20 JUL 2015

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.329 OF 2014

BETWEEN

DANIEL NG'ETICH.....1ST PETITIONER

PATRICK KIPNG'ETICH KIRUI.....2ND PETITIONER

KENYA LEGAL & ETHICAL ISSUES

NETWORK ON HIV & AIDS (KELIN).....3RD PETITIONER

-VERSUS -

THE HON.ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPLES MAGISTRATE'S

COURT AT KAPSABET.....2ND RESPONDENT

PUBLIC HEALTH OFFICER, NANDI CENTRAL

DISTRICT TUBERCULOSIS DEFAULTER TRACING

CO-ORDINATOR.....3RD RESPONDENT

THE MINISTER FOR PUBLIC HEALTH & SANITATION.....4TH RESPONDENT

RESPONDENTS WRITTEN SUBMISSIONS

My Lady, the humble submissions of the Respondents.

The Amended petition dated 13th February,2013 is opposed by the Respondents. We have filed our Grounds of Opposition dated 16th June, 2015 and filed in court on 18th June, 2015.

The respondents fully rely on the contents of the Grounds of opposition.

My Lord the petition seeks *inter alia* the following orders;

1. This honourable Court be pleased to issue a declaration that the confinement of the petitioners at the Kapsabet G.K prison for the purposes tuberculosis treatment, for a period of eight months as ordered by the 2nd Respondent, was not authorized under Section 27 of the Public Health Act CAP 242 of the Laws of Kenya, and was therefore unlawful.

2. That 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 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.

3. 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 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.

4. 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 CAP 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.

5. 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 CAP 242 of the Laws of Kenya, does not authorize the confinement of persons suffering from infectious diseases in prison facilities for the purposes of treatment and that the 4th Respondent inform the court that the Petitioners in writing once the circular has been issued.

6. 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.

7. The court be pleased to order the 1st Respondent to pay general and exemplary damages on an aggravated scale to the 1st and 2nd Petitioners for the physical and psychological suffering occasioned by their unlawful and unconstitutional confinement for 46 days.

THE PETITIONERS CASE

The petitioners in this matter allege that their incarceration by the Court for failure to take their TB drugs in terms of Section 27 of the Public Health Act CAP 242 Laws of Kenya (hereinafter referred to as the Act) is unconstitutional. That the second Respondent ordered the two petitioners to be incarcerated and isolated for eight months or until the satisfactory completion of their TB treatment.

That the manner and nature 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.

The Petitioners have now filed the instant petition seeking various declarations of rights and orders for compensation for the alleged infringement of their constitutional rights.

THE RESPONDENTS CASE

My Lady, the Respondents oppose the Amended petition its entirety. We filed our Grounds of Opposition dated 16th June, 2015 on 18th June, 2015.

It is our submission that one of the major functions of the medical department in the 4th Respondents office is to promote the public health and the prevention, limitation or suppression of infectious, communicable diseases in Kenya subject to the salient provisions of the Public Health Act, CAP 242 Laws of Kenya.

The petitioners in the instant petition allege that the incarceration of the 1st and 2nd petitioners in terms of Section 27 of the Act for failure to adhere to TB treatment is unconstitutional. This is due to the fact that the 2nd Respondent ordered that the 1st and 2nd petitioners be isolated for 8 months or until the satisfactory completion of the TB treatment.

My Lady, the issue that therefore arises is whether the confinement of the 1st and 2nd petitioners at the Kapsabet G.K prison for a period of 46 days was/is not authorized under Section 27 of the Act.

It is not denied that the 1st and 2nd petitioners actually failed to adhere to treatment. The Respondents submit that the failure to take the prescribed drugs by the 1st and 2nd petitioners meant that they returned to the active TB infectious state and that they continued to interact, associate and mix with the general public in which case they could easily transmit the infection thereby interfering with the rights of others of enjoying the highest attainable standards of health.

We submit that Section 27 of the Act should be read together with Section 28 which states;

Section 27 of the Act reads; "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"

Section 28 of the Act reads; "Any person who— (a) while suffering from any infectious disease, willfully exposes himself without proper precautions against spreading the said disease in any street, public place, shop, inn or public conveyance, or enters any public conveyance without previously notifying the owner, conductor or driver thereof that he is so suffering; or (b) being in charge of any person so suffering, so exposes such sufferer; or (c) gives, lends, sells, transmits or exposes, without previous disinfection, any bedding, clothing, rags or other things which have been exposed to infection from any such disease, shall be guilty of an offence and liable to a fine not exceeding thirty thousand shillings or to imprisonment for a term not exceeding three years or to both; and a person who, while suffering from any such disease, enters any public conveyance without previously notifying the owner or driver that he is so suffering shall in addition be ordered by the court to pay such owner and driver the amount of any loss and expenses they may incur in carrying into effect the provisions of this Act with respect to disinfection of the conveyance: Provided that no proceedings under this section shall be taken against persons transmitting with proper precautions any bedding, clothing, rags or other things for the purpose of having the same disinfected."

My Lady, from a reading of Section 27 and 28 of the Act, we humbly submit that the law is very clear that persons like the 1st and 2nd petitioners while suffering from diseases like TB must be accommodated in such a manner as to adequately guard against the spread of the disease, if not properly accommodated in a manner that will stop the disease then the person can be put in isolation and there detained until he finishes the medication or until the order is vacated by the Magistrate.

Section 28 further provides for penalties for exposure of infected persons and things and we humbly submit that the 1st and 2nd petitioners knowing very well that they were suffering from TB, willfully exposed themselves to the public without proper precaution since they were not in their homes when the medical team that was supervising their treatment visited them to administer the medicine.

Section 28 of the Act is therefore very clear on the punishment that such persons should get and it provides that they are guilty of an offence and liable to a fine not exceeding Thirty Thousand shillings(30,000/=) or to imprisonment for a term not exceeding three years or to both.

My Lady, it is clear that the 1st and 2nd petitioners were guilty of an offence under the Act and the 2nd Respondent sentenced them to imprisonment for eight months or until the satisfactory completion of their TB treatment. It is our submission that the trial magistrate was very lenient to the 1st and 2nd petitioners by sentencing them to prison for 8 months or until the satisfactory completion of their TB treatment without imposing a fine on them and/or imprisoning them for the maximum period of time allowed in law.

It is against this backdrop that we submit that even though there were less restrictive means to achieve the Respondents objective, the same could not work since the 1st and 2nd petitioners failed to adhere to the less restrictive means. For instance they were supposed to report to hospital everyday for the purposes of taking their medication which they failed to abide by. Second option was to take medication at home being supervised by the agents of the 3rd respondent under the program called "directly observed treatment" which they also failed to observe despite the fact that they were taken through proper education on the need to adhere to treatment before being put on measure number one (Hospital treatment) and measure number two (home based treatment) and lastly the last legal compulsive approach of confinement in a G.K prison facility.

We therefore humbly submit that the confinement of the 1st and 2nd petitioners at the Kapsabet G.K prison for a period of 46 days was in public interest, legal and allowed by the Act.

We therefore humbly submit that the alleged confinement of the 1st and 2nd petitioners at the Kapsabet G.K prison was not a violation of their rights in any manner under Sections 74, 80 and 81 of the 1969 Constitution and Articles 24, 25, 28, 29, 51(1), 47(1), 39(1) and 24(1) of the Constitution of Kenya as alleged by the petitioners.

My Lady, the petitioners in their submissions rightly state that it is the duty of the court to interrogate policy and decision and ensure that it is consistent with the Bill of Rights. We submit that the respondents decision to detain the 1st and 2nd petitioners for their default in taking medication was well within the provisions of the Act and cannot be said to have violated the Bill of Rights. Confinement in the G.K prison in our humble view was the last resort since the respondents were dealing with people who were hell bent in exposing their families and the wider public to the dangerous TB virus. My Lady, we further submit that the petitioners have not produced any evidence to prove that the 1st and 2nd petitioners were not isolated while in prison and this honourable court must close its ears to such allegations that are unsubstantiated.

My Lord, in Law, if a party seeks to rely on a fact he bears the burden to show that the fact exist and that the law is clear to the extent that he who alleges must prove. The Evidence Act CAP 80 at Section 107 provides that;

"107. (1). Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

Further Section 109 of the same Act provides;

"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in it's existance, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The allegations of violations of constitutional rigthts by the 1st and 2nd petitioners have been outrightly controverted by the respondents. It is therefore incumbent upon the petitioners to prove on a balance of probabilities that the allegations they have brought before this Honourable Court are true. As stated by Justice Nyamu, as he then was, in **Constitutional Petition No.128 of 2006, Lt Col. Peter Ngari Kagume & Others-Vs- Attorney General.**

"When a court is faced by a scenario where one side alleges and the rival side disputes, the one alleging assumes the burden to prove the allegation..."

It is our humble submission that no evidence has been produced by any of the petitioners to prove these allegations of torture while at the Kapsabet G.K prison. The 1st and 2nd petitioners have not tendered any evidence or presented anyone, including their fellow inmates if any to corroborate their allegation that they were indeed incarcerated in a crowded cell.

My Lady, courts of law such as the Surbordinate court are empowered to make right and wrong decisions but cannot be said to have violated provisions of the Constitution by making a wrong interpretation of the Law including the Constitution. Odunga J in ***Republic-vs-Business Premises Rent Tribunal & 3 Others Ex-Parte Christine Wangari Gachege[2014]Eklr*** the learned Judge found as follows

"...and so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior courts or tribunals is necesarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its excercise...even if it were alleged that the commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a Magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and their is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction...

In Jasbir Singh Rai & 3 Others-Vs-Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003, Omolo JA stated as follows;

"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way..."

My Lady, where the court is alleged to have made a decision contrary to the text and spirit of the Constitution the remedy lies in appealing, reviewing, revision or in

appropriate instances judicial review proceedings, the decision cannot be said to be unconstitutional provided it is made with jurisdiction. Mumbi Ngugi J in ***Nation Media Group Limited-vs- Kamlesh Mansuklal Damji Pattni & 2 Others [2013]Eklr*** stated thus;

"...counsel for the applicant argues that the applicant has the option of seeking review or stay from the subordinate court, of appealing to the High Court, and of contemporaneously seeking orders from a court in this division of the High Court. It must be emphasized, as it has been emphasized in numerous cases before, that this division is simply a division of the High Court. It does not have powers superior to those exercised by other divisions of the High Court. See in this regard the decision of the Court of Appeal in ***Peter Nganga Muiruri-Vs-Credit Bank Limited & 2 Others Court of Appeal Civil Appeal No. 203 of 2006****....Consequently, any power that a court in this division has to deal with a constitutional issue is the same power that another division of the High Court which is seized of the applicant's appeal has. If, therefore, the orders of the subordinate court are unconstitutional in their effect, the court seized of the appeal has the same power as this court to so pronounce.*

Secondly, the applicant wishes to have this court declare the orders of the lower court unconstitutional. Mr. Imende submits on its behalf that the situation in this case is different from say, the situation in the case of ***Robert Mwangi & Others-Vs- Shepherd Catering and Others High Court Petition No. 84 of 2012****. His reasoning is that in that case, the orders in question had been issued by a High Court, unlike in the present case where they were issued by a subordinate court. In my view, the basic principle is the same. If another Division of the High Court issues an order which a party considers unconstitutional, the party's options would be to seek a review from that Court, or appeal to the Court of Appeal. It cannot come to the Constitutional Division seeking a declaration of unconstitutionality from that court.*

Similarly, a party dissatisfied with the substance or merits of an order of a subordinate court, but is not alleging procedural impropriety, cannot seek declarations of unconstitutionality from this court. Its options lie in review or appeal. I would agree with the sentiments expressed by the ***Privy Council in the case of Maharaja-Vs- The Attorney General of Trinidad& Tobago(1979) 385, at page 399,*** where it observed as follows:

"In the first place, no human right or fundamental freedom recognized by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was an error. The fundamental human right is not to a legal system that is infallible but one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by Section 1(a); and no mere irregularity in procedure is enough, even though it

goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice."

In the circumstances of the present case, the Principle Magistrates Court at Kapsabet was the court of 1st instance so that the 1st and 2nd petitioners have an opportunity to take their grievance to the next tier of the judicial process to have the decision reviewed. The respondents can rightly state that until there is a final determination of the issue after the appellate process the respondents cannot be said to have acted unconstitutionally since the decision of the Principal Magistrate's court is not the final interpretation of the matter in issue.

My Lady, courts are empowered to make right and wrong decisions and where a court has given a wrong interpretation of the Constitution or any law it cannot be said to have acted unconstitutionally but to have made an error in law.

Justice Majanja in ***Pauline Cherono Kones & Anor-Vs- The Chief Magistrate's Court & Anor. High Court Petition No 254 of 2013(unreported),*** observed as follows;

"Although this court has wide jurisdiction under Article 165(6) and (7) of the Constitution, this jurisdiction is not intended to take away the ordinary jurisdiction of the subordinate courts or supplant it. The subordinate courts are entitled to make certain decisions which if there is an error, the normal appellate procedure will apply"

My Lady, we therefore humbly submit that the 1st and 2md petitioners petition must not succeed since they opted to allege violation of constitutional rights due to the decision of the 2nd respondent instead of applying for its review or appealing the same to the High Court and as such the instant petition is neither regular nor competent to address their grievance against the decision of the Subordinate court.

My Lady, on issue number three as per the petitioners submissions on whether the 1st and 2nd petitioners should be awarded general and exemplary damages on aggravated scale by the 1st respondent for physical and psychological suffering occasioned by their unlawful and unconstitutional confinement for 46 days we submit that damages of any nature must not issue since we have demonstrated that none of the 1st and 2nd petitioners constitutional right was infringed upon as alleged or at all.

This honourable court is guided by law in its endeavor to serve justice to both parties in this petition and this therefore means that the constitutional provisions and the relevant law must guide this honourable court. My Lady, earlier on in our submissions we quoted the provisions of the Evidence Act CAP 80 Laws of Kenya on the issue of proving the existence of facts. The 1st and 2nd petitioners allege that they are entitled to general damages for the psychological suffering, torture and inhuman and degrading treatment occasioned to them during their unlawful and unconstitutional confinement.

My Lady, the aforementioned allegations of torture and inhuman treatment are not proved by any tangible evidence. It has not been stated whether the 1st and 2nd petitioners ever visited any doctor or medical facility to help them overcome the alleged torture in the G.K prison. It is therefore our humble submissions that these wild and baseless allegations leveled against the respondents by the 1st and 2nd petitioners must not succeed without evidence.

My Lady, the petitioners further submit that this honourable court should compel 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 Act does not authorize 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.

We humbly submit that the executive arm of Government and more specifically the 4th respondent is very much aware of the situation obtaining in relation to the treatment on TB in Kenya, it is the role of the executive to formulate policies and the petitioners cannot therefore purport to direct the executive on the policies to formulate and within what timelines to deliver the said policies.

Further, the circular cannot issue since the Act at Section 28 is very clear that a person who willfully exposes himself to the public while suffering from an infectious disease is guilty and should be fined and/or imprisoned.

CONCLUSION

My Lady, in conclusion we humbly submit that the 1st and 2nd petitioners committed offences that are known in law and that they were given a chance to be heard by the trial court. We have demonstrated that if the 1st and 2nd petitioners were aggrieved by the order of the 2nd respondent then their only way out of the issue was to appeal or apply for review and not seek constitutional declarations as in the instant petition.

There has been a steady increase in the number of TB patients in Kenya particularly since the 1990's. This rising number of TB cases poses a major threat to the health and economy of this country. The case notification rate has steadily increased from 54 per 100,000 people in 1991 to 320 per 100,000 people in 2004. The peak age group for both genders in 2004 was 25-34, the economically productive and sexually active age group with a male female ration of 1.4. The annual increase in TB case notification rate is about 16%. The World Health Organization that only 47% of the TB cases are being detected in Kenya, indicating that the remaining 53% undetected cases continue to transmit TB.

My Lady, in this region, TB is the most common opportunistic infection for people living with HIV infection normally an entry to comprehensive care and treatment.

It is against this backdrop that we submit that persons who knowingly mingle in public knowing very well that they can transmit the TB virus should be restrained as provided by the Act if they fail to adhere to other options that include home and hospital treatment since they are a danger to the society in general. The respondents settled on restraining the 1st and 2nd petitioners in a G.K prison since they had failed to take their medicine when they were under treatment at home and in the hospital and the only way to ensure that they took their medication was incarcerating them.

If TB treatment is defaulted it is likely to lead to Multidrug resistant TB (MDR) and Extra Multi Drug Resistant TB (XMDR) which are very difficult and expensive to treat. This would create danger to the general population if the individuals were allowed to mix and interact freely with the public. In the instant case the 1st and 2nd petitioners had become difficult to convince to take medicine.

My Lady, in conclusion we submit that the instant petition is misconceived due to the fact that the allegations made by the petitioners against respondents are baseless and unsupported with evidence and we pray that the same be dismissed with costs.

DATED at **NAIROBI** this ....14th.....day of .....July.....2015

E. Obura
Litigation Counsel
FOR: THE HON. ATTORNEY GENERAL

DRAWN & FILED BY:
The Hon. Attorney General,
Attorney General's Chambers,
Sheria House,
Harambee Avenue,
P.O Box 40112-00100,
NAIROBI.

TO BE SERVED UPON:
Allan Achesa Maleche,
Kenya Legal and Ethical Issues Network on HIV & AIDS
Mombasa Road, Somak Building (Next to Airtel)
4th Floor,
P.O Box 112-00202,
NAIROBI.