

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
PETITION NO. 3 OF 2010
IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER
SECTION-ARTICLE 22(1) OF THE CONSTITUTION OF THE REPUBLIC OF
KENYA
AND
IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTION
ARTICLES 28, 29, 51(1), 47(1), 39(1) AND 24(1) OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA
AND
IN THE MATTER OF THE PUBLIC HEALTH ACT, CHAPTER 242 OF THE
LAWS OF KENYA
BETWEEN
DANIEL NG'ETICH=====1ST PETITIONER
PATRICK KIPNG'ETICH KIRUI =====2ND PETITIONER
KENYA LEGAL & ETHICAL ISSUES
NETWORK ON HIV & AIDS (KELIN)=====3rd PETITIONER
AND
THE HON. THE ATTORNEY GENERAL=====1ST RESPONDENT
THE PRINCIPAL MAGISTRATE'S
COURT AT KAPSABET=====2ND RESPONDENT
PUBLIC HEALTH OFFICER NANDI CENTRAL DISTRICT
TUBERCULOSIS DEFAULTER TRACING
COORDINATOR=====3RD RESPONDENT
THE MINISTER FOR PUBLIC HEALTH
& SANITATION =====4th RESPONDENT
PETITION

{Pursuant to Article 22(1) of the Constitution of the Republic of Kenya and Rule 11 and 12 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006}

TO:

The High Court of Kenya at Eldoret

THE HUMBLE PETITION of DANIEL NGETICH, PATRICK KIPNG'ETICH KIRUI AND KELIN whose address of service for the purposes of this petition only is KELIN, KINDARUMA ROAD, OFF RING ROAD KILIMANI, P.O.BOX 112-00202, NAIROBI, KENYA, sheweth that:

INTRODUCTION

1. This matter is about the unconstitutional incarceration of two men in terms of Section 27 of the Public Health Act, Chapter 242 of the Laws of Kenya ("PHA" or "the Act") for "failure to adhere" to Tuberculosis ("TB") treatment. The Principal Magistrate's Court at Kapsabet ordered the two men to be incarcerated and isolated for 8 months or until the satisfactory completion of their TB treatment. The manner and conditions of the incarceration endangered the men's health and provided the ideal conditions for the rapid transmission of TB, thereby potentially placing the public at extremely high risk of infection.
2. This Honourable Court found that such incarceration was unconstitutional, not in compliance with the PHA and "the worst of choices" and ordered the release of the men. The Petitioners now approach this Honourable Court to

humbly pray for a declaration of rights, injunctive relief and an order for compensation.

3. The remainder of this Petition is structured as follows

- A. The Parties
- B. Factual and procedural background
- C. The Petitioners' interests
- D. **Summary of the Petitioners' claim and legal argument**
- E. **The nature of TB, the TB burden in Kenya and the personal and public health risks posed by detention of people with TB in prisons**
- F. **Particulars of unconstitutionality**
- G. **Relevant international law framework**
- H. **Relevant legislative and regulatory framework for TB prevention**
- I. **International and foreign policy on the involuntary confinement of individuals on TB treatment**
- J. **Your Petitioners' humble prayer**

THE PARTIES

4. The Petitioners are as follows:

- a) DANIEL NGETICH is an adult male of sound mind and a resident of Kiropket area in Nandi Central Ward within Nandi County and is the 1st Petitioner herein.
- b) PATRICK KIPNG'ETICH KIRUI is an adult male of sound mind and also a resident of Kiropket area in Nandi Central Area in Nandi Central Area Ward within Nandi County and the 2nd Petitioner herein.

- c) KENYA LEGAL & ETHICAL ISSUES NETWORK ON HIV & AIDS (KELIN) is a non-partisan, non-profit making and non-governmental organisation duly registered under the Non-Governmental Organisations Co-ordination Act 19 of 1990 and committed to the protection, promotion and enhancement of enjoyment of the right to health through public interest litigation, advocacy and law reform and the 3rd Petitioner herein.
5. The Respondents are named in terms of Article 21 and Article 156(4) of the Constitution of the Republic of Kenya, 2010:
- a) The 1st Respondent is the Attorney General of the Republic of Kenya and the Principal Legal Adviser to the Government and the person authorized by law to represent the Government in proceedings to which it is a party and is named in that capacity.
 - b) The 2nd Respondent is the Principal Magistrate at Kapsabet Law Courts and is named in that capacity.
 - c) The 3rd Respondent is the Public Health Officer – Nandi Central District Tuberculosis Defaulter Tracing Co-ordinator and an agent of the 4th Respondent and is named in that capacity.
 - d) The 4th Respondent is the Minister of Public Health and Sanitation, who is statutorily mandated to deal with matters relating to the management, prevention, control and the spread of TB and is named in that capacity.

FACTUAL AND PROCEDURAL BACKGROUND

6. On or about 13 August 2010, the 3rd Respondent arrested the 1st and 2nd Petitioners who were subsequently arraigned on allegations that they had failed to take TB medication prescribed to them.
7. The 3rd Respondent made an application (Principal Magistrate Kapsabet-Miscellaneous Application No. 46 of 2010) for a court order pursuant to the provisions of Section 27 of the PHA. The application sought the imprisonment of the 1st and 2nd Petitioners at the Kapsabet G. K. Prison for a period of eight months on the grounds that they had defaulted in taking their prescribed TB medication, and that such default had “exposed the general public of Kiropket area and their immediate families to the risk of tuberculosis infection”.
8. The 2nd Respondent issued a court order dated 13/8/2010 stipulating that the 1st and 2nd Petitioners “Shall be confined at Kapsabet G.K. Prison, in isolation for the purposes of Tuberculosis treatment for a period of 8 months or such period that will be satisfactory for their treatment”.
9. The 1st and 2nd Petitioners were subsequently confined pursuant to the court order at the Kapsabet G.K. Prison for a period of 46 days.
10. The 1st and 2nd Petitioners were incarcerated in abysmal conditions that violate fundamental constitutional rights and are entirely contrary to public health and the effective treatment of TB. These include:
 - A. The 1st and 2nd Petitioners slept on the floor of the cell for over a week. The prison authorities did not allow them blankets for the majority of the period of incarceration. After the prison authorities eventually gave

the 1st and 2nd Petitioners blankets, the prison authorities quickly took the blankets away again.

- B. The prison authorities did not provide the 1st and 2nd Petitioners with adequate food and nutrition as required for the successful treatment of TB.
- C. The prison authorities subjected the 1st and 2nd Petitioners to an unhygienic environment, thereby endangering their health and potentially that of the public.
- D. The prison authorities did not isolate the 1st and 2nd Petitioners as per the order of the Magistrate's Court, but rather confined them in a communal, dangerously overcrowded cell that is designed for 10 men but held over 50 at a time during the 1st and 2nd Petitioner's period of incarceration, thereby creating a serious potential threat to public health.

11. These actions and conditions constitute torture in terms of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which has been ratified by Kenya and thus forms part of Kenyan law in terms of Article 2(5) of the Constitution of the Republic of Kenya, 2010.¹

12. All of these actions and conditions are violations of the 1st and 2nd Petitioners' constitutional rights, impede the effective treatment of TB and place the public at risk of TB infection.

¹ Part 1 Article 1 of the convention provides: "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

The Petition to the High Court

13. The 1st and 2nd Petitioners subsequently approached this Honourable Court on [1⁴ September 2010 citing contraventions of Articles 51(1), 47(1) and 24(1) of the Constitution of the Republic of Kenya and alleging contraventions of their rights to movement and reasonable administrative action and also alleging that their detention was a continuing act in contravention of their fundamental rights.

The ruling of this Honourable Court

14. On 30 September 2010, The Honourable Judge P.M. Mwilu of this Honourable Court ordered the release of the 1st and 2nd Petitioners from confinement in prison “to their respective homes from where they will continue their treatment under the supervision of [the 3rd Respondent]”. This Honourable Court noted:

“It is, in my view, that the G.K. Prison was the worst of choices to confine the petitioners and the period of eight months is unreasonably long seeing that it was not backed by any medical opinion. Why were the petitioners not confined in a medical facility? Why a prison? What is their crime?”

This Honourable Court therefore found that:

“the action taken was unconstitutional and not even in compliance with the Public Health Act that it was purportedly grounded on.”

THE PETITIONERS' INTERESTS

15. The 1st and 2nd Petitioners act in their own interests as people having been wrongfully incarcerated for 46 days and subjected to torture in contravention of their constitutional rights and other rights. The 3rd Petitioner also acts in its own interest in that the judgment of this Court will have a major impact on its ability to achieve its core objective of the “protection, promotion and enhancement of enjoyment of the right to health”.
16. All three (3) Petitioners also act in the public interest in that the matter before this Honourable Court has extremely important implications for the health and constitutional rights of those receiving treatment for TB as well as for public health more broadly in that the act of imprisoning people with infectious TB creates a serious public health risk by placing detainees, prison employees, families and communities at high risk of infection.
17. The 3rd Petitioner conducts a number of activities in regard to the isolation and detention of people with TB. For example:
 - a. The 3rd Petitioner conducted a training workshop on community engagement and a rights based approach to the care of TB Patients on 20 to 22 March 2011 in Kapsabet , Nandi County.
 - b. On 23 March 2011, the 3rd Petitioner held a community dialogue forum on human rights and the effective control, management and care of TB and HIV in Kapsabet , Nandi County.
 - c. From 28 November to 1 December 2011, the 3rd Petitioner held a workshop to accelerate the implementation of isoniazid preventive treatment, intensified case finding for active tuberculosis and

tuberculosis infection control (the “three I’s principles”) in East Africa at the Sarova Panafric Hotel in Nairobi.

18. As demonstrated by the 3rd Petitioner’s extensive work in regard to the isolation and detention of people with TB, this issue is a core component and major priority of the 3rd Petitioner’s work. Moreover the 3rd Petitioner has manifestly demonstrated its desire to work with stakeholders through all reasonable means to prevent the imprisonment of people with TB and to develop a national policy that includes an effective and comprehensive TB prevention, diagnosis, treatment, care and support programme with a policy on the detention and isolation of people suffering from infectious TB in certain cases and under constitutionally defensible conditions. However, as discussed further below, the persistence by several Magistrate’s courts in ordering imprisonment for people that have not adhered to TB regimens has made it impossible for the 3rd Respondent to achieve these goals without enforcing the rights of people living with TB through the courts. For these reasons, the 3rd Petitioner is left with no other viable options but to approach this Honourable Court with the prayers described in part J of this petition.

SUMMARY OF THE PETITIONERS’ CLAIM AND LEGAL ARGUMENT

19. The ruling of this Honourable Court establishes that:

- a. Confinement in prison for the purposes of Section 27 of PHA is unconstitutional.
- b. Section 27 of the PHA does not contemplate confinement and isolation in prison and that therefore such confinement and isolation is in contravention of the Act.

- c. A period of eight months confinement is unreasonably long in that it is not “backed by any medical opinion”.

20. The 3rd Petitioner is alarmed that, despite the ruling from this Honourable Court, Magistrate’s courts continue to order imprisonment in terms of Section 27 of the PHA, often in cases with facts that are virtually identical to those of this case. For example:

- a. On 1 July 2011, the Senior Principal Magistrate’s Court at Kerugoya in Criminal Case No. 257 of 2011 “sentenced” Mr Simon Maregwa Githure “to serve six months imprisonment” at Gathirigiri G.K. prison in terms of Section 27 of the PHA for failing to adhere to his TB treatment despite this Honourable Court’s ruling..
- b. Again, on 22nd November, 2012, the Senior Principal Magistrate’s court at Naivasha in Criminal Case No. 3580 of 2012 ordered Mr Ezekial Karanja Mwangi to be detained and isolated in prison for nine months in terms of Section 27 of the PHA .

21. This is a small sampling of cases that have come to attention of the 3rd Petitioner. Moreover, the media continues to report similar cases frequently as we have shown in the List of Documents filed together with this Petition.

22. In sum, while the ruling of this Honourable Court is clear and has gone a long way toward ensuring that these violations should not recur, Public Health Officers continue to seek and Magistrate’s courts continue to give orders of imprisonment in terms of Section 27 of the PHA.

23. This practice is not only unconstitutional in terms of the findings of this Honourable Court, but, as shown in the affidavit in support of this Petition by Dr. Tobias Kichari, also creates a serious risk to the health of the individual and the public.

24. Every health authority is under an obligation in terms of Section 13 of the PHA to take:

“all lawful, necessary and, under its special circumstances, reasonably practical measures for preventing the occurrence or dealing with any outbreak or prevalence of any infectious, communicable or preventable disease, to safeguard and promote the public health and to exercise the powers and perform the duties in response of the public health conferred or imposed on it by this act or by any other law.”

25. The Minister of Health is empowered by Section 169 of the PHA to make rules for the purpose of carrying out of the purposes of the Act, but has not made any such rules to clarify the provisions of Section 27, which has serious implications on a number of constitutional rights, as expanded on below, and has been frequently applied in a manner so as to contravene these rights.

26. This Honourable Court is charged with the “fundamental duty” to “observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights” in terms of Article 21(1) of the Constitution of the Republic of Kenya, 2010. The High Court has jurisdiction to “hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights” in terms of Article 23(1) of the Constitution of the Republic of Kenya 2010.

27. This Honourable Court may moreover grant “appropriate” relief, including a declaration of rights, a conservatory order, an injunction, a declaration of the invalidity of a law and an order for compensation in terms of Article 23(3)(a-e) of the Constitution.

28. The Petitioners therefore believe and assert that it is necessary for this Honourable Court to confirm its previous finding that the confinement of people suffering from infectious diseases in prison facilities for the purposes of treatment under Section 27 of the PHA violates the Constitution of the Republic of Kenya, 2010 and any use of this provision to order such detention in prison is at all times unconstitutional.

29. Moreover, the on going recurrence of these violations despite of the ruling of this Honourable Court renders it necessary for:

- a. The 4th Respondent to issue a circular to all public and private medical facilities, public health officers and to the judiciary clarifying that:
 - i. Section 27 of the PHA does not authorise the confinement of persons suffering from infectious diseases in prison facilities for the purposes of treatment;
 - ii. People suffering from infectious diseases should never be imprisoned for the sole purposes of isolation and treatment; and
 - iii. Where a period of confinement and/or isolation is necessary for public health purposes, the period of such confinement should be no longer than absolutely necessary to ensure treatment adherence and the least restrictive means of ensuring adherence

should be used and that the period of isolation must be backed by medical opinion and should presumptively be no longer than two weeks after initiation on effective treatment or the period in which the person is infectious.

- b. The 4th Respondent to develop and implement a policy on involuntary confinement and isolation of individuals with infectious TB that is compliant with the Constitution of the Republic of Kenya, 2010 and incorporates international law, policy and best practice.

30. The 1st and 2nd Petitioners also seek an order that the 1st Respondent pay general and exemplary damages on an aggravated scale under Article 23 of the Constitution to the 1st and 2nd Petitioners for the physical and psychological suffering occasioned by their unlawful and unconstitutional confinement for 46 days.

THE NATURE OF TB, THE TB BURDEN IN KENYA AND THE PERSONAL AND PUBLIC HEALTH RISKS POSED BY DETENTION OF PEOPLE WITH TB IN PRISONS

The nature of TB

31. TB is an airborne communicable disease which spreads easily especially in confined, poorly ventilated and overcrowded environments. Bacteria known as mycobacteria tuberculosis cause pulmonary TB. Transmission occurs by the inhalation of the bacteria in droplets of sputum that are carried through the air when expelled from the lungs through breathing, coughing, spitting, sneezing or singing.

32. Not everyone infected with TB bacteria becomes sick. When a person has TB but is not symptomatic, he or she has 'latent' TB. When a person is symptomatic, he or she has active TB. Only active TB is infectious.
33. Most people who are exposed to and become infected by TB bacteria do not become sick because the immune system stops the TB bacteria from multiplying. This TB is latent and is not infectious; it cannot be spread to others. If the immune system is unable to suppress the bacteria and they become active, the bacteria multiply and the person will become sick with active TB.
34. People with active TB are infectious and can spread the bacteria to others; especially people who have weak immune systems or are confined in poorly ventilated and crowded spaces. This is why it is absolutely critical, from a medical and public health perspective, that infectious individuals should not be introduced to the prison environment.
35. Because people living with HIV may have weakened immune systems, especially if they are not provided with anti-retroviral therapy in combination with adequate nutrition, these individuals may be particularly susceptible to developing active TB. 93% of TB patients in Kenya know their HIV status. Of these, 39% are living with HIV. Moreover, the prison population has disproportionately high rates of people living with HIV. People living with HIV in prisons are at risk of lacking reliable access antiretroviral therapy and adequate nutrition and are therefore at particularly high risk of having compromised immune systems.

36. There are many strains of TB bacteria and different strains exhibit differing degrees of drug susceptibility:

- a. Drug-susceptible strains of TB can be effectively treated with a standard first line regimen of drugs. This treatment takes approximately 6 to 8 months. Once initiated on treatment, an individual typically only remains infectious for about two weeks.
- b. Multi-drug resistant TB strains (MDR TB) are resistant to the first line regimen of TB treatment and are therefore very difficult to treat. Treatment for MDR TB is considerably more expensive and commonly takes two years or more to complete. Success rates are much lower than with drug susceptible strains. In addition, the side effects of the drugs used to treat MDR TB are extremely harsh and include, for example, a considerable risk of permanent deafness amongst other equally serious side effects. MDR TB is often fatal.
- c. Extensively drug resistant strains of TB (XDR TB) cannot be treated with the standard first and second line of TB regimens. There is not effective treatment for these strains of TB. While some people with these strains of TB do achieve good treatment outcomes, for the most part, XDR TB is almost always fatal.

37. Infection with a drug-resistant strain of TB can occur in one of two ways. Prison conditions like those the 1st and 2nd Petitioners were exposed to facilitate both of these types of transmission.

38. First, a person can be infected with drug-susceptible TB, which can then develop into drug-resistant TB. This often happens due to treatment default or treatment that is unsuccessful for other reasons, after which the bacteria

develop resistance to the medicines previously used. Second, drug-resistant strains of bacteria can also be transmitted directly from one person to another. This type of transmission, known as “primary infection”, is becoming increasingly common.

39. As mentioned, only people with active TB are infectious. Once initiated on effective treatment, these people will no longer be infectious after approximately two weeks. Thus, there is no medical or public health justification for isolation of a person with TB after approximately two weeks of effective treatment, as these people can no longer spread the bacteria.

The TB burden in Kenya

40. Kenya suffers an exceedingly high burden of TB. It is amongst the 22 countries that collectively share 80% of all TB cases in the world. According to the World Health Organization (WHO), Kenya had 103,981 new, notified TB cases and 1,393 reported cases of MDR TB in 2011.
41. “Incidence” and “prevalence” are the perhaps the most commonly used and valuable quantitative indicators of the burden of disease in a country. “Incidence” is a measure of the rate at which a disease is transmitted in a population. “Prevalence” is a measure of the number of people in a population with a disease. According to the WHO, Kenya has one of the highest incidences of TB in the world at 288 per 100,000 people. Again according to the WHO, Kenya is also amongst the hardest hit in the world in terms of prevalence with a rate of 291 per 100,000 people.

The personal and public health risks posed by detention of people with infectious TB in prisons

Risks to personal health

42. The effective treatment of TB is dependant on reliable access to TB treatment, adequate nutrition and sufficient rest amongst other conditions. As with any health condition, stress, deprivation of nutrition or sleep, exposure to unhygienic conditions and the lack of family support impede recovery. There is no doubt that the conditions and torture to which the prison authorities subjected the 1st and 2nd Petitioners were not conducive to successful treatment and seriously endangered their health.

Risks to public health

43. Prisons are recognised internationally as having very high burdens of TB. Transmission is predominantly determined by contact between infectious and susceptible prisoners. TB is commonly the number one cause of death in prisons located in developing countries.²

44. The extremely high incidence rates in prisons are clearly caused by overcrowding, lack of ventilation and poor prevention practices.³ The high TB prevalence in prison populations is likely to be attributable to the fact that a disproportionate number of prisoners are from population groups already at high risk of TB infection and TB disease. These include, for example, alcohol

² See eg, Baussano I, Williams BG, Nunn P, et al. *Tuberculosis incidence in prisons: A systematic review*. PLoS Med 2010;7(12):e1000381. doi:10.1371/journal.pmed.100038 (internal citation omitted).

³ See eg Johnstone-Robertson et al. *Tuberculosis in a South African prison – a transmission modeling analysis*. (2011) 101 SAMJ

or drug users, people without homes, people with mental illness, former prisoners and mobile populations.⁴

45. A recent study of a large prison in South Africa showed that overcrowding in communal cells and poor TB case finding result in annual TB transmission risks of 90% per annum.⁵ In other words, nine out of ten people in prison for a period of one year will become infected with TB. The conditions prevailing in the prison that was the subject of that study are similar to those prevailing in the G.K. Prison, where the 1st and 2nd Petitioners were incarcerated.

46. In sum, this Honourable Court's finding that "G.K. Prison was the worst of choices to confine the petitioners" was absolutely correct from a medical and public health standpoint. Such confinement is not, as this Honourable Court put it, "in compliance" with the PHA, which provides for isolation and confinement for the purposes of "*guard[ing] against the spread*" of infectious diseases. Rather, imprisonment is directly counter to the purpose of Section 27 of the PHA in that it creates a serious risk to public health by creating the ideal conditions for the transmission of TB and *facilitating* rather than guarding against its spread.

PARTICULARS OF UNCONSTITUTIONALITY

47. The 1st and 2nd Petitioners' period of confinement overlapped the promulgation of the Constitution of the Republic of Kenya, 2010 (2010 Constitution). Therefore, the period of confinement after 27 August 2010 is governed in terms of the 2010 Constitution whereas the period prior to 27 August 2012 is governed by the Constitution of the Republic of Kenya, 1969

⁴ Ibid

⁵ Ibid

(1969 Constitution). The actions of the Respondents and the conditions of imprisonment to which the the 1st and 2nd Petitioners were subjected are contrary to a number of rights in both constitutions.

48. The prolonged confinement of the 1st and 2nd Petitioners in a prison with sentenced prisoners, in overcrowded conditions and without adequate food, while not charged, convicted or sentenced in respect of a crime, violated their rights to:

- a. Freedom from inhuman or degrading treatment or punishment under Article 74 of the 1969 Constitution, and freedom from cruel, inhuman or degrading treatment or punishment under Article 29(f) of the 2010 Constitution;
- b. Freedom and security of the person under Article 29(a) and (b) of the 2010 Constitution; and
- c. Their inherent dignity under Article 28 of the 2010 Constitution,

49. The prolonged confinement of the 1st and 2nd Petitioners in a prison such that their movements and activities were impeded violated their right to freedom of movement under Article 81 of the 1969 Constitution and Article 39 of the 2010 Constitution.

50. The prolonged confinement of the 1st and 2nd Petitioners such that they could not associate with their families and communities violated their right to freedom of association under Article 80 of the 1969 Constitution Article 36 of the 2010 Constitution.

51. The violations of the 1st and 2nd Petitioners' right to freedom from inhuman and degrading treatment were not capable of being justified by virtue of Article 74 of the 1969 Constitution or Article 25(a) of the 2010 Constitution and were therefore unlawful.
52. The violations of the 1st and 2nd Petitioners' right to freedom of association, freedom of movement, dignity, freedom and security of the person occasioned by their confinement by the Respondents were not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom under Article 24(1) of the 2010 Constitution and were therefore unlawful.
53. The Respondents were under an obligation to justify the confinement of the 1st and 2nd Petitioners as a reasonable and justifiable limitation on their rights that was in accordance with the law, legitimate and necessary, and the least restrictive reasonably available alternative.
54. The confinement of the 1st and 2nd Petitioners in a prison was unreasonable and unjustifiable and thus unconstitutional because it was not done in accordance with the law, was not necessary in the circumstances, was not legitimate and necessary, and was not the least restrictive reasonably available alternative.
55. The confinement of the 1st and 2nd Petitioners in a prison was not necessary to prevent their transmitting tuberculosis to others and in fact may have facilitated the transmission of TB to others if the 1st and 2nd Petitioners were infectious at the time of incarceration.

56. There is no evidence that the 1st and 2nd Petitioners were infectious and posed a risk of transmitting the disease to others. Medical evidence states that individuals whose tuberculosis is not infectious do not pose a risk to others such that there is no countervailing public interest in limiting their constitutional rights. Indeed, medical evidence states that confinement in conditions such as those prevailing at G.K Prison provides ideal conditions for the spread of TB and facilitates its transmission.

57. The lack of any rational nexus between the purposes of Section 27 of the PHA and the Respondent's actions taken against the 1st and 2nd Petitioners suggests that such actions were not taken in pursuance of the purposes of Section 27 of the PHA. This lack of a rational nexus between the purposes of Section 27 of the PHA and the actions taken may suggest discrimination against the 1st and 2nd Petitioners on the basis of health status.

58. There can be no doubt that the actions did not further the public health purposes of Section 27 and indeed were directly contrary to those purposes. These facts were known or should have been known to the 3rd and 4th Respondents. There can likewise be no doubt that imprisonment is a punitive sanction to be reserved for criminal offences.

59. The punitive nature of the 1st and 2nd Petitioner's imprisonment is especially apparent because the length of imprisonment in this case was seven and a half months longer than the period in which the 1st and 2nd Petitioners would be infectious if on treatment and two months longer than the entire course of treatment. The torture to which the prison authorities subjected the 1st and 2nd Petitioners was likewise punitive. The punitive nature of the imprisonment and torture of the 1st and 2nd Petitioners suggests animus against them. This

suggestion of animus and discrimination occurs in and is corroborated by the context of historical and prevailing stigma against people living with TB. The factual scenario of this case further corroborates the suggestion of discrimination, as it does not provide for any other rational explanation of the Respondent's actions.

60. This Honourable Court is therefore justified in concluding that the Respondent's actions constitute unconstitutional discrimination against the 1st and 2nd Petitioners on the basis of their health status in terms of Article 27(4) of the Constitution of the Republic of Kenya, 2010. This conclusion is suggested in the previous ruling of this Honourable Court, which asks, "Why were the petitioners not confined in a medical facility? Why a prison? What is their crime?"

61. The confinement of the 1st and 2nd Petitioners was not necessary to improve their treatment outcomes. The conditions of overcrowding, inadequate nutrition, inadequate infection control measures and separation from family support in Kapsabet G. K. Prison were not conducive to effective treatment and were inferior to conditions of community-based care. The 1st and 2nd Petitioners were also not given the information and opportunity necessary to cooperate meaningfully in a treatment plan.

62. The confinement of the 1st and 2nd Petitioners in a prison was not the least intrusive or restrictive reasonably available alternative. The Respondents failed to consider alternative voluntary forms of preventing the transmission of tuberculosis in a household setting. The Respondents failed to consider the inappropriateness of prison facilities for the purpose of isolating patients with

infectious diseases and failed to consider alternative places of confinement such as a residential dwelling, health facility or hospital.

63. The confinement of the 1st and 2nd Petitioners for a period of eight months was not the least intrusive or restrictive reasonably available alternative for two reasons. First, medical evidence states that people with active TB cease being infectious after approximately two weeks of treatment. Second, the entire course of treatment only takes six months.

RELEVANT INTERNATIONAL LAW FRAMEWORK

64. In terms of Article 2(5-6) of the Constitution of the Republic of Kenya, 2010:

“(5) The general rules of international law shall form part of the law of Kenya.” and;

“(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

65. The actions of the Respondents and the conditions of imprisonment to which the 1st and 2nd Petitioners were subjected are contrary to a number of international legal instruments ratified by Kenya, including the International Covenant on Civil and Political Rights (“ICCPR”) and the African Charter on Human and Peoples’ Rights (“ACHPR”). These include:

- a. Article 7 of the ICCPR and Article 5 of the ACPHR both provide that no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment;

- b. Article 9 of the ICCPR and Article 6 of the ACHPR both provide for the liberty and security of an individual adding that no one should be deprived of his / her freedom arbitrarily;
 - c. Article 10 of the ICCPR and Article 5 of the ACHPR both provide that in the event one is deprived of one's liberty, one shall be treated with respect and humanity;
 - d. Article 12 of the ICCPR and Article 12 of the ACHPR both provide for the liberty of movement of an individual;
 - e. Article 22 of the ICCPR and Article 10 of the ACHPR both provide for the freedom of association with others;
66. International law (to which Kenya must have regard under Article 2 (5) of the 2010 Constitution) makes clear that involuntary detention procedures to isolate and prevent infected individuals spreading infection to others must be proportionate and subject to a proper judicial assessment of the extent to which the measures in question can legitimately restrict individual liberties.
67. The United Nations Committee on Economic, Social and Cultural Rights has stated with respect to Article 12 of the International Covenant on Economic, Social and Cultural Rights (to which Kenya is a State Party) that restrictions on human rights for public health purposes must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society, in its General Comment 14, paragraph 28.

The United Nations Economic and Social Council has issued Principles on the Limitation and Derogation Provisions in the International Covenant on Civil

and Political Rights (the Siracusa Principles), which are the leading international framework for determining whether involuntary confinement for public health purposes is justified under the International Covenant on Civil and Political Rights (to which Kenya is a State Party). They provide that involuntary confinement for public health purposes will be legitimate only where: (a) The restriction is provided for and carried out in accordance with the law; (b) The restriction is in the interest of a legitimate objective of general interest; (c) The restriction is strictly necessary in a democratic society to achieve the objective; (d) There are no less intrusive and restrictive means available to reach the same objective; and (e) The restriction is based on scientific evidence and not drafted or imposed arbitrarily or in an unreasonable or otherwise discriminatory manner.

68. The United Nations Human Rights Committee has urged States Parties in its Annual Report 2009 to the International Covenant on Civil and Political Rights (to which Kenya is a State Party) to “ensure that any coercive measures arising from public health concerns are duly balanced against respect for patients’ rights, guaranteeing judicial review and patient confidentiality and otherwise ensuring that persons with tuberculosis are treated humanely.”

69. The World Health Organization Guidance on ethics of tuberculosis prevention specifies that it is only in rare instances, after all reasonable efforts to promote adherence have failed and the patient remains infectious, involuntary detention or detention may be considered. The guidelines emphasise that the isolation or detention should never be implemented as a form of punishment. They also stress that in the rare event when isolation or detention is used, it must take place in adequate settings with appropriate infection control measures.

RELEVANT LEGISLATIVE AND REGULATORY FRAMEWORK FOR TB PREVENTION

70. The PHA is the primary piece of legislation related to public health. Section 27 provides⁶:

“Where, in the opinion of the medical officer of health, any person has recently been exposed to the infection, and may be in the incubation stage, of any notifiable infectious disease and is not accommodated in such manner as adequately to guard against the spread of the disease, such person may, on a certificate signed by the medical officer of health, be removed, by order of a magistrate and at the cost of the local authority of the district where such person is found, to a place of isolation and there detained until, in the opinion of the medical officer of health, he is free from infection or able to be discharged without danger to the public health, or until the magistrate cancels the order.”

71. The Division of Leprosy, Tuberculosis and Lung Disease (DLTLD) Strategic Plan 2011 – 2015 (“Strategic Plan”) is the primary policy related to TB prevention and constitutes the nation’s plan for TB through 2015. The Strategic Plan does not call for isolation or confinement of people with drug susceptible TB in any circumstances.

72. Intervention J of sub-objective 6.5.1 identifies the refurbishment and maintenance of drug resistant isolation facilities. This indicates that isolation may be contemplated in some instances for people with drug resistant strains of TB. Other than this, isolation and confinement are neither called for nor

⁶ The Act was amended in 2012, Section 27 was not repealed or amended.

mentioned in the policy. The policy does however identify prisoners and prison warders as a special group that is “at higher risk of acquiring tuberculosis disease than the general population.” (Chapter 1.1)

73. Section 6.7 sub-objectives 1(G-J) identify several interventions specific to prisons and prisoners as a “special group” including improved TB screening, TB education in prisons, and the refurbishment of TB clinics and diagnostic services amongst others.

74. Section 6.15 sub-objective 5(g) calls for a baseline needs assessment for special groups including prisoners to be conducted.

75. Legislation and policy is to be interpreted in line with the Constitution and the duty to “observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of rights” in terms of section 21(1) of the Constitution.

76. It is apparent from Section 27 of the PHA read with the provisions of the Strategic Plan and the Constitution that there is a need for and policy makers intend for there to be a policy on the involuntary confinement of individuals with TB. Such policy must be compliant with the Constitution and, in the absence of national guidelines, should incorporate principles from international guidelines and guidelines in other jurisdictions.

INTERNATIONAL AND FOREIGN POLICY ON THE INVOLUNTARY CONFINEMENT OF INDIVIDUALS ON TB TREATMENT

77. Fortunately, there is ample guidance on best practice in this area from international authorities and foreign authorities. In order to provide this Honourable Court and the Respondents with reference for these policies, we draw attention to the policies from the WHO, the Centre for Disease Control and South Africa. South Africa, like Kenya, has an extremely high burden of TB and MDR TB and has developed a very advanced policy on the treatment of MDR TB from which Kenya can draw expertise. Both the WHO and the CDC are internationally recognised experts on health standards and policy.

- a. WHO Policy on TB Infection Control in Health-Care Facilities, Congregate Settings and Households provides for a rights based approach in dealing with TB patients both in the community and health settings.
- b. Prevention and Control of Tuberculosis in Correctional and Detention Facilities: Recommendations from CDC indicate that early identification of persons with TB disease through entry and periodic follow-up screening, successful treatment of TB disease and latent TB infection and appropriate use of airborne precautions would help in the management of TB.
- c. Multi-drug resistant tuberculosis: a policy framework on decentralised and deinstitutionalised management for South Africa gives a clear right based approach for dealing with TB. Detention in prisons for treatment is not recommended.

YOUR PETITIONERS HUMBLE PRAYER

78. Your Petitioners therefore humbly pray that

- a) This Honourable Court be pleased to issue a declaration that the confinement of the Petitioners at the Kapsabet G. K. Prison for the purposes of tuberculosis treatment, for a period of eight months, as ordered by the 2nd Respondent, was not authorised under Section 27 of the Public Health Act, Chapter 242 of the Laws of Kenya, and was therefore unlawful.
- b) This Honourable Court be pleased to issue a declaration that the confinement of the Petitioners at the Kapsabet G. K. Prison for the purposes of tuberculosis treatment, for a period of eight months, as ordered by the 2nd Respondent, violated the Petitioners' rights under Articles 74, 80 and 81 of the Constitution of the Republic of Kenya, 1969, and Articles 24, 25, 28, 29, 51(1), 47(1) 39(1) and 24(1) of the Constitution of the Republic of Kenya, 2010.
- c) This Honourable Court be pleased to issue a declaration that the confinement of patients suffering from infectious diseases in prison facilities for the purposes of treatment is a violation of their rights under Articles 74, 80 and 81 of the Constitution of the Republic of Kenya, 1969, and Articles 24, 25, 28, 29, 51(1), 47(1) 39(1) and 24(1) of the Constitution of the Republic of Kenya, 2010, and will not be a reasonable or justifiable limitation of these rights.
- d) This Honourable Court be pleased to order that the confinement of patients suffering from infectious diseases in prison facilities for the purposes of treatment under Section 27 of the Public Health Act, Chapter 242 of the Laws of Kenya violates the Constitution; and any use of this provision to order such detention in prison is at all times unconstitutional.
- e) This Honourable Court be pleased to order the 4th Respondent to issue a circular within 14 days to all public and private medical facilities and public

health officers clarifying that Section 27 of the Public Health Act, Chapter 242 of the Laws of Kenya, does not authorise the confinement of persons suffering from infectious diseases in prison facilities for the purposes of treatment and that the 4th Respondent inform the Court and the Petitioners in writing once the circular has been issued.

- f) The Court be pleased to order the 4th Respondent within three months to develop a policy on the involuntary confinement of individuals with tuberculosis that is compliant with the Constitution of the Republic of Kenya and incorporates principles from the international guidance on the involuntary confinement of individuals with TB.
- g) The Court be pleased to order the 1st Respondent to pay general and exemplary damages on an aggravated scale to 1st and 2nd the Petitioners for the physical and psychological suffering occasioned by their unlawful and unconstitutional confinement for 46 days.
- h) The Court be pleased to order the Respondents to pay the costs of this Petition.
- i) The Court be pleased to make such other order(s) as it shall deem just.

~~DATED~~ at Nairobi this ~~2nd~~ day of ~~September~~ 2010

AMMENDED at Nairobi this day of 2013

ALLAN ACHESA MALECHE
ADVOCATE FOR THE PETITIONERS

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