



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 329 OF 2014

BETWEEN

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

PATRICK KIPNG'ETICH KIRUI2ND PETITIONER

KENYA LEGAL AND ETHICAL ISSUES NETWORK

ON HIV AND AIDS (KELIN).....3RD PETITIONER

VERSUS

THE HON. ATTOORNEY 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 AND SANITATION.....4TH RESPONDENT

JUDGMENT

Introduction

1. This petition relates to the constitutionality of certain actions taken against the petitioners purportedly pursuant to section 27 of the **Public Health Act** (hereafter "**the Act**"). The provision has been used by public health authorities to have persons who have infectious diseases, notably tuberculosis (hereafter "**TB**"), and have defaulted in the treatment of the diseases, arrested, charged and confined to prison on the orders of a Magistrate's Court. The petitioners argue that the use of the provisions of the Act to have them committed to prison for the purposes of treatment amounts to a violation of their constitutional rights including the right to dignity, the right to freedom from torture and other cruel and degrading treatment, and the right to freedom of movement.

2. The 1st and 2nd petitioners, **Daniel Ng'etich** and **Patrick Kipng'etich Kirui** describe themselves as adult males of sound mind and residents of Kiproket area in Nandi Central Area in Nandi County. The 3rd petitioner, **Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN)** describes itself as a non-governmental organisation registered under the Non-Governmental Organization Co-ordination Act No. 19 of 1990, committed to the protection, promotion and enhancement of enjoyment of the right to health through public interest litigation, advocacy and law reform.

3. The petitioners have filed the instant petition against the **Attorney General** (hereafter "**AG**") of the Republic of Kenya, who is the principal legal adviser to the Government; the **Principal Magistrate at Kapsabet Law Courts**, the **Public Health Officer, Nandi Central District Tuberculosis Defaulter Tracing Co-ordinator**, and the **Minister in charge of Public Health and Sanitation** as the 1st - 4th respondents respectively.

Background

4. The events giving rise to the petition occurred on or about 13th August, 2010, when the 1st and 2nd petitioners were arrested by the 3rd respondent. They were then charged in court before the 2nd respondent on the allegation that they had failed to take the TB medication prescribed to them. In **Misc App No 46 of 2010**, the 3rd respondent applied before the Principal Magistrate Kapsabet for orders for the imprisonment of the 1st and 2nd petitioners pursuant to section **27 of the Public Health Act**. The Court issued an order dated 13th August, 2010 for the confinement, in isolation, of the 1st and 2nd petitioners at the Kapsabet G.K Prison for the purposes of TB treatment. The confinement was to be for a period of 8 months or such period as would be satisfactory for their treatment. The two petitioners were as a result confined at the Kapsabet G.K Prison for a period of 46 days.

5. Pursuant to an application made on behalf of the petitioners in **Eldoret High Court Petition No 3 of 2010**, the High Court (Mwilu J, as she then was) on 30th September 2010, ordered the release of the petitioners, to their respective homes from where they would continue their treatment under the supervision of the 3rd respondent. In ordering the petitioners' release, the court observed that their incarceration was unconstitutional and not even in compliance with the Public Health Act. She also observed that the G.K Prison was the worst of choices to confine the petitioners, and the period of eight months was unreasonably long given that it was not backed by any medical opinion. It is against this background that the petitioners filed the present petition in the High Court in Eldoret, from which the matter was transferred, by consent of the parties, to the Constitutional and Human Rights Division in Nairobi in May 2014.

6. In their Amended Petition dated 15th February 2013, the petitioners seek the following orders:

- 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 authorized 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 Article 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 purpose 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.*
- 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 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.*

7. The factual basis of the petition, that is that the 1st and 2nd petitioner, as well as other persons who were infected with TB and were required to undergo a course of treatment but had defaulted on the treatment, were arrested and confined to prison for the purposes of treatment, is not in dispute. Such persons, according to the petitioners, include four other cases in Kiambu and Nyeri, and a case from the High Court in Embu in **Misc Criminal Application No 24 of 2011** which had been handled by Muchelule J. What is at issue is the constitutionality and legality of such confinement, whether such confinement is the best means of ensuring that persons with infectious diseases follow the required course of treatment, and whether there are other means by which the state can ensure that such persons follow the prescribed course of treatment and thus do not pose a risk of infection to the general public.

The Petitioners' Case

8. The petitioners' case is set out in three affidavits sworn by Mr. Daniel Ng'etich, Mr. Allan Achesa Maleche, the Executive Director of KELIN, and a third by Dr. Tobias Kichari, a medical doctor, all sworn on 15th February 2015. Mr. Maleche also swore a supplementary affidavit on 30th October, 2014.

9. Mr. Ng'etich's deposition sets out the conditions to which he and the 2nd petitioner were subjected to following their confinement in prison. He avers that they slept on the floor of the cells for over a week without bedding and were only issued with a blanket after KELIN intervened, but that the blanket was

later taken away by the prison wardens. He deposes further that while they were given medication in prison, they were not given a balanced diet as is required for TB patients on medication.

10. It is also his deposition that they were held together with approximately fifty other prisoners in a room that should ordinarily hold ten inmates, thus it was extremely difficult for them to sleep and move around.

11. In his affidavit, Mr. Maleche deposes that in confining the 1st and 2nd petitioner to prison, no precaution was taken to avoid the spread of TB as was intended. He echoes the averment by the 1st petitioner that the petitioners were held together with other inmates at the Police Station and the prison. While in the courtroom, the 1st and 2nd petitioner were not isolated but shared the courtroom with the general public. It was his contention therefore that even though the purpose of arrest, conviction and detention of the petitioners was to prevent them from spreading the disease to third parties, the actions of the 2nd and 3rd respondents did not reflect that.

12. Mr. Maleche further deposed that the actions of the respondents against the petitioners were excessive and punitive and violated the constitutional threshold of reasonableness. Further, it was his contention that the 1st and 2nd petitioners were subjected to acts which were humiliating, degrading, discriminatory, inhuman and which amounted to psychological torture, and which were violations of their constitutional rights.

13. He averred that under section 27 of the Public Health Act, prison facilities are not envisaged as the place of isolation for purposes of TB treatment as prisons do not have places for isolation, nor do they have health facilities. Further, that the convictions of TB patients to prison poses a threat to the rest of the prison population as they are at risk of being infected since the cells are not properly ventilated and the prisons are overcrowded, which amounts to a violation of the right to health of prisoners. It was his view that a prison, which is well known for its uncleanness, cannot be the best alternative institution to hold such person when they are already sick.

14. Mr. Maleche further deposes that while section 27 of the Public Health Act broadly describes the conditions under which an individual can be detained, there is little guidance on the procedures to be adopted, and neither are there safeguards to access legal representation or request judicial review as is required by international law.

15. It was averred further on behalf of KELIN that the correct procedure stipulated under the section was not followed before the confinement of the petitioners. No certificate signed by a medical officer of health was presented to the Magistrate's Court; there is no evidence to show that the two petitioners were tested to ascertain which state of the disease they had and whether at that point they were infectious, as it was important to ascertain the category of TB they had and the level of threat, if any, that they posed to the public in order to justify the compulsory confinement measures; and the public health threat that the 2nd and 3rd respondents asserted as the basis for the restrictive measures should have been demonstrable.

16. Mr. Maleche deposed that the petitioners were not challenging the importance of section 27 of the Public Health Act. Their argument, on the contrary, was that the place of detention for purposes of protecting members of the public from infection should be health facilities/settings rather than prisons. This is because prisons in Kenya do not have isolation cells, and the available cells are shared by more than ten inmates and are not properly ventilated. In addition, it was their case that the **Prisons Act, Cap 90 Laws of Kenya**, does not provide for facilities of isolation of prisoners or any other persons. Further, that the Prisons Act only provides for prisoners who have been convicted for committing criminal acts and not those persons seeking medical attention or treatment.

17. It was the petitioners' case therefore that the measures employed by the 2nd and 3rd respondents are contrary to the internationally recommended TB Patient's Charter which spells out the rights and responsibilities of TB patients.

18. The petitioners further highlighted, in the supplementary affidavit sworn by Mr. Maleche, recent cases in which several persons infected with TB have been arrested, charged, convicted and incarcerated in different prisons in the country. Mr. Maleche cited such cases as including **Republic vs Anthony Wambari Wachira, Nyeri Resident Magistrate, Criminal Case No. 486 of 2014; Ministry of Health vs Elijah Waweru Njuguna, Kiambu Chief Magistrate Court, Criminal Case No. 1212 of 2014; Ministry of Health vs Peter Gatabaki Mundati (deceased), Kiambu Chief Magistrates Court Case No. 1211 of 2014;** and the case of one **Mohammed Galgalo** who was put on Direct Observation Treatment at home since the isolation ward at Kenyatta National Hospital was not operational.

19. The petitioners therefore contend that the incarceration of the 1st and 2nd petitioner, and by extension the other persons in the cases referred to by Mr. Maleche, deprived them of their fundamental right to be free from torture, cruel, inhuman or degrading treatment contrary to the provisions of Article 25 of the Constitution, as well as their freedom of movement and personal liberty. They further argue that depriving them of these rights for the purpose of preventing the spread of infectious diseases to members of the public was excessive and punitive and violated the constitutional threshold of reasonableness. It is also their argument that the choice of prison facilities for such confinement is unprecedented and unreasonable as the congested prison facilities come with a poor diet and the risk of additional infections due to poor hygiene standards.

20. It is the petitioners' case further that in making the order for their isolation, the Principal Magistrate failed to meet the constitutional threshold concerning reasonableness and justifications for the limitation of constitutional rights. While there may have been some ground for limiting their freedom of movement and personal liberty, the Principal Magistrate's conduct was quite excessive, unreasonable and even arbitrary since the justified limitation of a constitutional right must meet the threshold of reasonableness even in the manner in which the limitation is imposed. They contend further that in the failure to exercise reasonableness, the Principal Magistrate omitted to consider the merits or appropriateness of prison facilities for purposes of isolation of patients with infectious diseases since the proper place for isolation of such patients is either a residential dwelling place or a health facility/hospital within the import and contemplation of the Public Health Act.

21. In his affidavit, Dr. Kichari makes various depositions regarding the nature of TB. He also gives his professional opinion on the management and best practices in respect of TB in circumstances such as those of the petitioners in the present case. It was his deposition that in the case of the 1st and 2nd petitioners, it cannot be established whether they were infectious when they were arrested as no medical report or certificate was filed in court to demonstrate their status of infectiousness. In his opinion, isolation of a patient should only occur when all other reasonable means of achieving compliance with treatment have been exhausted and no less restrictive alternatives exist.

The Case for the Respondents

22. The respondents, who were all represented by the office of the Attorney General, opposed the petition and filed an affidavit in reply sworn on 27th July 2015 by Mr. James W. Macharia, the Cabinet Secretary then in charge of the Ministry of Health. They also filed Grounds of Opposition dated 16th June, 2015 and submissions dated 14th July, 2015.

23. In his affidavit, Mr. Macharia makes various depositions of fact on information from the 3rd

respondent. He deposes that the 1st and 2nd petitioner were examined by a qualified medical practitioner who certified that they be put on medication for TB. They were informed of the treatment options and the dangerous nature of TB. At one time, the 3rd respondent tried in vain to locate the two so that they could take their drugs but calls to them went unanswered. Many visits to their homes were also unfruitful, which prompted their arrest and arraignment in court because of failure to adhere to the guidelines on TB treatment. Mr. Macharia makes further depositions on matters of fact and law, which are also echoed in the respondents' Grounds of Opposition.

24. In the said grounds, the respondents argue that Article 24 (1) (d) of the Constitution is clear that rights or fundamental freedoms in the Bill of Rights may be limited if there is need to ensure that the enjoyment of rights or freedoms by any individual does not prejudice the rights and freedoms of others. Their argument is that the failure by the two petitioners to adhere to treatment meant that they returned to active TB infectious state while continuing to interact, associate and mix with the general public, in which case they could easily transmit the infection thereby interfering with the right of other members of society to enjoy the highest attainable standards of health. They also argued in the said Grounds of Opposition that section 27 and 28 of the Public Health Act should be read together.

25. While conceding that there were indeed less restrictive means to prevent the petitioners from spreading the disease, it was the respondent's further contention that such means did not work as the two petitioners failed to report to hospital every day for the purpose of taking their medication as instructed. They had also failed to be available at their homes when they were scheduled to take their medication. While they had been taken through proper health education on the need to adhere strictly to the treatment before being put on measure number one, which was treatment in hospital and measure number two which is home based treatment, the respondents contend that the petitioners failed to adhere to the said guidelines, which necessitated the last compulsive approach of confinement in a government prison.

26. The respondents contend that the 3rd respondent settled on the option of treating the two while in lawful confinement due to the fact that default in TB treatment is likely to lead to a multi-drug resistant TB and extra multi drug resistant TB which are very difficult and expensive to treat. The respondents argue that if this is allowed to happen, and the individuals were allowed to mix and interact freely with the public, it would create a danger to the general population. It is the respondents' case that the country has witnessed a steady increase in the number of TB patients; that this poses a major threat to the health and economy of the country, and that this state of affairs must be remedied through strict compliance with the provisions of the Public Health Act.

27. The respondents therefore term the present petition incompetent, misconceived, misplaced and an abuse of the process of this Court as the petitioners' rights and fundamental freedoms have not been breached in any manner as alleged or at all. They pray that the petition be dismissed with costs.

Determination

28. This petition demonstrates the conflict between the need to protect the rights of individuals, such as the petitioners, who have contracted an illness which all acknowledge is infectious and dangerous, and the right of the general public to be protected from infection. It poses to public health authorities the challenge of determining how best, when confronted with a TB patient who will not voluntarily follow the course of treatment prescribed, and who therefore is likely to develop drug or multi-drug resistant TB, to ensure that such a person takes his medication in his own interest and in the interest of the general public.

29. There is not much dispute that in such circumstances, there is a need to isolate the TB patient, and to ensure that he or she takes his medication until cured of TB. The dispute is whether confining such persons in prison is the best course to follow, whether such action violates the fundamental rights and freedoms of the infected person, and whether, in any event, such a course of action is likely to achieve the intended result: the protection of other persons from infection, and therefore a reduction in the number of cases of TB.

30. Having read the pleadings and submissions of the parties, I believe that I am called upon to consider whether confinement of persons in prison for the purposes of treatment is a violation of their constitutional rights, and if so, what remedies are appropriate in the circumstances of this case.

I must at the outset confess to some difficulty in dealing with this matter in view of a ruling of the High Court sitting in Eldoret. The petitioners had challenged the constitutionality of their confinement and sought certain declarations from the High Court in **Daniel Ng'etich and Another vs Attorney General and 2 Others, Eldoret High Court Petition No. 3 of 2010**. In her ruling delivered on 30th September, 2010, the Learned Judge (Mwilu J) stated as follows:

***“The Petitioners allege contravention of sections 51(1), 47(1), 39(1) and 24(1) of the constitution of the Republic of Kenya. They were ordered detained at the G.K. Prison Kapsabet for a period of eight months by an order of the Hon. Principal Magistrate Kapsabet upon an application by the Nandi Central District Tuberculosis Defaulter Tracing Coordinator. The contraventions they allege are limitation of their rights to movement, reasonable administrative action, and that their detention is a continuing act in further contravention of their fundamental rights. They pray for declarations that whatever law they may have been confined pursuant to is in contravention of the constitution and therefore invalid.*”**

The state was representing the Public Health Officer and did not oppose the petition.

***I have perused the petition and the affidavits. 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? I find that the action taken was unconstitutional and not even in compliance with the Public Health Act that it was purportedly grounded on. Consequently I order that the petitioners be released forthwith from confinement at G.K. Prison Kapsabet to their respective homes from where they will continue their treatment under the supervision of the Public Health officer Nandi Central District Tuberculosis Defaulter Tracing Coordinator. Orders accordingly.*” (Emphasis added.)**

32. In the present petition, the petitioners plead at paragraph 22 that:

“In sum, while the ruling of this Honourable Court is clear and has gone a long way towards 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.”

33. They then assert as follows at paragraph 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.”

34. The difficulty that I find myself in is this. It is not this Court that made the ruling relied on by the petitioners, and it cannot therefore be properly argued that the Court is confirming “*its previous finding*”. Secondly, a reading of the ruling of the Court suggests that the finding of the Court was not that the action taken under section 27 was simply unconstitutional. Rather, the Court’s finding was that it was “***unconstitutional and not even in compliance with the Public Health Act that it was purportedly grounded on.***”

35. Ideally, the matters raised in this petition ought to have been raised in the petition before the High Court in Eldoret so that the Court could have dealt with all aspects of the petitioners’ claim. However, as the Honourable Judge who rendered the ruling is no longer available in the High Court, and the task of determining the issues that the petition raises fall on me, I believe the best course of action is to consider the provisions of the Public Health Act *vis a vis* the provisions of the Bill of Rights in the Constitution in respect of the rights of the petitioners alleged to have been violated.

Violation of Constitutional Rights

36. The petitioners have alleged violation of sections 74, 80 and 81 of the former constitution and Articles 28, 29, and 39 of the Constitution. Article 28 of the Constitution guarantees to every individual the right to human dignity and states that. Article 74 of the former constitution contained the constitutional prohibition against torture and other cruel and degrading treatment, which is now contained in Article 29 of the Constitution, which guarantees the freedom and security of the person. Sub-clause 29(f) recognizes that every person has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading manner.

37. Section 80 protected the citizens’ right to freedom of assembly and association, while section 80 protected freedom of movement. Freedom of movement is now guaranteed under Article 39 in the following terms:

1. Every person has the right to freedom of movement.

38. The petitioners have also placed reliance on Article 25(a) of the Constitution which makes provision with regard to which of the rights under the Bill of Rights cannot be derogated from in the following terms:

Despite any other provision in the Constitution, the following rights and fundamental freedoms shall not be limited-

a. Freedom from torture and cruel, inhuman or degrading treatment or punishment.”

39. The petitioners have also relied on Article 51 which provides that a person who is detained, held in custody or imprisoned retains all the rights guaranteed in the Bill of Rights.

40. I note that the petitioners were arrested and imprisoned on 13th August, 2010, just before the promulgation of the Constitution and were in prison after its promulgation, so its provisions are applicable to the present petition. The question at issue is whether their arrest and imprisonment, purportedly pursuant to section 27 of the Public Health Act, violated any of their rights set out above. Which leads

me to a consideration of the provisions of section 27 of the Act.

Section 27 Public Health Act

41. The petitioners argue in their submissions filed on 3rd July, 2015, and presented by their Counsel, Mr. Maleche, that section 27 of the Public Health Act did not authorize the Principal Magistrate to confine the 1st and 2nd petitioners to the Kapsabet G.K Prison for a period of eight months. The orders of the Magistrate's Court were therefore, in the petitioners' view, unlawful. According to the petitioners, isolation as used in the section is not intended to be punitive. It is a measure to ensure good order in public health by isolating an individual who may be at risk, but who also puts at risk the health of others. It is their submission further that the isolation in prison is contrary to the **World Health Organization Guidance on Ethics of Tuberculosis Prevention, Care and Control**.

42. In submissions presented by Learned State Counsel, Mr. Obura, the respondents' answer is that a reading of sections 27 and 28 of the Public Health Act reveals that the law is clear that persons such as the two petitioners, who are suffering from diseases like TB, must be accommodated in such a manner as to adequately guard against the spread of the disease. If they are not properly accommodated in a manner that will stop the disease, then they must be put in isolation and detained until they finish the medication or until the order is vacated by the Magistrate.

43. In the respondents' view, the petitioners were guilty of an offence under the Act and were properly sentenced to imprisonment for eight months or until the satisfactory completion of their TB treatment. It was also their submission that in the case of the petitioners, the Magistrate was very lenient in sentencing them to imprisonment without imposing a fine on them and/or imprisoning them for the maximum period of time allowed in law. They submit further that the said imprisonment was in the public interest, was legal and was sanctioned by the Public Health Act. In their view, it cannot be said that there was any violation of the petitioners' constitutional rights.

44. It is useful to consider at this point the relevant provisions of the Public Health Act, namely sections 27 and 28. For the sake of completeness and proper understanding of the intention behind the isolation of persons with infectious illnesses, it is useful to consider also the provisions of section 26 of the Act. This section, which is titled "**Removal to hospital of infected persons**" provides as follows:

Where, in the opinion of the medical officer of health, any person certified by a medical practitioner to be suffering from an infectious disease is not accommodated or is not being treated or nursed in such manner as adequately to guard against the spread of the disease, such person may, on the order of the medical officer of health, be removed to a hospital or temporary place which in the opinion of the medical officer of health is suitable for the reception of the infectious sick and there detained until such medical officer of health or any medical practitioner duly authorized thereto by the local authority is satisfied that he is free from infection or can be discharged without danger to the public health.

45. Section 27 is titled "**isolation of persons who have been exposed to infection**" and provides that:

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. (Emphasis added)

46. Section 28 which is titled “**Penalty for exposure of infected persons and things**”, which the respondents insist must be read with section 27, creates an offence and provides a penalty with respect to exposure of persons and things and provides that:

Any person who—

(a) while suffering from any infectious disease, wilfully 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.

47. The petitioners have argued that their confinement was not authorized by law, and neither was it based on a legitimate objective nor strictly necessary. It is also their contention that neither was it the least restrictive means, and further, that it was also highly intrusive. They argue further that it was arbitrary as it did not take cognizance of the nature of the disease and its spread, and was unreasonable because confinement was for a much longer time than the disease is communicable. They relied for this argument on the decision in **ECHR 2005/7 Case of Enhorn vs Sweden, 25 January, 2005, No. 56529/00, Second Section** which related to involuntary civil confinement of a person with HIV.

48. It was also their argument that their confinement was contrary to the Constitution and various international instruments to which Kenya is a party and amounted to cruel, inhuman and degrading treatment or punishment. They relied in support for this contention on the decision in **S vs Makwanyane and Another [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1** and **Republic vs Minister for Home Affairs and Others ex parte Sitamze [2008] 2 EA 323**.

49. The petitioners also relied on the provisions of section 25 of the **United Nations Economic and Social Council Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) (The Siracusa Principles)** to submit 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. Their submission, however, was that such measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured, but in the

petitioners' view, the measures taken by the respondents were not aimed at preventing the spread of TB but to punish them.

50. The petitioners have also relied on the decision in **Ndegwa vs Republic [1985] KLR 534** and **Kenya Anti-Corruption Commission vs Deepak Chamanlal Kamani and 4 Others [2014] eKLR** to submit that the acts of the respondents were a violation of their freedom of movement in that they were confined in a prison and were unable to leave for the length of their sentence. It is also their argument that while their detention was unlawful, it was not in the interest of public health to confine them in prison with other prisoners who would then be exposed to TB. Further, the length of their confinement exceeded what was necessary for their infections to stop being communicable.

51. As I understand it, the Public Health Act is intended to safeguard, as its name states, public health. It imposes a duty on local authorities to ensure that persons who are suffering from an infectious disease are properly accommodated and treated, and that if they are not so properly accommodated and treated, they are isolated so as to prevent the spread of the infectious disease which they need treatment for.

52. In this case, the 1st and 2nd petitioners had TB, were required to take a course of medication, but had failed to adhere to the said treatment. They thus posed a risk of infection to the general public.

53. I do not understand the petitioners to argue that, in their circumstances and those of the other persons mentioned in Mr. Maleche's affidavit, they should not have been detained. As they submit in reliance on section 25 of the **Siracusa Principles**, public health may be invoked as a ground for limiting rights where such limitation is necessary to allow a state take measures necessary to deal with a serious threat to public health. The condition, however, is that such measures must be taken in accordance with World Health Organisation regulations or, as section 26 of the Siracusa Principles provides, "**Due regard shall be had to the international health regulations of the World Health Organization.**"

54. What does the World Health Organisation require states to do with regard to treatment of infectious diseases, or isolation of persons with infectious diseases? **In its Guidance on ethics of tuberculosis prevention, care and control 2010**, the WHO states as follows with respect to involuntary isolation and detention:

"Is it ever ethically acceptable to resort to involuntary isolation and detention in the context of tb?"

In general, TB treatment should be provided on a voluntary basis, with the patient's informed consent and cooperation. As explained above, engaging the patient in decisions about treatment shows respect, promotes autonomy, and improves the likelihood of adherence.

Indeed, non-adherence is often the direct result of failure to engage the patient fully in the treatment process.

While there has been a great deal of publicity about isolated cases of TB patients unwilling to undergo treatment, it is important to remember that these cases are highly infrequent occurrences. Individuals who have been properly counselled about the risks and benefits of TB treatment rarely refuse care, and adherence is not usually a problem if appropriate support is provided. The reason many countries are struggling with high rates of TB infection is not that a few individuals refuse to take their TB medications, but rather that access to high-quality TB diagnosis and treatment is too often unavailable.

Detention should never be a routine component of TB programmes. However, in rare cases, despite all reasonable efforts, patients will not adhere to the prescribed course of treatment, or will be unwilling or unable to comply with infection control measures. In these cases, the interests of other members of the community may justify efforts to isolate or detain the patient involuntarily. As explained below, involuntary isolation and detention must be carefully limited and used only as a very last resort.

Any programme that experiences frequent refusals of care, or significant problems with adherence, should take a hard look at whether it is doing everything it can to implement the person-centred approach described in this document.” (Emphasis added)

55. With respect to the circumstances under which it is ethically appropriate to resort to compelled isolation or detention of TB patients, the WHO Guidance state as follows:

“For patients who are willing to undergo treatment, isolation and detention are usually neither necessary nor appropriate. As studies have shown ..., treating TB patients at home with appropriate infection measures in place generally imposes no substantial risk to other members of the household. By the time a diagnosis is made, the household contacts have already been exposed to the patient’s infection and the possibility of contact infection goes down fast as treatment is started. Even for patients with M/XDR-TB, community-based treatment models have been successfully implemented in a number of different settings.

As such, community-based care should always be considered before isolation or detention is contemplated. Countries and TB programmes should put in place services and support structures to ensure that community-based care is as widely available as possible.”

56. The WHO Guidance provide that isolation or detention should be limited to exceptional circumstances when an individual:

“-is known to be contagious, refuses treatment, and all reasonable measures to ensure adherence have been attempted and proven unsuccessful;

-is known to be contagious, has agreed to ambulatory treatment, but lacks the capacity to institute infection control in the home;

-is highly likely to be contagious (based on symptoms and evidence of epidemiological risk factors) but refuses to undergo assessment of his/her infectious status.”

57. Further, the WHO Guidance are categorical that isolation or detention should never be implemented as a form of punishment. Emphasis is placed on information and counselling of patients, and the Guidance state that patients who decline treatment and who pose a risk to others should be made aware in advance that their continued refusal may result in compulsory isolation or detention.

58. Where it is determined that involuntary isolation or detention is the only reasonable means of safeguarding the public, the WHO Guidance state that 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 out in the Siracusa Principles. These require that the 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.”

59. The WHO Guidance further provide that ***“In the rare event that isolation or detention is to be used, it must take place in adequate settings, with appropriate infection control measures,” and “reasonable social supports should be provided to isolated patients and their dependants, taking into account the local system’s capacity”.***

60. It is evident from the above WHO Guidance, and indeed from the provisions of the Public Health Act, which is relied on by the respondents to sentence those who default in TB treatment to prison, that the idea cannot be that persons who are ill with an infectious disease should be confined to prison. Section 2 of the Public Health Act defines ‘**isolation**’ to mean the segregation and separation from and interdiction of communication with others of persons who are or are suspected of being infected. The Act further stipulates that the term “**isolated**” has a corresponding meaning.

61. While the Act does not provide guidelines on how persons with such diseases are to be isolated, it is clear that the intention behind isolation is not punishment, as the respondents seem to understand it, but to ensure that a person who has failed to follow the course of treatment for TB does so, in his own interests and in the interests of the public. The isolation must therefore be in such conditions as will ensure that the infected person is able to adhere to the course of treatment or, if he refuses to take treatment, he does not pose a risk to others.

62. Taking all the above matters into consideration, I am inclined to find that while there was a violation of the petitioners’ right to liberty as guaranteed under Article 29 and of their freedom of movement guaranteed under Article 39, such limitation was justifiable under Article 24, and was in accordance with the Siracusa Principles. What was patently wrong and unjustifiable, and still is wrong and unjustifiable, is that such confinement should be in penal institutions. I say this for several reasons.

63. First, in this day and age, it cannot be proper to take any but a human rights approach to the treatment of persons in the position of the petitioners. As was submitted by Ms. Ondamna in her rejoinder to the respondents’ submissions, the reasons for default in treatment by the petitioners was connected to their socio-economic situation. Indeed, as is evident also from the supplementary affidavit sworn by Mr. Maleche on 30th October 2014, it is those who are poor, and therefore dependent on the public health system, who find themselves being punished for defaulting in TB treatment.

64. In this regard, I note the averments with respect to **Mr. Peter Gatabaki Mundati (deceased)** who was sentenced to prison for defaulting in treatment in Kiambu Case No. 1211 of 2014, but died in prison; and the case of **Elijah Waweru Njuguna**, sentenced to prison in Kiambu Case No. 1212 of 2014, who had defaulted because doctors went on strike and he could not access medicine. More telling is the case of **Mohammed Galgalo** who, according to Mr. Maleche, is also deceased. He was referred to Kenyatta National Hospital for isolation and treatment, but was informed that the isolation ward in the hospital was not operational. It appears to me that in addition to lack of adequate facilities for the treatment of TB, as the case of Galgalo illustrates, the lack of access to treatment facilities and information about TB, as well as to counseling on the dangers that it poses if not properly treated, is doubtless responsible for many cases of default to follow the course of treatment.

65. It also appears to me that as a society, we have two tragedies at our hands. We have the tragedy of a largely poor, uneducated population, with scant information about the dangers of diseases such as TB, and therefore apt, for a variety of reasons, not to follow treatment. Which leaves the public health authorities with the option offered by the Public Health Act of isolating and confining such persons and ensuring that they undergo treatment during the period of confinement. And herein lies our greater tragedy. If the isolation ward at the largest referral hospital in the country, Kenyatta National Hospital, is not operational as averred by the 3rd petitioner, it is unlikely that any other medical facility in the country has the requisite isolation facilities. Which leaves the easy option of confining persons who default in treatment to prison.

66. The respondents argued that the petitioners had not proved that they were not kept in isolation, or that they were kept with other prisoners in crowded cells. In my view, however, the onus in this regard lay with the respondents to place before the Court material on which it could find that there are proper isolation facilities in prisons for the treatment of persons in the position of the petitioners. This is because this petition is about the right to health of the petitioners, a right which the state has a responsibility to ensure, and in accordance with Article 21, is required to take ***“legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43”***, which includes the right to health. It is my view that rather than demanding that the petitioners prove that they were not kept in isolation, the state could have shown the steps it has taken to provide isolation facilities in prisons in general, and in the Kapsabet GK Prison in particular.

67. It seems to me that the state, having failed to adequately address the needs of the health sector, and confronted with rising cases of TB, has taken the easy option: arrest those who default and lock them away, and keep them away from the law abiding society. Unfortunately, given the state of prisons in Kenya, which are known to be overcrowded and lacking in basic facilities, that does not help in the treatment of the TB patients confined, or in stopping the spread of TB. Not only is such action not sanctioned by the Public Health Act, it is also patently counter-productive.

68. The petitioners have alleged violation of their constitutional rights under Article 28, 29, and 39 of the Constitution, whose provisions I have set out elsewhere in this judgment. I have found that while isolation and detention is permissible in the interests of public health where a person infected with TB poses a threat to public health, the detention of the petitioners was not in accordance with the Public Health Act, or international guidelines and principles regarding isolation of patients with TB. I am also of the view that the acts of the respondent could not achieve the intended purposes, given the conditions of Kenyan prisons.

Conclusion and Disposition

69. Having so found, what are the appropriate remedies to grant in the circumstances of this case? To recap, the petitioners sought, inter alia, declarations that the confinement of the 1st and 2nd petitioners at the Kapsabet G.K Prison for the purposes of tuberculosis treatment for a period of eight months was not authorized under section 27 of the Public Health Act and was therefore unlawful; that such confinement violated the petitioners' rights under sections 74, 80 and 81 of the former constitution of Kenya and Articles 25, 28, 29, 51 (1), 47 (1), 39 (1) and 24 (1) of the 2010 Constitution; that the confinement of patients suffering from infectious diseases in prison facilities for the purpose of treatment is a violation of their rights under the said provisions of the former and current Constitution, and that any use of this provision is at all times unconstitutional.

70. The petitioners have also sought an order requiring 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 to inform the Court that it has duly issued such circular. They also seek an order that the 4th respondent does, within three months from the date hereof, develop a policy on the involuntary confinement of individuals with TB that is compliant with the Constitution and incorporates principles from the international guidance on the involuntary confinement of individuals with TB.

71. Given my findings above with respect to the use of confinement and isolation of persons with TB, and the extent to which such confinement is permissible under the provisions of the Public Health Act and international standards, I am satisfied that the orders sought by the petitioners are, to some extent, merited.

72. However, I am not satisfied that the 1st and 2nd petitioners are entitled to an award of general and exemplary damages on an aggravated scale as prayed. The petitioners represent, in my view, a large class of persons in Kenya who, due to a lack of information or, in some cases, disregard of the information available, are unable to strictly follow the treatment regime prescribed for TB. I note in particular that in some of the cases where the ill person had been taken to court, there had been several instances of default, and it appears that the option of imprisonment was resorted to as a last resort.

73. Thus, it appears to me that the state took the correct option of confining the parties in default, but used a mode that was not permissible under the law. Further, there appears to be a level to which a sense of personal responsibility is, in some cases, lacking and must be encouraged and nurtured. It is therefore not, in my view, in the interests of the larger public to grant an award of damages in cases such as this. What resources are available to the state are best applied in setting out policies and providing facilities in public health institutions for involuntary isolation and treatment of those who are not able (or willing) to follow through on their treatment.

74. In the circumstances, I issue the following declarations:

- a. 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 authorized under section 27 of the Public Health Act, Chapter 242 of the Laws of Kenya, and was therefore unlawful.**
- b. That the confinement of the 1st and 2nd 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 section 80 and 81 of the Constitution of Kenya, 1969 and Articles 29 and 39 (1) of the Constitution 2010.**
- c. That the confinement of patients suffering from infectious diseases in prison facilities for the purpose of treatment is a violation of their rights under Articles 29 and 39 (1) of the Constitution of Kenya, 2010.**
- d. 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.**

75. The petitioners have asked the Court 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. They also seek an order compelling the 4th respondent, within three months, to develop a policy on the involuntary confinement of individuals with tuberculosis that is compliant with the Constitution and incorporates principles from the international guidance on the involuntary confinement of individuals with TB.

76. Under section 28 of Part 1 of the Fourth Schedule of the Constitution, the national government is responsible for the formulation of a national health policy. However, section 2 of Part 2 of the Fourth Schedule places health services under the jurisdiction of county governments. Consequently, the national government has the responsibility, in cooperation with county governments, of ensuring that there are appropriate policies and facilities for the treatment of infectious diseases such as TB, and that where involuntary confinement is required as in the case of the 1st and 2nd petitioners, such confinement takes place in appropriate health facilities, not in prisons.

77. Consequently, I direct as follows with respect to involuntary confinement of patients with infectious diseases who default from treatment:

i. That the 4th respondent does issue a circular, within Thirty (30) days hereof, directed 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;

ii. That the 4th respondent does, in consultation with county governments, within Ninety (90) days from the date hereof, develop a policy on the involuntary confinement of persons with TB and other infectious diseases that is compliant with the Constitution and that incorporates principles from the international guidance on the involuntary confinement of individuals with TB and other infectious diseases.

iii. That the 4th respondent does, within Ninety (90) days from the date hereof, file an affidavit in this Court detailing the policy measures put in place on the involuntary confinement of persons with TB and other infectious diseases.

78. With respect to costs, as this matter raises serious issues of great public concern, I direct that each party shall bear its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 24th day of March 2016

MUMBI NGUGI

JUDGE

Mr. Maleche & Ms. Odamna instructed by the firm of Allan Achesa Maleche & Co. Advocates for the petitioners.

Mr. Obura instructed by the State Law Office for the respondents.



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