

THE SHIF CONTROVERSY: UNPACKING THE 13 JUNE HIGH COURT'S VERDICT

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This determination by the High Court highlights the legal complexities surrounding SHIF. While the Court acknowledges valid concerns, it deferred substantive rulings due to ongoing appeals. The awaited Court of Appeal decision will be crucial in shaping the future of SHIF and determining whether the mandatory contributions and data transfer provisions are legally sound.

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A. BACKGROUND

The Social Health Insurance Act (SHIA) was enacted in October 2023, establishing the Social Health Insurance Fund (SHIF) under the Social Health Authority (SHA). The Act made it mandatory for all Kenyan citizens to register and contribute to SHIF, with deductions set at 2.75% of gross salary for employed individuals and 2.75% of household income for unemployed persons. Employers were required to enroll employees and deduct contributions, while NHIF members' personal data was automatically transferred to SHIF.

Concerns arose regarding the mandatory nature of registration and contributions, the automatic transfer of personal data from NHIF to SHIF, and the potential violation of constitutional rights, including privacy, equality, and property protection. There was also debate around the issue of double taxation, where deductions were made from gross income after income tax had already been applied.

Several petitions were filed challenging SHIA, questioning the legality of SHIF regulations and also contesting the constitutionality of SHIA. In the recently released High Court Judgment, the Petitioners sought to challenge the implementation of SHIA, arguing that it infringed on fundamental rights and freedoms.

B. ISSUE FOR DETERMINATION

The High Court was tasked with addressing several key legal questions in this petition:

1. Whether the Petition before the Court was sub judice – the Court had to determine whether the issues raised were already pending in other cases, and whether ruling on this petition would lead to conflicting judgments.
2. Whether mandatory registration and contributions under SHIA were constitutional.
3. Whether the 2.75% deduction from gross salary constituted double taxation.
4. Whether the automatic transfer of NHIF members' personal data to SHIF was lawful.
5. Whether SHIF contributions and benefits were discriminatory.

ARGUMENTS BY THE PETITIONERS



The Petitioners, four medical doctors, argued that SHIA violated fundamental rights and freedoms. Their key concerns included the mandatory registration and contributions, which they contended were unconstitutional. They argued that contributions should be voluntary, not imposed by law.

They also raised concerns about double taxation, asserting that the 2.75% deduction from gross salary was problematic because income tax had already been applied. They claimed that post-tax income is private property and should not be subjected to additional deductions.

Another major issue was the discrimination in the contribution structure. Salaried individuals contributed based on gross income, while unemployed persons contributed based on household income. This created inequality, as higher earners paid more but received the same benefits.

ARGUMENTS BY THE PETITIONERS continued..



The Petitioners also challenged the automatic transfer of personal data from NHIF to SHIF, arguing that it was done without consent and violated the Data Protection Act and the right to privacy. They contended that the government had no legal basis to transfer personal data without explicit approval from NHIF members.

Additionally, they argued that SHIF benefits did not match contributions, making it an inferior insurance scheme. They claimed that Kenyans were paying more but receiving lower premiums compared to private insurance. The Petitioners maintained that the government was effectively forcing citizens to fund healthcare services without ensuring equitable benefits.

ARGUMENTS BY THE RESPONDENT

The Attorney General, Ministry of Health, and SHA being the Respondents in the Petition defended SHIA, arguing that SHIF was essential for universal health coverage and was designed to pool resources and ensure equitable healthcare access. They maintained that contributions were necessary to sustain the system and ensure that all Kenyans could access healthcare services.

The Respondent's argued that mandatory contributions were lawful, stating that SHIA was enacted legally and contributions were not a tax but a healthcare financing mechanism. They cited the government's constitutional obligation to provide healthcare under Article 43 of the Constitution and maintained that SHIF was a necessary step towards achieving universal health coverage.



ARGUMENTS BY THE RESPONDENT continued ..

Regarding the automatic transfer of personal data, the Respondents asserted that it was authorized by Regulation 5 of the Social Health Insurance (Amendment) Regulations 2024. They argued that NHIF members had previously consented to data processing, making additional consent unnecessary. They maintained that the transition was necessary to ensure seamless access to healthcare services.

The Respondents also contended that the petition was premature, as similar issues were already being litigated in other Courts including the Court of Appeal. They urged the Court to wait for the Court of Appeal's ruling before making a decision, arguing that ruling on this petition could lead to conflicting judgments.



C. HIGH COURT'S DETERMINATION

The Court ruled that the Petition was sub judice, meaning that similar issues were already pending in the Court of Appeal and another in a High Court Petition. The Court ruled that ruling on the petition before it would risk conflicting judgments and that it was appropriate to defer to the Court's handling those matters. As a result, the petition was struck out without a substantive ruling on the constitutionality of SHIF.

However, the Court acknowledged that the Petitioner's concerns about double taxation were valid. The Court noted that deducting 2.75% from gross income after income tax amounted to double taxation, making it potentially unlawful. Despite this, the Court declined to issue a ruling, citing the pending cases that would ultimately determine the matter.

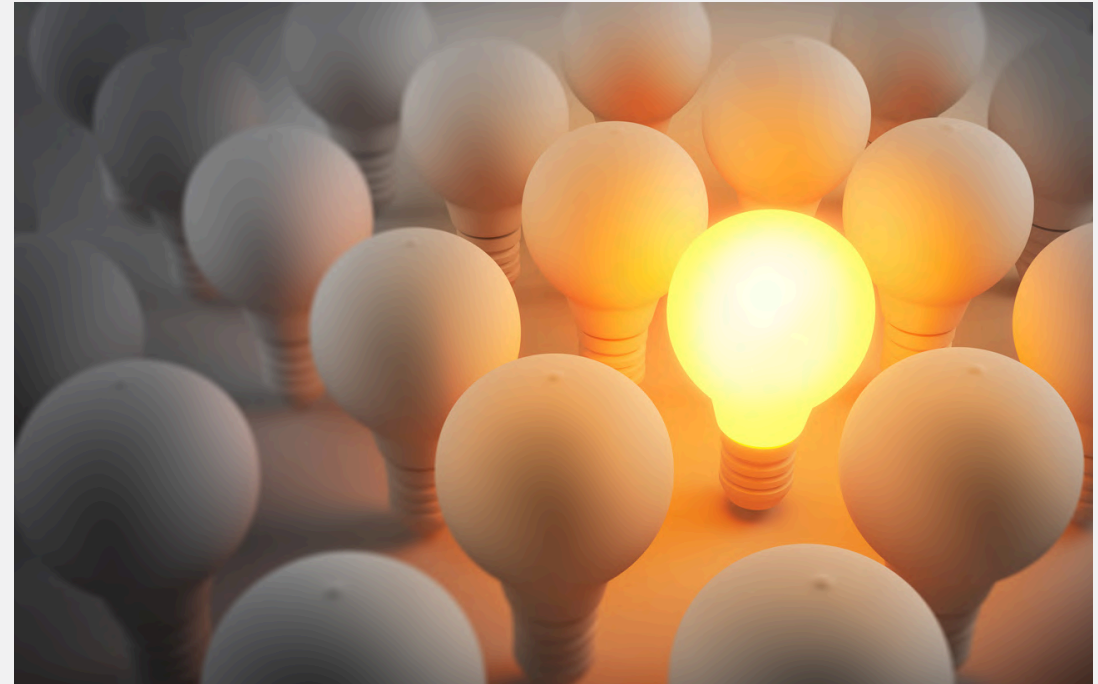


On the issue of data transfer, the Court found that the Petitioners had not demonstrated how the automatic transfer of NHIF data violated the Constitution. The Court upheld Regulation 5, which authorized the transition of NHIF members to SHIF, stating that the Petitioners had not provided sufficient evidence to prove that the transfer was unconstitutional.

D. CONCLUSION

The Government, Respondent in this Petition, maintains that SHIF deductions remain legally binding. However, many Kenyans argue that SHIF contributions are unfair, particularly for salaried workers who bear a heavier financial burden.

The Court of Appeal's ruling will ultimately determine whether SHIF remains constitutional or otherwise. If the Court of Appeal upholds the High Court concerns, the Government may need to revise SHIF regulations to address double taxation and privacy issues.



This determination by the High Court highlights the legal complexities surrounding SHIF. While the Court acknowledges valid concerns, it deferred substantive rulings due to ongoing appeals. The Court of Appeal's decision will be crucial in shaping the future of SHIF and determining whether the mandatory contributions and data transfer provisions are legally sound.

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