



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**PETITION NO. 1 OF 2014**

**BETWEEN**

**ANNE PACIFICA ACHIENG OSEWE SUING AS ADMINISTRATOR TO**

**THE ESTATE OF DR WALTER EDWARD DAN OSEWE (DECEASED) .....PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner brings this suit as the administrator of the estate of Dr Walter Edward Dan Osewe (“the deceased”). The deceased died on 21<sup>st</sup> July 2004 and his wife, Anne Pacifica Achieng Osewe, the petitioner, obtained letters of administration ad litem to lodge this case.
2. In the petition dated 26<sup>th</sup> February 2014, the petitioner seeks a declaration that the deceased’s fundamental rights and freedom were violated by police officers who arrested him without a warrant and thereafter detained him for 43 days before he was charged. The petitioner further avers that after the High Court allowed his appeal against conviction and sentence and ordered his release, he was detained for a further one year without any cause or justification. The petitioner prays for damages.

**The Facts**

3. The facts as gathered from the pleadings and petitioner’s depositions are that the deceased was at the time material to this suit a chartered accountant employed by the National Council of Christian Churches. He hailed from Kodhidha sub-location within Homa Bay District.
4. On 19<sup>th</sup> September 1986, the deceased was at his Dandora Estate house when police officer came and arrested him. He was held incommunicado at undisclosed locations until he was arraigned in court on a charge of neglect to prevent a felony contrary to **section 393** of the **Penal Code (Chapter 63 of the Laws of Kenya)** as read with **section 32** thereof. The particulars were that knowing that some people were designing to commit a felony, namely publishing and distributing a seditious publication titled *Mpatanishi*, he failed to use all reasonable means to prevent commission thereof. He was also charged with the offence of allowing a meeting of *Mwakenya*, an unlawful society, to be held at his house at Dandora contrary to **section 6(b)** of the **Societies Act (Chapter 108 of the Laws of Kenya)**.

5. According to the charge sheet, the deceased was arrested on 19<sup>th</sup> October 1986 and arraigned in court on 1<sup>st</sup> December 1986 to answer to the charges in ***Nairobi Chief Magistrate Criminal Case No. 5666 of 1986 (R v Walter Edward Osewe)***. He pleaded guilty to both charges and was convicted and sentenced to 15 months imprisonment on the first count and 30 months imprisonment on the second count. He lodged an appeal from the conviction and sentence; ***Nairobi HCCR Appeal No. 183 of 1987***. The appeal was heard on 13<sup>th</sup> June 1988 and the sentence reduced to time served. According to the petitioner, the deceased was kept in custody even after the High Court ordered his release. He was finally released on 17<sup>th</sup> August 1989.
6. The petitioner's case is that the deceased's right to personal liberty guaranteed by **section 72** of the former Constitution was violated when he was detained for an unreasonable period before he was arraigned in court to answer charges and that he was detained after the High Court ordered his release.

### **Determination**

17. Since the respondent did not file a replying affidavit, I can only take the facts pleaded by the petitioner as uncontroverted and admitted (see ***Harun Thungu Wakaba & Others v Attorney General, H.C. Misc. Application No. 1411 of 2004*** and ***Dominic Arony Amolo v The Honourable Attorney General Nairobi HCCC No. 494 of 2003 (Unreported)***).

18. **Section 72(3)** of the former Constitution, which deals with pre-trial detention, states as follows;

*72(3) A person who is arrested or detained -*

*(a) for the purpose of bringing him before a court in execution of the order of a court; or*

*(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.*

19. In ***Dominic Mutie v Republic NRB CA CRA No. 217 of 2005 (Unreported)***, the Court of Appeal construed the provisions of **section 72(3)** as follows;

*A plain reading of that provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as soon as is reasonably practicable (emphasis ours). The section further provides that where such a person is not taken to court within either the twenty-four hours for non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person charged with a non-capital offence brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72 (3) above is in our view clear that each case has*

*to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of section 84 (1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity.*

20. In **Julius Kamau Mbugua v Republic NRB CA CRA No. 50 of 2008 (Unreported)** the Court maintained that;

*By section 72(3) a suspect so arrested or detained and who is not thereafter released had to be taken to court as soon as reasonably practicable and if he is not taken within 24 hours, if arrested or detained for non-capital offence or within 14 days, if he is arrested for capital offence, then the section cast a burden on a person who alleges that any detention beyond the specified period is still constitutional, of proving that the suspect was still brought before the court as soon as is reasonably practicable.*

21. The cases cited support the interpretation that under **section 72(3)** of the former Constitution, the State could avoid liability by demonstrating that the detention of a person detained beyond the time limits specified was reasonable in the circumstances. As the petitioner's case was unopposed, I accept the facts presented by the petitioner. They are backed up certified court proceedings that confirm the dates he was arrested and charged and the High Court Appellate decision confirming that he was released. The petitioner also produced contemporary newspaper articles which confirmed that the deceased was arrested and charged. I find and hold that the deceased was kept in police custody for 43 days in violation of the right to liberty guaranteed under **section 72** of the former Constitution. The respondent did not furnish any explanation as to why the deceased was arrested in 19<sup>th</sup> October 1986 and arraigned in court on 1<sup>st</sup> December 1986. He was further held for a period of over one year after the High Court ordered his release and the State continued to detain him until he was released on 17<sup>th</sup> August 1989. No justification was furnished for continued detention after the High Court allowed his appeal.

22. I now turn to the issue of damages. The High Court has awarded damages for violation of constitutional rights in a number of cases where unlawful detention has been proved. In **Harun Thungu Wakaba v Attorney General (above)**, the 20 petitioners, who were incarcerated and had their rights violated, were awarded general damages ranging from Kshs.1,000,000.00 to Kshs.3,000,000.00. In **Rumba Kinuthia v Attorney General NRB HC Misc. App. No. 1408 of 2004 (OS) (Unreported)** the petitioner was awarded Kshs.1,500,000.00 as general damages. Having regard to the unlawful pre-trial and post-conviction violation of the deceased's liberty, I award his estate **Kshs 3,000,000.00** as general damages.

### **Disposition**

23. In light of the foregoing, I enter judgment for the petitioner in the following terms;

- a. I declare that the deceased's fundamental rights and freedoms under **sections 72** of the former Constitution were contravened and violated by the respondent's agents.
- b. I award the sum of **Kshs. 3,000,000.00** in general damages to the petitioner as legal representative of the deceased's estate.
- c. The petitioner shall have the costs of the petition which I assess at **Kshs. 150,000.00**.
- d. Interest on damages at court rates from the date of judgment.

**DATED and DELIVERED at HOMA BAY this 2<sup>nd</sup> day of March 2016.**

**D. MAJANJA**

**JUDGE**

Mr Okoth instructed by G. S. Okoth and Company Advocates for the petitioners.