



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CORAM: D.S. MAJANJA J.

PETITION NO. 96 OF 2011

BETWEEN

ALLIOW SOMO ABDI ON BEHALF OF THE SUBJECT

MOHAMED ADAN ABDOW.....1ST PETITIONER

ZUHURA SULEIMAN ON BEHALF OF THE SUBJECT

MOHAMED HAMID SULEIMAN.....2ND PETITIONER

AISHA SULEIMAN ON BEHALF OF THE SUBJECT

YAHYA SULEIMAN MBUTHIA.....3RD PETITIONER

AND

MINISTER OF STATE FOR PROVINCIAL

ADMINISTRATION & INTERNAL SECURITY.....1ST RESPONDENT

MINISTER FOR FOREIGN

AFFAIRS & INTERNATIONAL CO-OPERATION.....2ND RESPONDENT

THE COMMISSIONER OF POLICE.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

Introduction

1. The petitioners are Kenyan citizens. They bring this action against the respondents on behalf of the subjects who, at the time of filing the petition, had been detained in Uganda on allegations of having participated in bombing attacks that took place on 11th July 2010 at the Kyadondo Rugby Club and the Ethiopian Village Restaurant in Kampala. It was suspected that the bombings were carried out by the *Al-Shabaab* Militia based in Somalia with ties to *Al Qaeda*. Following the attack, the Kenyan authorities swung into action, arrested the subjects and handed them over to the Ugandan government to stand trial on charges relating to terrorism.

2. The petitioners case is contained in their petition dated 9th June 2011 together with the supporting affidavit of Allioo Somo Abdi sworn on 9th June 2011. The respondent's filed a replying affidavit sworn on 11th November 2011 by Inspector Charles Ogeto, a police officer attached to Anti-Terrorist Police Unit. On 21st November 2010, each of the subjects filed an affidavit in support of their respective cases.

3. At this stage I wish to point out that the petition and affidavits are rather prolix and have set out not only facts but statements of law, arguments and submissions thereby obscuring the key facts which form the basis of the case. That notwithstanding, the allegations of fact made by the petitioners and subjects are neither contested nor controverted by the respondents. I shall therefore outline the facts before I delve into the legal arguments and reliefs.

Factual Background

4. Mohammed Adan Abdow (“Abdow”) was arrested on 21st July 2010, transferred and handed over to the Ugandan authorities on 27th July 2010. Mohamed Hamid Suleiman (“Suleiman”) was arrested on 13th August 2010 and handed over to the Ugandan authorities on 14th August 2010 while Yahya Suleiman Mbutia (“Mbutia”) was arrested on 25th August 2010 and handed over to the Ugandan authorities on 26th August 2010.

5. Abdow deponed that he was arrested on 21st July 2010 without charge and on 27th July 2010 at about 3.00am, together with other Kenyans he was removed from Kileleshwa Police Station, handcuffed, hooded and pushed into a car where he was sandwiched between two police officers. He was not informed where he was being taken. After 8 hours of driving without food, water, rest and use of the toilet, he was handed over to Uganda security agents at Malaba.

6. Suleiman deponed that on 18th August 2010 while outside his flat in South C, Nairobi, he was ambushed by police officers, handcuffed, pushed into a car which sped off to Lang’ata Police Station where he was locked up in a cell without being informed of the reason for his arrest and detention. On the same night he was transferred to the Anti-Terrorism Police Unit (ATPU) headquarters along Hospital Road, Nairobi. At about midnight he was taken to Kasarani Police Station and locked up in the cell. Early in the morning on 24th August 2010, he was informed that he had been arrested for his involvement in the Kampala bombings and was scheduled to be transferred to Uganda. An officer assisted him to call and inform his mother, the 2nd petitioner, about his predicament. On the same morning, he was escorted to the ATPU headquarters where he was handcuffed, hooded and driven to Malaba where he was handed over to Ugandan authorities. Suleiman deponed that he had not been given food or water or allowed to go to the toilet from the time he was arrested.

7. Mbutia stated that on 25th August 2010 he was pulled out of a bus at gun point by 10 security agents near City Cabanas as he was travelling to Mombasa. He was immediately handcuffed, hooded and under threat of shooting bundled into a car and taken to a police cell and held in solitary confinement. On the morning of 26th August 2010, when he was removed from the cells he realized he was at the Inland Container Deport Police Station off Mombasa Road. He was handcuffed and hooded before being transferred to the ATPU headquarters where he was interrogated. Thereafter he was handcuffed, hooded and shackled before being taken on an 8-hour journey to the border at Malaba where he was handed over to Ugandan authorities.

8. While in Uganda, the subjects deponed that they were interrogated by American, Kenyan and Ugandan security agents about their involvement in the Kampala bombings before being taken to Nakawa Magistrates Court where, on 30th November 2010, they were committed to stand trial for offences relating to the Kampala bombings. The court remanded them to Luzira Upper Prison, Kampala pending trial. They were subsequently tried by the High Court of Uganda, International Crimes Division (Criminal Session Case No. 0001 of 2010).

9. During the trial, Abdow was discharged on 12th September 2011 after the Director of Public Prosecutions, Uganda entered a *nolle prosequi*. Suleiman and Mbutia were both acquitted following the judgment delivered on 26th May 2015. The subjects are now in Kenya.

10. After Suleiman was arrested, the 2nd petitioner filed an application of *Habeas Corpus*, **Zuhura Suleiman (on behalf of the subject Mohamed Hamid Suleiman) v The Commissioner of Police and Others NRB HC Misc. Criminal Application No. 441 of 2010 [2010]eKLR**. By a ruling dated 30th September 2010, the court held that the arrest and handing over of the subject to the Ugandan authorities was illegal and unconstitutional.

11. The 3rd petitioner, on behalf of Mbutia, filed an application for *Habeas Corpus*, **NRB HC Misc. Criminal Application No. 469 of 2010** but it was dismissed on 14th March 2011 on account of the fact that it had been overtaken by events and for non-attendance of the applicant’s counsel.

Grounds for relief

12. The petitioners contend that the subjects were unlawfully arrested without warrants by police officers, detained incommunicado in various police stations in Kenya and denied access to any person who could assist them during this period. The petitioners complain that no charges were preferred against the subjects, that they were not arraigned before any court for extradition or any other judicial proceedings before being handed over to the Ugandan authorities. The petitioners point to the fact that the respondents’ actions were declared unlawful and unconstitutional in **Zuhura Suleiman v The Commissioner of Police & 2 Others (Supra)**.

13. The petitioners maintain that the subjects’ fundamental rights and freedoms were violated when they were subjected to prolonged incommunicado pre-arraignment detention in Uganda, deprivation of fair trial rights through continued interrogations by Ugandan, Kenyan and foreign security agents, the right to adequate facilities to prepare their defenses and deportation of their legal counsel from Uganda.

14. The petitioners also accused the 2nd respondent of unreasonably refusing to make any *state to state* representations with the Republic of Uganda on their behalf with regard to the illegal removal or ameliorate their detention conditions or ensure due process and fair trial in Uganda. They also accused the respondents of refusing to provide the petitioners with full and accurate information regarding their arrest and detention, search and enforced removal which information is critical to their defense and the constitutional petition which they intended to file in Uganda to challenge the constitutionality of the criminal charges against them.

The reliefs

15. Based on the facts and grounds of relief, the petitioners sought the following orders:

i) *A declaration that the arrest and detention in Kenya and the enforced removal, kidnapping and rendition of the Subjects from Kenya to the Republic of Uganda is unconstitutional, in violation of the Extradition (Contiguous and Foreign Countries) Act (Chapter 76 laws of Kenya) and a violation of the fundamental rights and freedoms of the Subjects to equal protection of law, human dignity, freedom and security of the person, the right to be represented before a court of law, human dignity, freedom and security of the person, the right to be presented before a Court of law, right to family life, fair hearing /trial rights, the right not to be held incommunicado and the right to an order of habeas corpus guaranteed by Articles 27(1) (2), 28, 29(a) (b) (c) (d) (f), 45(1), 49(1)(c) (f) and 50 of the Constitution of Kenya 2010.*

ii) *A declaration that the search of the persons and homes of the Subjects herein and then 2nd and 3rd Petitioners and confiscation of their assorted items and properties is unconstitutional and a violation of Article 31 of the Constitution of Kenya 2010.*

iii) *A declaration that under Articles 12(1)(a), 20, 21(1)(2), 35 and 73 of the Constitution of Kenya 2010, the petitioners, the named subjects herein and the Court are entitled from the respondents jointly and severally to a full, accurate and faithful disclosure of all information relating to the search of the persons and homes of the Subjects, the arrest and detentions in Kenya and the enforced extrajudicial removal, kidnapping and rendition of the Subjects from Kenya to the Republic of Uganda, the conditions of detention of the Subjects in Uganda and guarantees of a fair trial in Uganda.*

iv) *A declaration that under Articles 12(1)(a), 19, 20, 21(1), 27(1)(2), 28, 29(a) (b) (c) (d) (f) and 45(1) of the Constitution of Kenya, the 2nd Respondent has a constitutional obligation to make diplomatic state to state representations on behalf of the named subjects and the petitioners bringing the unconstitutionality and illegality of the presence of the subjects in Uganda to the attention of the competent Ugandan authorities and to seek termination of the charges preferred against the subjects, cancellation of the detention of the subjects in Uganda and the immediate and safe repatriation of the subjects to the republic of Kenya.*

v) *A declaration that under Articles 12(1)(a), 20, 21(1)(2), 35 and 73 of the Constitution of Kenya, 2010, the Petitioners, the named Subjects herein and the Court are entitled from the 2nd Respondent to a full, accurate and faithful disclosure of all information relating to the diplomatic state to state representations made by the 2nd Respondent on behalf of the named subjects herein to the Republic of Uganda*

vi) *A declaration that pursuant to the decisions of this Court in MOHAMED AKTAR KANA V ATTORNEY GENERAL [2010]eKLR and ZUHURA SULEIMAN V THE COMMISSIONER OF POLICE & 2 OTHERS [2010]eKLR and under Articles 73, 201(a), 232 & 238 of the Constitution of Kenya 2010 any deployment of any public resources including human resources towards assisting Uganda in the unlawful trial of the Subjects herein is unconstitutional being in furtherance of the unconstitutional, illegal and unlawful conduct of the Respondents herein and a further violation of the fundamental rights of the Subjects herein guaranteed by the Constitution of Kenya 2010, the Constitution of Uganda, 1995 and internationally recognised by international human rights instruments, norms and customs.*

vii) *A declaration that pursuant to the findings of this court in MOHAMED AKTAR KANA V ATTORNEY GENERAL [2010]eKLR and the principles in the cases of R v HORSEFERRY ROAD MAGISTRATE'S COURT EX-PARTE BENNET [1994] 1 AC 42 and DR. KIZZA BESIGYE & OTHERS V ATTORNEY GENERAL, CONSTITUTIONAL COURT OF UGANDA PETITION NO. 07 OF 2007 (Unreported), the criminal charges preferred against the Subjects in Uganda, pursuant to their unlawful, extrajudicial enforced removal, kidnapping and rendition from Kenya to Uganda are an abuse of the process of court and amenable to permanent stay.*

viii) *A mandatory injunction and/or an order of mandamus do issue compelling the Respondents jointly and severally to furnish the Petitioners, the subjects and the Court with the following information*

a) *The full names and particulars of designations and ranks of the state officers, Public officers, police officers, agencies departments, institutions, committees and/or any organs of the Government of Kenya, enforced extrajudicial removal, kidnapping and rendition of the Subjects from Kenya to Uganda without extradition orders issued by Kenyan courts.*

b) *Certified copies of the Original decision/s in (i) above and any minutes of any meetings that made the decision in (i) above.*

c) *Specific particulars of the Kenyan law under which the decision in (i) above was made.*

d) *The full names, designations, ranks and agencies of all the police officers and any others State and Public officers and their agencies who participated in the arrest of the Subjects.*

e) *The full names of the police stations and any other places of detention where the Subjects were detained in Kenya prior to their extradition, kidnapping and /or rendition from Kenya to Uganda together with certified extract copies of the originals of the occurrence books exhibiting the detention of the subjects in Kenya*

- f) *The full, names, designations, ranks of all police officers and any other state and Public officers who participated in the transportation of the subjects from Kenya to Uganda and their agencies, departments, police units or stations.*
- g) *Specific particulars of Kenyan laws authorising the removal, transportation and rendition of the petitioners from Kenya to Uganda without court orders issued by Kenyan courts.*
- h) *Specific particulars of Kenyan laws authorising the removal, transportation, rendition and surrender to Uganda while bypassing or circumventing extraditions proceedings in Kenyan courts.*
- i) *Full particulars and descriptions, including registration numbers of all the motor vehicles and any other vessels used in transporting the subjects from Kenya to Uganda.*
- j) *A detailed, faithful and true statement of account of the costs of transportation of the subjects to Uganda, including costs of fuels and allowances/imprests for the escorting officers.*
- k) *Full particulars of the State and/or public Officers, Government agencies, Police Departments/Units, Police officers or any other government officers who authorised the costs in (x) above and government department and vote head from which the expenditure was drawn.*
- l) *A detailed faithful and true account of the itineraries, conditions of detention and welfare of the subjects inside the motor vehicles and or any other vessels while in transit enroute from Kenya to Uganda.*
- m) *A detailed, faithful and true account of the handing over of the subjects to the Ugandan authorities including the actual point of handing over, certified copies of the travel documents of the subjects, full names, designations, ranks and government agencies of the handing over officers and corresponding details of their Ugandan counterparts receiving each of the subjects, full names and designations, ranks and government agencies of the handing over officers and corresponding details of their Ugandan counterparts receiving the subjects.*
- n) *The full names and particulars of designations and ranks of the police officers and or other security agents who arrested the 2nd and 3rd subjects herein MOHAMED HAMID SULEIMAN AND YAHYA SULEIMAN MBUTHIA and two (2) Moroccans in their company in Garissa in April 2010, the reasons for the arrest, places of detention, period of detention, particulars and copies of items seized from them, the inventory of items seized from them, reasons for the release from police detention without charge and arraignment in court of the 2nd and 3rd subjects herein and the reasons for the removal of the Moroccans from Kenya.*
- o) *The full names and particulars of designations and ranks of the police officers and or other security agents who conducted searches in the homes of the 3rd petitioner AISHA SULEIMAN on 12th September 2010 and certified copies of warrants of search authorising the said searches.*
- p) *All documents exhibiting the actions, steps or arrangements made by the Respondents to reverse the predicament of the Subjects in view of the High court decisions in MOHAMED AKTAR KANA v ATTORNEY GENERAL [2010]eKLR and ZUHURA SULEIMAN v COMMISSIONER OF POLICE & 2 OTHERS [2010]eKLR unequivocally declaring the arrest detention and forcible removals. Kidnappings and renditions of the Subjects from Kenya to Uganda without extradition proceedings as unconstitutional, illegal and in violation of the basic rights of Kenyan citizens.*
- q) *All documents exhibiting any actions, steps or arrangements made by the Respondents jointly and or/severally with the Government of Uganda to ameliorate the present predicament of the subjects including the guarantees of safe and human conditions of detention, facilitation of all the rights of accused persons, including fair trial rights, the right to counsel and the rights of visitations and access in custody in the Republic of Uganda.*
- r) *Copies of all statements recorded by officers of the 3rd Respondent or any other Kenyan Public officers or security agents earmarked as prosecution witnesses against the subjects in the Criminal case pending against the subjects before the High Court of Uganda at Kampala or any other cases that might be preferred against the subjects in Uganda.*
- ix) *A mandatory injunction and or an order of mandamus do issue compelling the 2nd Respondent to furnish the Petitioners, the named subjects herein and the Court with full, accurate and faithful information on the state to state representations made by the 2nd respondent with the Republic of Uganda on behalf of the subjects unequivocally bringing to the attention of the competent authorities in Uganda the unconstitutional, illegal and unlawful process of arrest and enforced extrajudicial removal, kidnapping and rendition of the Subjects from Kenya to Uganda in violation of Kenyan and Ugandan Constitutions and the impropriety of the Criminal charges facing the Subjects.*
- x) *A mandatory injunction and/or an order of mandamus do issue compelling the 2nd respondent to furnish the Petitioners, the named Subjects herein and the Court with full, accurate and faithful information on the state to state representations made by the 2nd respondent with the Republic of Uganda on behalf of the subjects herein.*
- xi) *An order of injunction and/or prohibition do issue restraining and/or prohibition the Respondents, their officers, appointees, agents and /or servants from expending and or deploying any state/public resources, facilities, equipment, human resources or availing Kenyan public officers and police officers towards assisting Uganda in the prosecution of the Criminal case pending against the subjects herein or towards any case that might be preferred against the subjects before any court or tribunal in the*

Republic of Uganda.

xii) General damages for violations of the fundamental rights and freedoms of the subjects in prayers(i) and(ii) above

xiii) Exemplary, aggravated and punitive damages for violation of constitutional rights.

xiv) Costs of this petition.

xv) Interest on prayers (xii) to(xiv) above

xvi) Any other order(s) as the Honourable court shall deem fair, fit and just to grant.

Respondents' Case

16. The respondent's case is straightforward and constitutes a justification of its action in handing over the subjects to Ugandan authorities. The Replying Affidavit of Charles Ogeto states, inter alia, that:

[9] THAT the handing over of the petitioners by the Kenyan Authorities to the Republic of Uganda was pursuant to the provisions of Article 124 of the Treaty for the Establishment of the East African Community which, inter alia, provides: -

(a) (i) The Partner States agree that peace and security are pre-requisites to social and economic development within the community and vital to the achievement of the Community. In this regard, Partner States agree to foster and maintain an atmosphere that is conducive to peace and security through co-operation and consultation on issues pertaining to peace and security of Partner States

(5) The Partner States agree to enhance co-operation in the handling of cross border crime, provision of mutual assistance in criminal matters, including the arrest and repatriation of fugitive offenders and exchange of information on national mechanisms for combating criminal activities.

(5)(b) Enhance joint operations such as pursuit of criminals and joint patrols to promote border security.

[10] Since Article 2(6) of the Constitution recognises Treaties or Conventions which have been ratified by Kenya as forming part of the Kenyan Law, it is our contention that the government of Kenya acted within the law in apprehending and handing over the petitioners to the Ugandan Authorities.

Issues for Determination

17. From the facts I have outlined, it is clear that some of the reliefs sought in the petition have been overtaken by events as the criminal proceedings in Uganda against the subjects have now been determined and the subjects are now in Kenya hence any relief based on the proceedings in Uganda would be superfluous. For example, the petitioners have in prayers (viii), (ix), (x) and (xi) made prayers on relation to the proceedings in Uganda and have sought extensive information which would have been useful to their defence and filing further proceedings in Uganda. Bearing in mind the trial was determined, the issues are no longer live and any decision on them would be otiose.

18. An examination and interrogation of the petition together with the depositions allude to violation of the subjects' rights while in Uganda. For instance, they deposed that they were subjected to prolonged pre-arraignment detention in Uganda, deprived of fair trial rights through continued interrogations by Ugandan, Kenyan & foreign security agents and denied the right to adequate facilities to prepare their defences and that their legal counsel was deported back to Kenya. All these matters took place in Uganda. There is also prayer (iii) and (iv) which seem to make reference to the proceedings before the Uganda Court. This court has no jurisdiction over the courts in Uganda and cannot make orders affecting the administration of justice in that country.

19. Finally, it is important to point out the declarations sought by the petitioners are made on the basis of the Constitution that came into force on 27th August 2010. However, the acts complained of took place within Kenya took place prior to that date and must hence be judged in accordance with the former Constitution (see ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others SCK Appl. No. 2 of 2011 [2012]eKLR***).

20. In my view, the main issue for determination is whether the arrest, detention and handing over or rendition of subjects to the Ugandan authorities violated the fundamental rights and freedoms of the subjects. Since the respondents did not contest the fact that the subjects were handed over to the authorities in Uganda but justified their actions, the question for the court is whether their actions could be justified under the Constitution or any other law.

Whether removal of the subjects violated the Constitution?

21. The legality of the removal of the subjects to face charges in Uganda is neither new nor novel and was held to be unconstitutional in ***Zuhura Suleiman v The Commissioner of Police & 2 Others (Supra)***. Muchelule J., summarized Suleiman's case as follows:

[F]ollowing the Kampala bombings, they arrested the subject. They quickly, within a few hours of arrest, handed him over to Uganda. Inspector Ogeto's affidavit is silent on the nature of evidence the police held regarding the subject's connection in the bombings to be able to hand him over. The subject was arrested at 10.30 p.m on Friday and on the following day, a Saturday, he

was in Uganda being handed over. He had been collected from Kasarani Police Station, where he had slept, at 7.55 a.m. There was certainly no opportunity afforded for him to apply to the Kenyan Courts for release, for instance. There was no formal communication with his family or information that he was being taken out of jurisdiction. He is a Kenyan citizen who had immunity against expulsion. There was no formal request by the Ugandan authorities for him. There was no warrant issued by a court in Uganda seeking his arrest. All extradition provisions were disobeyed in his connection. In short, all the evidence indicates he was illegally arrested, detained and removed from Kenya.

After setting out the facts, he observed that:

Whether one is a terror suspect or an ordinary suspect, he is not exempted from the ordinary protection of the law. Whatever the security considerations that the Police had in this case, the recognition and preservation of the liberties of this subject was the only way to reinforce this country's commitment to the rule of law and human rights. Police must have the capacity to battle terrorism and enforce human rights at the same time as the two are not, and should not, be incompatible.

And concluded that:

I find that no exceptional circumstances, whether state of war or terrorist actions, can be invoked to justify the treatment handed down to the subject herein by the Respondents. I find that the return made by Inspector Ogeto was not sufficient and that the arrest, detention and removal of the subject from Kenya to Uganda were illegal and transgressed his fundamental rights and liberties. Since he is out of jurisdiction, however, I make no further orders.

22. The petitioners relied on **Section 72(1)(i)** of the former Constitution which provided as follows:

72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases –

.....

(i) for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another; or

23. A reading of **section 72(1)(i)** of the former Constitution shows that the right to liberty could only be limited under authority of the law and for the purpose of effecting extradition or other lawful removal of a person from Kenya. Thus, the respondents bear the burden of showing under which law they acted when they removed the subjects from Kenya.

24. The respondents justified their action by relying on the provisions of the **Treaty for the Establishment of the East African Community** relating to security co-operation. Those provisions do not exist in a vacuum and co-exist side by side with the law and are subject to the Constitution which sets out fundamental rights and freedoms of the individual. Under the former Constitution, those provisions were not self-executing and had to be implemented by domestic law enacted for that purpose. In this case and in relation to **section 72(1)(i)** of the former Constitution, the law relating to extradition of any person to Uganda is the **Extradition (Contiguous and Foreign Countries) Act (Chapter 76 of the Laws of Kenya)**.

25. The petitioners also called in aid the decision of the Court of Appeal in **Moses Tengeya Omweno v The Commissioner of Police & Another CA Civil Appeal No. 243 of 2011 [2018]eKLR**. In that case, the appellant, a Kenyan Citizen by birth, was arrested by Kenyan Police officers on 2nd June 2000 at around 6.00pm without a warrant or court order issued by a competent Kenyan court, detained at Embakasi Police Station and taken to Kosovo, Yugoslavia to answer to criminal charges in a criminal court in Prisitna, Kosovo. Ruling on the legality of this action, the court observed that:

The critical issue is whether at the time of forcible removal and repatriation from Kenya due process was followed. It is immaterial for what purpose the appellant was forcibly removed from Kenya. Whether the appellant is a citizen or not, due process must be followed. No person resident in Kenya can forcibly be removed, repatriated or expelled from Kenya without due process and right to fair hearing and access to court of law in Kenya, if need be.

26. I note that in that case, the Court of Appeal cited with approval the **Zuhura Case (Supra)** and further held that the removal from Kenya must be authorised by the law. It further stated:

*[48] In the instant appeal, we have perused the record and it is manifest that the removal of the appellant from Kenya was not done under the authority of any law in force in Kenya. Further, **Section 81(3) (f)** of the former Constitution has a proviso that permits removal from Kenya. However, for the proviso to apply, the person to be removed from Kenya is to be tried or punished in some other country for a criminal offence under the law of that other country. The removal must be authorized by the law in question. In the instant case, the respondents failed to pin point the law that authorized the removal of the appellant from Kenya. Failure to show such law means that the appellant's removal from Kenya violated **Section 81** of the former Constitution.*

27. It is therefore beyond doubt that the removal of the subjects from Kenya without due process is unconstitutional and a violation of fundamental rights and freedoms of the subjects. The applicable law is the **Extradition (Contiguous and Foreign Countries) Act (Chapter 76 of the Laws of Kenya)** which applies to Uganda and Tanzania sets out the procedure for the extradition of suspects. The requesting country, in this case Uganda, must issue a warrant of arrest which is then enforced by a Kenyan magistrate. In this case, the respondent did not demonstrate that a warrant had been issued by a Ugandan court or that the extradition process was commenced in Kenya.

28. Without belaboring the point, I find and hold that the respondents' reliance on **Article 124** of the *Treaty Establishing the East Africa Community* is unfounded, an interrogation of the Article only provides a general guidance on how the partner states need to cooperate in areas of combating crime and sharing intelligence. It does not in any way oust the application of the *Extradition (Contiguous and Foreign Countries) Act* and *Extradition (Commonwealth Countries) Act (Chapter 77 of the Laws of Kenya)*, which were not complied with and, which envisage a judicial process before extradition of any suspect.

29. The former Constitution also protected the freedom of any Kenyan citizen from expulsion from the country. It provided as follows:

81. (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.

30. However, the immunity from expulsion could be restricted or under **section 81(3)(c)** and **(f)** which stated as follows:

81.(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

.....

(c) for the imposition of restrictions, by order of a court, on the movement or residence within Kenya of any person or on any person's right to leave Kenya either in consequence of his having been found guilty of a criminal offence under the law of Kenya or for the purpose of ensuring that he appears before a court at a later date for trial of such a criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or lawful removal from Kenya;

.....

(f) for the removal of a person from Kenya to be tried or punished in some other country for a criminal offence under the law of that other country or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted; [Emphasis mine]

31. The exceptions to **section 81(1)** contained in **section 81(3)** of the former Constitution envisaged that before expulsion from Kenya, there would be extradition or lawful proceedings against any citizen for removal from Kenya, a situation that does not obtain in this case. In the Moses Tengeya Omweno Case (Supra), the Court of Appeal took the following position;

*[48] In the instant appeal, we have perused the record and it is manifest that the removal of the appellant from Kenya was not done under the authority of any law in force in Kenya. Further, **Section 81(3) (f)** of the former Constitution has a proviso that permits removal from Kenya. However, for the proviso to apply, the person to be removed from Kenya is to be tried or punished in some other country for a criminal offence under the law of that other country. The removal must be authorized by the law in question. In the instant case, the respondents failed to pin point the law that authorized the removal of the appellant from Kenya. Failure to show such law means that the appellant's removal from Kenya violated **Section 81** of the former Constitution. (See **Salim Awadh Salim & 10 others -v- Commissioner of Police & 3 others, Nairobi Constitution and Judicial Review Petition No. 822 of 2008**). Further, we are of the considered view that a warrant of arrest issued by a foreign court (i.e. foreign jurisdiction) is not enforceable on Kenyan soil unless expressly permitted by Kenyan law.*

Other violations

32. The respondent did not contest the fact that they arrested the Subjects without any warrants, subjected the subjects, the 2nd and 3rd petitioners to unlawful searches and seized their property before arresting them and handing them over to the Ugandan authorities contrary to **section 76(1)** of the former Constitution provided that, "Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises." Under **section 29(h)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*, the police may arrest any person without a warrant, "any whom he suspects upon reasonable grounds of having been concerned in an act committed at a place out of Kenya which, if committed in Kenya, would have been punishable as an offence, and for which he is liable to be extradited under the *Extradition (Contiguous and Foreign Countries) Act* or the *Extradition (Commonwealth Countries) Act*."

33. The burden to prove that the search and seizure was based on reasonable suspicion is on the respondents and when called upon to do so, they did not furnish any evidence to show that the searches of the subjects had a reasonable basis. In *Standard Newspapers Limited & Another v Attorney General & 4 others [2013] eKLR* Mumbi Ngugi J., observed as follows on search without a warrant:

*As indicated elsewhere in this judgment, I have come to the conclusion that the search and seizure carried out by agents of the respondents against the petitioners on the night of 2nd March 2006 was arbitrary and in breach of the petitioners' rights under section 76 and 79 of the former Constitution. Even assuming that the reasons for carrying it out, as alleged by the respondents, were justifiable under the proviso to section 76, which this Court cannot determine as no evidence with regard thereto was placed before it, it was nonetheless an unlawful search as it violated the law and the due process requirements with regard to search and seizure. Which then leads to a consideration of the appropriate relief to grant to the petitioners for the violations. (See also *Abubakar Shariff Abubakar -v- Attorney General & another [2014] eKLR*).*

34. The 2nd and 3rd petitioners also made independent claims of unlawful searches and seizures. According to the deposition of Allow Somo Abdi in support of the petition, the police applied for a search warrant on 29th October 2010 before the Chief Magistrate's Court at Kibera Misc. Criminal Application No. 196 of 2010 (*Anti-Terrorism Police Unit v Mohammed Hamid Suleiman*). Following the grant of warrants

of search, the 2nd petitioner's house was searched causing her, Suleiman's wife and children trauma. The petitioners contend that the warrants were obtained under false pretences as Suleiman had already been handed over to the Ugandan authorities.

35. As regards the 3rd petitioner, her home was searched on 12th September 2010 while Mbutia was under detention in Uganda. According to the 1st petitioner, the police came to her home without furnishing her with search warrants, conducted a search of her home and confiscated various items of a personal nature belonging to Mbutia as evidenced by the inventory prepared by the police.

36. The respondents did not seek to justify their actions hence I have no option but to find that their actions violated **section 76(1)** of the former Constitution.

Reliefs

37. This court has wide jurisdiction to frame and grant appropriate relief under **section 84** of the former Constitution. Apart from consequential declarations, this court is entitled to award general and exemplary damages sought in prayers (xii) and (xiii) of the petition for the violations of the fundamental rights of the petitioner.

38. Before I deal with the damages sought in the petition, I note that the 3rd subject sought special damages in paragraph 6 of his affidavit sworn on 20th November 2018. He claimed that as a result of his arrest and rendition he lost a bid to purchase a property in Nairobi from Ukulima Cooperative Sacco worth Kshs. 165,000,000/- in which his company, Kensington International Ltd was the successful bidder and which he had paid the requisite 10% deposit. This claim is in the nature of special damages which must be properly pleaded and proved and since it was not pleaded, I reject this aspect of the claim contained in the deposition.

39. Counsel for the petitioners cited several cases to support the claim for general, vindicatory and exemplary damages. He urged that the court had wide powers under **section 84** of the Constitution to award damages of any nature not limited to compensatory damages. He submitted that this was a case where the State had acted not only in violation of the Constitution, callously, arbitrarily and thus exemplary damages were deserved. In support of this argument, counsel cited amongst other precedents **Attorney General v Ramanoop [2005] 4 LRC 301**, **Kihoro v Attorney General of Kenya [1993] 3 LRC 390** and **Dr Odhiambo Olel v Attorney General HCCC No. 366 of 1995 (UR)**. The petitioners therefore proposed the following as damages;

- i) Ksh 18,000,000 in general damages to the 1st petitioner against the 1st, 3rd and 4th respondents jointly and severally for the violation of the fundamental rights of the 1st subject in prayers (i) and (ii)
- ii) Ksh 75,000,000 in general damages to each of the 2nd and 3rd subjects against the 1st, 3rd and 4th respondents jointly and severally for the violation of fundamental rights and 3rd subjects in prayers (i) and (ii) and for their continued detention in Uganda
- iii) Ksh 3,000,000 in general damages to each of the 2nd and 3rd petitioners as against the 1st, 3rd and 4th respondents jointly for the violation of the fundamental rights of the 2nd and 3rd petitioners in prayer(ii)
- iv) Kshs 15,000,000 in exemplary/vindicatory damages to the 1st petitioner against the 1st, 3rd and 4th respondents jointly and severally for the arbitrary, callous, highhanded, outrageous and oppressive violation of their constitutional rights
- v) Kshs 500,000/- in exemplary/vindicatory and/or aggravated damages to each of the 2nd and 3rd petitioners herein against 1st, 3rd and 4th respondents jointly and severally for the arbitrary, callous, highhanded, outrageous and oppressive violation of their constitutional rights.

40. As I have stated elsewhere, the violation of the subjects' fundamental rights and freedoms culminated in their removal from Kenya. Those events in my view constitute a single transaction and a global approach to the award of damages would be most appropriate as was held in **Dominic Amolo Arony v The Attorney General NRB HC Misc. Civil Application No. 494 of 2003 [2003]eKLR** as follows:

For our part, we have two options both of which are attractive and reasonable in our view. The first is an award of a lump sum for all the breaches cited elsewhere and posit that, because the breaches happened almost within a defined period and within the defined area of E Block at Kamiti Prison, it would be a fair proposition to award such lump sum figure in damages. A further reason to be advanced in support of this position is that the breaches happened contemporaneously with each other and it would be difficult, nay impossible to separate each of them and give a fair and reasonable award in respect of each We must as we hereby do, come to the firm conclusion that a lump sum figure in damages would be the better, the fairer and the more reasonable approach to take in this matter.

41. In **Moses Tengeya Omweno Case (supra)**, the Court of Appeal in considering the award of damages analysed several cases from the High Court and Court of Appeal where the court had awarded damages for violation of fundamental rights and freedoms and came to the conclusion that a global award was appropriate. As in this case, the facts of that case revealed violation of several fundamental rights and freedoms hence the court determined that;

[57] We are conscious and swayed by the general trend of award of general damages by the High Court and the Court of Appeal in the various cases cited above. Persuaded by the award in these cases, it is our considered view that the sum of Ksh. 2,000,000/= was not commensurate with all the constitutional violations meted upon the appellant. The said sum was patently inadequate. We set aside the lump sum award of Ksh. 2,000,000/= as general damages and substitute it with a lump sum of Ksh. 5,000,000/= to cover all violations of the constitutional rights of the appellant.

42. The facts in the *Moses Tengeya Omweno Case (Supra)* were on all fours with the facts of this case. The decision was determined almost a year ago and provides a baseline for awards in similar cases hence I do not find any reason to depart from that decision given the almost similar facts. In coming to this conclusion, I have taken into account the fact of their removal from Kenya, the manner in which they were arrested and detained and the consequences of their removal from the country to them and their families. I therefore award each of the subject Kshs. 7 million as damages for violation of their fundamental rights and freedoms as outlined.

43. As regards the 2nd and 3rd petitioners, I award them Kshs. 500,000/- as damages for unreasonable search and seizures.

Conclusion and disposition

44. The facts of this case disclose that the removal and handing over the subjects to the Ugandan authorities was a culmination of various violations of their fundamental rights and freedoms. The respondents' justification for this action folded under the light of the former Constitution as validated by several decisions of our courts condemning such action as devoid of constitutionality and legality. Warsame J., emphasized the importance of the adherence to the Constitution even in the face of challenges to lawful authority by acts of terrorism in *Mohamed Aktar Kana v Attorney General NRB Appl. No. 544 of 2010 [2010]eKLR* as follows;

However, the Applicant and his Advocate have brought to the attention of this court the tenacity of the government of Kenya through its agents to simplify and trivialize the matter by saying that there is an agreement to transfer suspects within East Africa provided there is a request by one member country. That may be true but the question arises is whether an individual can be subjected to bilateral agreement in contravention of his basic fundamental rights.

The significant issue which we must not lose sight of is that the new constitution has enshrined the Bill of Rights of all citizens and to say one group cannot enjoy the right enshrined under the bill of rights is to perpetuate a fundamental breach of the constitution and to legalize impunity at very young age of our constitution. That kind of behavior, act or omission is likely to have far and serious ramification on the citizens of this country and the rulers. It also raises basic issue of whether a President who has just sworn and agreed to be guided by the provisions of the constitution can allow his agents to breach with remarkable arrogance or ignorance. All these, are issues which require sober and attentive judicial mind in order to address the rights and obligations of all parties involved.

Prima facie the allegations contained in this application is serious indictment on the institution of the President and whether he is protecting, preserving and safeguarding the interests, rights and obligations of all citizens as contained in the new constitution. This application is a clear indication that the security arms of this country have not tried to understand and appreciate the provision of this new Bill of Rights. It also shows yester years impunity are still thriving in our executive arm of the government.

45. I have found the respondents liable for violation of the subjects and petitioners' rights and fundamental freedoms, I therefore issue the following reliefs which shall constitute judgment in favour of the petitioners against the respondents jointly and severally:

(a) I declare that the arrest and removal from Kenya of **MOHAMED ADAN ABDOW, MOHAMED HAMID SULEIMAN and YAHYA SULEIMAN MBUTHIA** to Uganda to face trial without extradition proceedings or other lawful process was a violation of their right not to be deprived of their personal liberty guaranteed by **section 72** of the former Constitution and the right to immunity from expulsion from Kenya protected by **section 81** of the former Constitution.

(b) I declare that the entry into the premises of **MOHAMED ADAN ABDOW, MOHAMED HAMID SULEIMAN and YAHYA SULEIMAN MBUTHIA** by the Kenya police and the searches upon their persons and houses and those of the 2nd and 3rd petitioners, **ZUHURA SULEIMAN and YAHYA SULEIMAN MBUTHIA** was arbitrary and unconstitutional contrary to **sections 76 (1)** of the former Constitution.

(c) I award **Kshs. 7,000,000/=** as damages to cover all violations of the fundamental rights and freedoms to **MOHAMED ADAN ABDOW, MOHAMED HAMID SULEIMAN and YAHYA SULEIMAN MBUTHIA**

(d) I award **Kshs. 500,000/=** each to **ZUHURA SULEIMAN and YAHYA SULEIMAN MBUTHIA** as damages for arbitrary and unconstitutional searches contrary to **sections 76 (1)** of the former Constitution.

(e) I award the petitioners costs of the petition.

(f) The damages shall accrue interest at court rates from the date of this judgment until payment in full.

46. I am grateful to the parties for their well-researched submissions and authorities. If I have not made reference to them in the judgment, it is not because they were not of assistance to the court.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 15th day of JANUARY 2019.

E. C. MWITA

JUDGE

Mr Mureithi, Advocate, instructed by Mbugua Mureithi and Company Advocates for the petitioners.

Mr Odhiambo, Litigation Counsel, instructed by the Office of the Attorney General for the respondents.ma