REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 329 OF 2014

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF 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

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SUBMISSIONS FOR THE AMMENDED PETITION DATED 16 FEBRUARY, 2013

My Ladyship,

The Petitioners make these Submissions in support of their Amended Petition dated 13 February, 2013 which is now before this Honourable Court. We equally rely on all the affidavits sworn in support of the amended petition.

Brief Statement of facts:

On or about 13 August 2010, the 3rd Respondent arrested the 1st and 2nd Petitioners who were subsequently arraigned in Court before the 2nd Respondent on allegations that they had failed to take TB medication prescribed to them. 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 Public Health Act. 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".

The 2nd Respondent issued a court order dated 13 August, 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". Pursuant to that order, the 1st and 2nd Petitioners were confined at the Kapsabet G.K. Prison for a period of 46 days.

The 1st and 2nd Petitioners claim that they were incarcerated in abysmal conditions that violated their fundamental Constitutional rights and are entirely contrary to public health and the effective treatment of TB. The rights that were violated include:

A. The 1st and 2nd Petitioners slept on the floor of the cell for over a week. The prison authorities did not provide them with 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.

The 1st and 2nd Petitioners subsequently approached the High Court of Kenya sitting in Eldoret on 14 September, 2010 citing contraventions of Articles 51(1), 47(1) and 24(1) of the Constitution of the Republic of Kenya, alleging contravention 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. On 30 September, 2010, The Honourable Judge P.M. Mwilu of the Honourable Court ordered the release of the 1st and 2nd Petitioners from confinement in prison "to their respective homes from where they were to continue with their treatment under the supervision of [the 3rd Respondent]".

Issues arising for determination

The issues for determination are framed as follows:

1. Whether the confinement of the 1st and 2nd Petitioners at the Kapsabet GK Prison and of TB patients for purposes of TB treatment, for a period of 8 months was/ is not authorised under Section 27 of the Public Health Act, Chapter 242 of the Laws of Kenya.

2. Whether the confinement of the 1st and 2nd Petitioners at the Kapsabet GK Prison and of TB patients for purposes of TB treatment for a period of 8 months violated/ violates their rights under Articles 24(1), 25,28,29, 51(1), 47 (1) and 39 (1) of the Constitution of Kenya.
3. 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.
4. Whether the Court should compel the 4th Respondents 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.
5. Whether the Court should compel the 4th Respondent to develop a policy on the involuntary confinement of individuals with tuberculosis, within three months, 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.
6. Costs of the suit.

My Lady, we discuss each of the issues of determination as follows:

<u>Issue No. 1</u>

Whether the confinement of the 1st and 2nd Petitioners at the Kapsabet GK Prison and of TB patients for purposes of TB treatment, for a period of 8 months was/ is not authorised under Section 27 of the Public Health Act, Chapter 242 of the Laws of Kenya.

My Lady, it is our submission that section 27 of the PHA herein the 'act', did not authorise the 2nd respondent to confine the 1st and 2nd petitioners at the Kapsabet (G.K)

prison for a period of 8 months. We further submit that given the lack of authority the decision by the 2nd Respondent was unlawful.

Section 27 of the PHA states as follows:

> *"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."*

This Court's ruling dated 30 September, 2010 in the same matter stated:

> *"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 as it is not backed by any medical opinion. Why were the prisoners not confined to a medical facility? Why a prison? What is their crime?"*

The above dicta is indicative that the means chosen by the 2nd Respondent were inappropriate for the ends sought to be achieved. Isolation in terms of section 27 of the act is not intended to be punitive but is a measure sought to ensure good order in public health, by isolating an individual that may be at risk or risking the health of others. Therefore, confining the 1st and 2nd petitioners in a prison is not logically connected to the purpose of section 27 as can be seen from the plain text of the provision. The Court was thus correct in finding that a G.K Prison is the worst possible choice as it does not meet the requirements of the section.

Further to the above your Ladyship is that the Prisons Act Cap 90 of the Laws of Kenya does not envision isolation, there is no mention of isolation or a place of isolation in the legislation and therefore, there is no legislative guarantee that a prison would have the infrastructure to isolate any individual.

Finally, your Ladyship we request that guidance is taken from the World Health Organization's (WHO) "Guidance on ethics of tuberculosis prevention, care and control"[1]. The Guidance on involuntary detention and isolation state as follows:

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[1] The Guidance is available at http://whqlibdoc.who.int/publications/2010/9789241500531_eng.pdf

"If, in a rare individual case, a judgement is made that involuntary isolation or detention is the only reasonable means of safeguarding the public, it is essential to ensure that the manner in which isolation or detention is implemented complies with applicable ethical and human rights principles. As set forth in the Siracusa Principles (32), this means that such measures must be:

- *in accordance with the law;*
- *based on a legitimate objective;*
- *strictly necessary in a democratic society;*
- *the least restrictive and intrusive means available; and*
- *not arbitrary, unreasonable, or discriminatory.*

These principles are not just legal obligations; they also reflect important ethical values. Other ethical values, such as reciprocity, should also be respected."

Your Ladyship, we submit that the confinement of the 1st and 2nd Petitioners in Kapsabet G.K Prison failed to meet the above requirements because it was not authorised by law; it was not based on a legitimate objective; it was not strictly necessary; it was not the least restrictive means and was highly intrusive; and finally it was arbitrary as it did not take cognisance of the nature of the diseases and its spread and unreasonable because confinement was for a much longer time than the disease is communicable.

In the case of *ECHR 2005/7 Case of Enhorn v Sweden, 25 January 2005, no. 56529/00. Second Section* the Court in examining whether the deprivation of the applicant's liberty amounted to "the lawful detention of a person in order to prevent the spreading the infectious diseases", it was called upon to establish which criteria are relevant when assessing whether such a detention is in compliance with the principle of proportionality and the requirement that any detention must be free from arbitrariness. The Court found that the essential criteria when assessing the 'lawfulness' of the detention of a person "for the prevention of the spreading of the infectious diseases" are **whether the spreading of the infectious disease is dangerous to public health or safety, and whether the detention of the person infected is the last resort in order to prevent the spreading of the disease, because lees severe measures have been considered and found to be insufficient to safeguard the public interest. When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist.**

In his concurring opinion, Justice Costa noted that **"systematic confinement of persons capable of spreading infectious diseases would turn them into outcasts;**

this would be an unacceptable step backwards in terms of human rights, which are founded on the principle of freedom and responsibility of the human being. It is acceptable only for limited periods ("quarantine"), where the disease is curable, as in the case of tuberculosis ..."

Issue No. 2

Whether the confinement of the 1st and 2nd Petitioners at the Kapsabet GK Prison and of TB patients for purposes of TB treatment for a period of 8 months violated/ violates their rights under Articles 24(1), 25,28,29, 51(1), 47 (1) and 39 (1) of the Constitution of Kenya.

My Ladyship, we submit that confinement of the 1st and 2nd Petitioners in Kapsabet G.K Prison was a violation of their rights under Articles 74, 80 and 81 of the 1969 Constitution and 24, 25, 28, 29, 51(1), 47(1), 39(1) and 24(1) of the 2010 Constitution.

My Lady, we discuss both the former and current Constitutions because the 1st and 2nd Petitioner's period of confinement fell under two Constitutional regimes.

My Lady, for the purposes of convenience the rights falling under both Constitutions shall be discussed together and we shall utilise sub-titles.

Article 74 of the Constitution, 1969 and Article 25(a) and 29(f) of the Constitution, 2010

My Lady, we submit that confinement of the 1st and 2nd Petitioner to Kapsabet G.K Prison for a period of 8 months amounted to cruel, inhuman and degrading treatment or punishment which is contrary to Articles 74 and 29(f) of the 1969 and 2010 Constitutions respectively. Additionally, the confinement is contrary to Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the African Charter on Human and People's Rights (ACPHR) which both provide that no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 74 and Article 29(f) of the 1969 and 2010 Constitutions respectively protect the individual from inhuman or degrading treatment or punishment. This in accordance with Article 25(a) of the 2010 Constitution is a freedom that may not be limited. Given that the freedom cannot be limited there can be no reasonable and justifiable circumstances to impose such treatment.

The South African Constitutional Court in *S v Makwanyane and Another*[2] was faced with the challenge of defining "inhuman and degrading treatment or punishment" while debating the constitutionality of the death penalty. To this effect the Court held that:

> *"It is also an inhuman punishment for it "...involves, by its very nature, a denial of the executed person's humanity", and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state. The question is not, however, whether the death sentence is a cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is a cruel, inhuman or degrading punishment within the meaning of section 11(2) of our Constitution. The accused, who rely on section 11(2) of the Constitution, carry the initial onus of establishing this proposition"*[3]

The above dictum gives guidance on how a court should interpret the phrase "inhuman and degrading treatment of punishment". The courts should not be limited to ordinary meaning of the words but should be guided by the meaning of these words in the context of the Constitution of Kenya (2010).

In the case of the ***Republic v Minister For Home Affairs and Others ex parte Sitamze*** **[2008] 2 EA 323**, Justice Nyamu, citing various authorities stated that:

> *"The provisions of section 74(1) of the Constitution of Kenya are echoed in Article 7 of the International Covenant on Civil and Political Rights, 1966, (ICCPR) which states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. ..... Torture means 'infliction of intense pain to the body or mind; to punish, to extract a confession or information or to obtain sadistic pleasure. It means infliction of physically founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to elicit, matters of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest. It is a deliberate inhuman treatment causing very serious and cruel suffering. "Inhuman treatment" is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.'*

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[2] 1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.
[3] Supra at para 26.

With the given interpretation of inhuman treatment, which can be described as physical and mental cruelty that serves to endanger one's life we submit that confinement for the purpose of section 27 of the PHA amounted to a violation of the freedom from inhuman and degrading treatment. As is evident from the affidavits of the 1st and 2nd petitioners the treatment they received while in the Kapsabet G.K Prison was nothing short of inhuman. They were placed in overcrowded cells, denied blankets and proper nutrition. These actions could have potentially endangered their lives and the lives of their fellow prisoners in the same cells.

Article 80[4] of the Constitution, 1969

My Lady we submit that the 1st and 2nd Petitioners confinement is a limitation on their right to freely associate with other persons as envisioned by Article 80 of the Constitution and Article 22 of the ICCPR and Article 10 of the ACHPR both provide for the freedom of association with others.

My Lady, we submit that while protection of public health is an important government interest on which the state is entitled, within certain limits. Thus, Section 25 of the Siracusa Principles on the Limitation and derogation of Principles in the International Covenant on Civil and Political Rights states that:

> *Public Health may be invoked as a ground for limiting rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population.* ***These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.*** *(Emphasis added)*

In this case, and based on the sworn affidavits of the 1st and 2nd Petitioners, the measure taken to incarcerate them at the Kapsabet GK Prison, was not aimed at preventing the spread of TB but to punish them.

Article 81[5] of the Constitution, 1969 and Article 39(1)[6] of the Constitution, 2010

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[4] This Article states: "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests."

[5] "Protection of freedom of movement.
(1) No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.
(2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section."

[6] "Every person has the right to freedom of movement."

Your Ladyship we submit that, Article 80 of the 1969 Constitution and Article 39(1) of the 2010 Constitution both guarantee the freedom of movement within Kenya. These are read with 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.

We further submit that in terms of 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

Your Ladyship, on the significance of the right to movement we rely on dicta in ***Ndegwa V. R [1985] KLR 534*** which discussed the right to movement as envisioned in the 1969 Constitution:

> *"No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration."*

The Court in *Kenya Anti-Corruption Commission v Deepak Chamanlal Kamani & 4 others* [2014] eKLR developed the dicta above expounding on the content of the right:

> *"The freedom of movement has four facets; free movement throughout the country; residence in any part of Kenya, to leave and return to Kenya and immunity from expulsion from Kenya. This right may be limited by a lawful detention or in the interest of defence, public safety or order, public morality, public health or where a person has been found guilty of a criminal offence or for purpose of ensuring that he appears before a court at a later date for trial of such criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or lawful removal from Kenya."*

We submit that the 1st and 2nd Petitioner's freedom of movement was limited in that they were confined in a prison and were unable to leave for the length of their sentence. We also submit that their confinement was not lawful as it was not in the interests of public health to confine them in a G.K Prison with other prisoners who would then be exposed to TB, further the length of confinement far exceeded what was necessary for the 1st and 2nd Petitioners' infections to stop being communicable.

Article 28 of the Constitution of Kenya (2010)

My Lady, we submit that confinement of the 1st and 2nd Petitioner to Kapsabet G.K Prison for a period of 8 months failed to take cognisance of the dignity of the Petitioners and amounts to a limitation of Article 28.

Human dignity is tied to the self-worth of a person being alive is one thing but having a life worth living is another; a prisoner about to be executed is dead before they get to the electric chair in the same vein a person with no dignity or humanity is dead even before they start living.[7]

The most important aspect of human dignity is the fact that every single person is an end in themselves this means that each of us exists for a reason. It is important to realise that using another person as a tool towards another achievement and only seeing them as such tool is denying their humanity. Confining the Petitioners to prison served them no benefit as the conditions were untenable and unlikely to encourage their health and well-being. Therefore the only reasonable conclusion is that they were confined for to protect the public health and they were being used as a means to justify an end. We submit that the 1st and 2nd Petitioners were used as tools to ensure public health by confining them to a prison, there was no consideration of their health and well-being when the period of confinement was imposed. This was in blatant disregard of their humanity and as such limited their right to human dignity.

My Lady, in the United States Supreme Court case of *Furman v Georgia*[8] Brennan J when discussing arbitrariness of punishment held that:

> *"In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the [Cruel and Unusual Punishments] Clause - that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others."*[9]

My Lady, we submit that punishment must comport with human dignity. In ensuring dignity the state must not arbitrarily inflict a severe punishment. In this case we submit the 2nd Respondent arbitrarily inflicted a severe punishment. The length of time for confinement was 8 months this is longer than it takes to complete treatment and significantly, it is 7 and a half months longer than is necessary for a person to stop being infectious. Therefore we submit that the period of 8 months is arbitrary, severe and does not comport with the 1st and 2nd Petitioner's right to human dignity.

My Lady, we submit that confinement of the 1st and 2nd Petitioners was a limitation of their right to human dignity. We further submit that the limitation is not in accordance

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[7] M C Nussbaum (1999) *Sex and Social Justice* USA: Oxford University Press
[8] [1972] USSC 170; 408 US 238
[9] Supra at para 274

with Article 24(1)[10] of the Constitution and it thus amounts to a violation of their right to human dignity.

Article 47(1)[11] of the Constitution of Kenya (2010)

My Lady, we submit that confinement of the 1st and 2nd Petitioners was contrary to their constitutionally guaranteed right to fair administrative action. In *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR which positively referred to dicta in *Minister of Health and Another v Treatment Action Campaign*[12] the Court held that:

> *"Article 47 provides that, "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." It is the duty of the court to interrogate the policy and where it is inconsistent with the provisions of the Bill of Rights or the fundamental values in the Constitution to declare that policy inconsistent with the Constitution. As was stated by court in Minister of Health and Others v Treatment Action Campaign and Others (2002) 5 LRC 216, 248; "The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself."*

Your Ladyship, the dicta in *Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others* [2014] eKLR is also instructive on the application of Article 47(1):

> *"It is now trite that there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. This Court is empowered to interfere*

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[10] Article 24(1) states: "A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

[11] "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

[12] (2002) 5 LRC 216

with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable."

Your Ladyship, we submit 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 2nd Respondent failed to interrogate whether or not his decision to detain the 1st and 2nd Petitioners was consistent with the Bill of Rights. Section 27 of Public Health Act gives Magistrate discretion to isolate a person that is in default of their TB medication. We submit that this discretion was exercised in a manner that frustrates the purpose of the Act because confinement in a G.K Prison did not only put the 1st and 2nd Petitioner at risk it did not meet the public health requirements of isolation in the course of treatment. Therefore, we submit that this honourable Court will be entitled to intervene due to the improper exercise of a discretion.

Article 51(1) of the Constitution of Kenya (2010)

My Lady, we submit that the confinement of the 1st and 2nd Petitioners failed to meet the requirements of Article 51(1) of the Constitution. Article 51(1) of the Constitution, 2010 provides for the rights of a detained person and it states:

"A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned."

Your Lady, the dicta in *Lee v Minister of Correctional Services*[13] the Court enunciated the following principle:

"That there is a duty on Correctional Services authorities to provide adequate health care services, as part of the constitutional right of all prisoners to "conditions of detention that are consistent with human dignity",119 is beyond dispute. It is not in dispute that in relation to Pollsmoor the responsible authorities were aware that there was an appreciable risk of infection and contagion of TB in crowded living

[13] [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC)

circumstances. Being aware of that risk they had a duty to take reasonable measures to reduce the risk of contagion."[14]

Kenya like South Africa has a Constitutional regime that respects fundamental rights even those ascribed to detained persons. Similarly, both countries suffer from overcrowded prisons and limited resources to reverse this situation. Therefore, your Ladyship, we submit that the conditions in which the 1st and 2nd Petitioners were held in which is discussed in details above are not in conformity with those required for a prisoner in the care of the State as enunciated by the dicta above.

Article 24[15] of the Constitution of Kenya (2010)-Limitations Clause

My Lady, as seen above we submit that the confinement of the 1st and 2nd Petitioner was a limitation of their rights and freedoms as articulated above. We submit that in accordance with Article 24(3) the onus shifts on the State to justify that limitation. We further submit that the State shall not meet this burden on the basis of principles enunciated by this Court in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2014]eKLR which held:

> *"I am guided and as can be seen from our Bill of Rights and specifically in the limitation Clause at Article 24, the constitution expressly contemplates the use of a context-sensitive form of balancing. To my mind therefore, the Court in applying the limitation clause must consider the nature and importance of the right and the extent to which it is limited, and whether such limitation is justified in relation to the purpose, importance and effect of the provision which results in the limitation. With that approach in mind,*

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[14] Supra at para 59.

[15] Article 24 of the Constitution states as follows:
"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right or fundamental freedom;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—
(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation
(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied."

"I am guided and as can be seen from our Bill of Rights and specifically in the limitation Clause at Article 24, the constitution expressly contemplates the use of a context-sensitive form of balancing. To my mind therefore, the Court in applying the limitation clause must consider the nature and importance of the right and the extent to which it is limited, and whether such limitation is justified in relation to the purpose, importance and effect of the provision which results in the limitation. With that approach in mind, I will be able to gauge whether the actions of the Respondents and Interested Party infringe on the Petitioner's fundamental rights. If the answer is in the affirmative, then I must consider whether the Respondents' actions can be justified or upheld upon the basis of the general limitation under Article 24."

The above case cited with approval the following dictum in *S v Manamela and Another* (2000) (5) BCLR 491 (CC):

"In essence, the Courts must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values protected...Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness."[16]

My Lady, we submit that taking into account the following—

a) importance of the individual rights discussed;
b) the need to ensure public health;
c) the nature and extent of the confinement in a G.K Prison;
d) the need to ensure that the 1st and 2nd Petitioners' individual rights do not infringe upon the right to health of the general public; and
e) significantly the availability of less restrictive means such as isolation in a medical facility.

The confinement of the 1st and 2nd Petitioner in Kapsabet G.K Prison for a period of 8 months amount to an unreasonable and unjustifiable limitation of their rights of: liberty and freedom of movement; freedom and security of the person; freedom of association; fair administrative action; detained persons and human dignity.

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[16] *S v Manamela* at para 32.

Issue No. 3

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.

The Petitioners have clearly demonstrated to the court that the 1st and 2nd Petitioners indeed suffered psychologically because of their arraignment in court and subsequent incarceration at the Kapsabet GK Prison for 46 days.We submit therefore that the 1st and 2nd Petitioners are entitled to general damages for the psychological suffering, torture and inhuman and degrading treatment occasioned to them during their unlawful and unconstitutional confinement.

The 1st and 2nd Petitioners further seek exemplary damages for the violation of their rights by the acts of the Respondents who are state agents. In the case of *Koigi Wamwere v The Attorney General (2012) eKLR,* this Court in deciding whether or not to award exemplary damages had this to say:

> *There is a divergence of opinion in our courts on whether or not exemplary damages should be awarded in addition to general damages for unconstitutional action. While Justice Musinga has in the case of* ***Cornelius Akelo Onyango & Others -v- AG MC Petition No. 223 of 2009 (unreported)*** *awarded exemplary damages based on the court's decision in the case of* ***Obonyo v Kisumu Municipal Council (1971) EA 91****, this court shares the view expressed by Majanja J in the case of* ***Benedict Munene Kariuki and 14 Others -v- The Attorney General High Court Petition No. 772 of 2009*** *that-*
>
> *In my view, these cases under Section 84 of the Constitution are cases concerning the Constitution. It is unnecessary to consider the element of "unconstitutional action" when the relief is awarded for unconstitutional conduct.....the issue of "unconstitutional action" was an additional factor and the court would consider in awarding exemplary damages.*

My Lady, we submit that the incarceration of the 1st and 2nd Petitioners amounted to Psychological torture which violated their constitutional rights and therefore should be awarded general and exemplary damages. My lady we further submit and in reliance of the cases of Simon *Kamere vs. The Attorney Genera and 2 Others (EKLR)*, *Samuel Muchiri W'Njunga vs. The Attorney General HCCC no 838 0f 2003* and*Caleb Gwahono Nanganers vs. The Attorney General HCCC No. 134 of 1998* that the court be persuaded to award the 1st and 2nd Petitioner the sum of Kshs 3,000,000 each for

general damages and the sum of Ksh 2,000,000/= each as exemplary damages. The afore mentioned cases dealt adequately with the issues of unlawful arrest, wrongful imprisonment and malicious prosecution. In the **Gwahona case,** the court set out the principle to be applied in awarding punitive or exemplary damages, and this is that

"--- the party to be subjected to this should be shown to have been reckless and outrageously negligent or has misconduct himself in such a manner as to attract punishment in damages."

Your ladyship we also rely on decision from the high court of Uganda who have dealt with similar issues of unlawful arrest and detention. In **Newman vs Attorney General (1988-1990) HCB 2009** general damages of shs 3,000,000/= were awarded for unlawful detention of 12 days; while in **APIRE MICHAEL VS ATTORNEY GENERAL, HC.C.S. NO.92 of 2004**, Judgment delivered on 28.06.2007, general damages of shs 8,000,000/= were awarded for unlawful arrest and detention of four (4) months and one day. Considering all the circumstances of this case court awards shs 2,000,000/= general damages for unlawful detention and mistreatment for nine days i.e. 16.04.1995 to 24.04.1995 at Gulu Central Police station

We submit your lady that we have been able to sufficiently demonstrate the recklessness, the outrageousness and negligence of the public health officers in arresting the 1st and 2nd petitioner with regard to the due process of the law and science with regards to dealing with person who have infectious diseases.

Issue No. 4

Whether the Court should compel the 4th Respondents 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.

My Lady, we submit that despite the ruling of this Honourable Court that, 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.

In *Prakash Singh & Ors vs Union Of India And Ors*the Supreme Court of India delivered a historic judgment instructing central and state governments to comply with a set of seven directives laying down practical mechanisms to kick-start police reform. The Court held that:

> *"Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of Rule of Law; (iii) pendency of even this petition for last over ten years; (iv) the fact that various Commissions and Committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the stage has come for issue of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the State Governments pass the requisite legislations."*

My Lady, we submit that the present case meets the criteria and there can be no further wait. Magistrates continue to imprison persons to fulfil the objectives of section 27 despite the ruling of this Court. That these persons are even before the courts indicates a lack of awareness amongst health officials of the judgment of this Court. We submit that it is indeed a grave problem; the actions are contrary to the rule of law; and that in the years since the ruling of this Court appropriate steps have not been taken to ensure compliance. Therefore, we submit that a circular from the Ministry of Health stating that confinement in prison for the purpose of section 27 of the PHA is unconstitutional is warranted and should be ordered.

Issue No. 5

Whether the Court should compel the 4th Respondent to develop a policy on the involuntary confinement of individuals with tuberculosis, within three months, 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.

My Lady we submit that the unintentional consequences of imprisonment for the purpose of section 27 of the PHA are caused by a lack of proper guidance from the Executive.

My Lady, in the matter of *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others (Muthurwa Estate)*[17] Justice Lenaola held:

> *"Before I do that, I must lament the widespread forced evictions that are occurring in the country coupled with a lack of adequate warning and compensation which are justified mainly by public demands for infrastructural developments such as road bypasses, power lines, airport expansion and other demands, Unfortunately there is an obvious lack of appropriate legislation to provide guidelines on these notorious evictions. . . . It is on this basis that it behoves upon me to direct the Government towards an appropriate legal framework for eviction based on internationally acceptable guidelines. These guidelines would tell those who are minded to carry out evictions what they must do in carrying out the evictions so as to observe the law and to do so in line with the internationally acceptable standards. To that end, I strongly urge Parliament to consider enacting a legislation that would permit the extent to which evictions maybe carried out. The legislation would also entail a comprehensive approach that would address the issue of forced evictions, security of tenure, legalization of informal settlements and slum upgrading. This, in my view, should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in **Articles 9** and **10** of the **Constitution.**"*

Justice Lenaola found that due to the widespread eviction it was necessary to direct the Government towards an appropriate legal framework based on internationally acceptable guidelines. My Lady we submit that this dicta is informative in this case, it is necessary that the Executive, Ministry of Health, be directed to develop a policy on involuntary confinement of persons with TB, so as to guide public and private health officials in a murky area in which there is so little guidance and information. This policy should as suggested by Justice Lenaola be based on international

[17] Petitions No. 65 of 2010.

acceptable guidelines and should espouse the national values of inclusiveness, as enumerated in Article 10, by encouraging public participation.

Issue No. 6

Costs of the suit.

My Lady, costs follow the event, however, this is a matter brought to Court in the Public Interest and we shall therefore rely on the decision of the Learned Judge Justice Odunga in *Republic v Medical Practitioners and Dentist Board & 3 Others Ex Parte Kenya Hospital Association (2014) eKLR* while quoting his brother Majanja J in *Amoni Thomas Amfry and another v Minister for Lands and Another, Nairobi High Court Petition No. 6 of 2013*, the court held:

"In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a properunderstanding of the law in question without private gain should not be deterred from adopting a cause that is beneficial to the public for fear of coats being imposed. . . . However, the vital factor in setting the preference, is the judiciously exercised discretion of the court accommodating the special circumstances of the case, while being guided by the ends of justice....."

My Lady, we submit that the Court exercises this discretion in deciding on the issue of costs.

Any other relief

My Lady, with regard to issues 4 and 5 we request that guidance is taken from the crafting of the order in the *Muthurwa Case*, where Justice Lenaola crafted his order with timelines whereby the Respondents were required to file affidavits that allowed the Court to monitor compliance with its ruling. We submit, that in this matter such order may well be necessary to ensure compliance within a reasonable period of time and to guarantee that another ruling of this Court does not go unnoticed. We further submit that the 4th respondent should be directed to file an affidavit within four months of the judgement to appraise the honourable court on the progress made on this matter.

These are our humble submissions.

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