? How businesses are making a kill amidst a pandemic'.

⁹⁷ 'Impact of corruption on specific human rights', *United Nations Office on Drugs and Crime* Module 7, 9 February 2022.

However, lack of integrity, transparency and corruption allegations may have cost Kenya Medical Supplies Authority (KEMSA) a contract with the United States Agency for International Development (USAID) hence denying 1.5 million HIV patients lifesaving drugs.⁹⁸ The United States Secretary of State Antony Blinken raised concern over corruption in KEMSA.⁹⁹ He averred that they had a positive obligation to taxpayers in terms of accountability and transparency.¹⁰⁰

USAID and KEMSA had a five-year contract for the procurement and supply of HIV, Malaria and family planning drugs which ended in 2020.¹⁰¹ The USAID asked the Global Health Supply Chain- Procurement and Supply Management-implemented by Chemonics and a consortium of partners to distribute the said drugs in Kenya instead of KEMSA. In 2020, KEMSA faced allegations of corruption and mismanagement of COVID-19 funds. The Cabinet Secretary (CS) of Health, Hon Muthahi Kagwe stated that USAID decided not to use the state corporation for the distribution of the HIV drugs because it did not trust KEMSA.¹⁰² Hon Kagwe insinuated that the Kenyan government was actively working to address USAID's 'lack of trust' in KEMSA by making changes in the organisation which would gain back trust from USAID and other donors.¹⁰³

The board of KEMSA led by chairman Kembi Gitura was grilled over their handling of procurement of drugs and other goods which were to be relied upon in addressing the Covid-19 situation.¹⁰⁴ Parliament undertook a parallel probe into the issue while the officials from the Auditor General had camped at the KEMSA offices. Jonah Manjari

⁹⁸ Angela Oketch, 'Kenya: Corruption cases cost KEMSA contract with USAID' *Daily Nation*, 29 April 2021.

⁹⁹ Oketch, 'Kenya: Corruption cases cost KEMSA contract with USAID'.

¹⁰⁰ Oketch, 'Kenya: Corruption cases cost KEMSA contract with USAID'.

¹⁰¹ Sara Jerving, 'Exclusive: USAID says no Kenya HIV medication deal' *Devex*, 22 April 2021.

¹⁰² Jerving, 'Exclusive: USAID says no Kenya HIV medication deal'.

¹⁰³ Jerving, 'Exclusive: USAID says no Kenya HIV medication deal'.

¹⁰⁴ Cyrus Ombati, Roselyne Obala, 'KEMSA board grilled at EACC offices over saga' *Sunday Standard*, 9 September 2020.

the Chief Executive Officer of KEMSA was suspended over the corruption saga.¹⁰⁵

5. Recommendations

There is need to ensure that there is transparency in the entire procurement process in the public health sector. Transparency in essence requires that the information in procurement decisions is publicly made available so as to allow prices paid for the same health product to be compared across a local, regional or national level and also to curb price gouging, price manipulation and overpayments. Data transparency can illuminate patterns of normal procurement behaviour and identify potential outliers indicative of overpayments, collusion, or kickbacks.¹⁰⁶

According to the WHO recommendations for Good Governance for Medicines (GGM) Programme which was launched in 2004, there is need for Kenya to implement anti-corruption laws governing the health sector, especially the pharmaceutical companies which are vulnerable to corruption. If the stakeholders in the health sector strictly comply with these laws, they will create accountability and transparency for the actions of the stakeholders within this sector because all the activities within will not only be monitored but also accounted for.¹⁰⁷

Various supervisory agencies should be incorporated to ensure strict compliance with stipulated administrative rules and regulations in conjunction with good governance and anticorruption measures. The whistle blowing mechanism will encourage the reporting of misconduct, fraud and corruption. However, this must be done by provision of effective protection for whistle-blowers in order to support a transparent organisational culture where employees are not only aware of how to report but also have assurance of protection in the reporting process. This will support smooth administration of the health sector.

¹⁰⁵ Ombati, Obala, 'KEMSA board grilled at EACC offices over saga'.

¹⁰⁶ South African Human Rights Commission, 'Access to health care'.

¹⁰⁷ DO Tormusa, and AM Idom, 'The impediments of corruption on the efficiency of healthcare service delivery in Nigeria' 12(1) *Journal of Health Ethics* (2016).

6. Conclusion

Poor governance and corruption negatively affect the provision of the highest standard of healthcare. Proactive mechanisms to detect corruption and the enforcement of negative sanctions against those found guilty of corruption are important interventions to create disincentives for engaging in corrupt activity. Alternative approaches, which include overarching common goals to motivate those who share a common vision and emphasising ethical values and decision-making, are equally important.¹⁰⁸ Corruption hurts health outcomes and it is the less privileged in the society that suffer the most.¹⁰⁹

¹⁰⁸ Laetitia C Rispel, Pieter de Jager, Sharon Fonn, 'Exploring corruption in the South African health sector' 31(2) *Health Policy and Planning* (2016) 239-249.

¹⁰⁹ Tormusa and Idom, 'The impediments of corruption on the efficiency of healthcare service delivery in Nigeria'.