



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**PETITION NO. 6 OF 2015**  
**(FORMERLY PETITION NO. 13 OF 2011)**

**BETWEEN**

**WILLIAM NYOWINO DWALLO ..... 1<sup>ST</sup> PETITIONER**

**ZEPHANIA OCHIENG OSODO ..... 2<sup>ND</sup> PETITIONER**

**AND**

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

**JUDGMENT**

1. The petitioners have brought the petition dated 30<sup>th</sup> March 2011 seeking damages for wrongful arrest, false imprisonment and defamation of character including costs of the case. The petitioners have each sworn depositions in support of the petition. At the time material to this case, the 1<sup>st</sup> petitioner was a primary school teacher employed by the Teachers Service Commission while the 2<sup>nd</sup> petitioner was a farmer and a commercial motorcycle operator in Kochia Location within Homa Bay County.

2. Following an incident within Homa Bay that resulted in death of Humphrey Omondi Ouma and Ariro Obondo on 15<sup>th</sup> November 2007, the 1<sup>st</sup> petitioner was arrested on 21<sup>st</sup> July 2008 and arraigned in court on 7<sup>th</sup> August 2008 to plead to charges of murder in ***Kisii High Court Criminal Case No. 22 of 2008***. The 2<sup>nd</sup> petitioner was arrested on 23<sup>rd</sup> July 2008 and was arraigned in court with the 1<sup>st</sup> petitioner on 7<sup>th</sup> August 2008.

3. While the murder trial was pending, the 1<sup>st</sup> petitioner filed an application in the High Court being ***Kisii Petition No. 174 of 2008 (William Nyowino Dwallo v Republic)*** seeking relief from the charges. By a ruling delivered on 17<sup>th</sup> November 2008, Musinga J., found as follows;

*It is not in dispute that the police violated the provisions of section 72(3)(b) of the Constitution aforesaid. They have also failed to give any reason for that. In ***Albanus Mwasia Mutua v Republic Criminal Appeal No. 120 of 2004***, the Court of Appeal held that such unexplained delay is unconstitutional and proceeded to acquit the appellant who had been sentenced to death. Likewise, I find and hold that the applicant's constitutional right has been violated. There being no explanation for such violation, the charges against the applicant is a nullity. The applicant is ordered set at liberty unless otherwise lawfully held.*

4. The respondent opposed the petition through the replying affidavit of David Kibet Lawendi, who at the material time was the Officer Commanding Kisii Police Station, sworn on 19<sup>th</sup> September 2011. He was, at the time of the incident, the acting Commanding Officer of Homa Bay Police Station. He deponed that his officers carried out investigations following an incident where two persons had died as a result of an assault incident within Homa Bay District. He deponed that all actions taken by the police were in good faith.

5. In light of the decision in *Petition No. 174 of 2008 (William Nyowino Dwallo v Republic)* and *Petition No. 215 of 2008* which are referred to by Musinga J., in *HCCR Case No. 22 of 2008* in acquitting both petitioners, it is not open to this court to determine whether the respondent violated the petitioners' rights contrary to **section 73(3)** of the former Constitution as the violation had already been adjudicated upon. The respondent has not appealed against the said decision or applied to set it aside. As liability has been established, the only issue for determination is suitable relief under **section 84** of the former Constitution.

6. Both appellants were charged with the offence of murder hence, the maximum period for which they could be held was 14 days. The 1<sup>st</sup> petitioner was held in custody for 17 days hence he was unlawfully detained for **3 days** while the 2<sup>nd</sup> petitioner was in custody for 15 days hence he was unlawfully detained for **1 day**. I therefore award the 1<sup>st</sup> petitioner **Kshs. 300,000.00** and the 2<sup>nd</sup> petitioner **Kshs. 100,000.00** as damages for unlawful detention. Although Kshs. 80,000.00 was pleaded as special damages, the depositions do not disclose how this sum was arrived at.

7. I therefore enter judgment for the petitioners in the following terms;

- a. I declare that the petitioners' fundamental rights and freedoms under **sections 72** of the former Constitution were contravened and violated by the police when they were held in custody in violation of **section 72(3)** of the former Constitution.
- b. I award the 1<sup>st</sup> petitioner **Kshs. 300,000.00** in general damages and the 2<sup>nd</sup> petitioner **Kshs. 100,000.00** as general damages.
- c. I award the petitioners costs of the petition which I assess at **Kshs. 40,000.00**.
- d. Interest shall accrue on damages at court rates from the date of this 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.