Jona & 87 others v Kenya Prison Service & 2 others (Petition 15 of 2020) [2021] KEHC 457 (KLR) (18 January 2021) (Judgment)

Vincent Sila Jona & 87 others v Kenya Prison Service & 2 others [2021] eKLR

Neutral citation: [2021] KEHC 457 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

PETITION 15 OF 2020

GV ODUNGA, J

JANUARY 18, 2021

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 22, 25, 27, 28, 29,50, 51, 159 AND 165 OF THE CONSTITUTION OF KENYA AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW

AND

IN THE MATTER OF APPLICATION AND ENFORCEMENT OF SECTION 333 (2) OF THE CRIMINAL PROCEDURE CODE IN RELATION TO SENTENCES THAT HAVE NOT FACTORED THE TIME SPENT IN CUSTODY.

AND

IN THE MATTER OF: CONSTITUTIONAL INTERPRETATION OF SECTION 46(2) CAP 90 OF THE PRISON'S ACT IN RELATION TO COMPUTATION OF REMISSION OF SENTENCE

BETWEEN

VINCENT SILA JONA & 87 OTHERS & 87 OTHERS ..... PETITIONER

AND

KENYA PRISON SERVICE ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION ..... 2ND RESPONDENT

OFFICE OF THE ATTORNEY GENERAL ..... 3RD RESPONDENT

The period spent in custody by an accused person should be taken into account during the imposition of sentences, save for the sentence of death.

Reported by Kakai Toili

Jurisdiction *– jurisdiction of the High Court – supervisory jurisdiction - whether the High Court's supervisory jurisdiction could be invoked despite the dismissal of an appeal by a person sentenced in disregard of section 333(2) of the Criminal Procedure Code - Constitution of Kenya, 2010, article 165; Criminal Procedure Code (cap 75) section 333(2).*

Statutes *– interpretation of statutes – interpretation of section 333(2) of the Criminal Procedure Code - what was meant by taking into account the period that an accused had spent in custody before they were sentenced as provided for in section 333(2) of the Criminal Procedure Code - Criminal Procedure Code (cap 75) section 333(2).*

Criminal Procedure *– sentencing – consideration of time spent in custody – claim that a trial court failed to consider the time spent in custody during sentencing contrary to the provisions of the Criminal Procedure Code – effect of - what were the options available to a person who was convicted and the sentence imposed did not take into account the period spent in custody – Constitution of Kenya, 2010, articles 23(1), 27(1), (2), (4) and (5), 165(3) (b) and (6); Criminal Procedure Code, (cap 75), section 333(2) and 362.*

Criminal Procedure *– sentencing – resentencing - claim that a trial court failed to consider the time spent in custody during sentencing contrary to the Criminal Procedure Code - factors to consider in determining the sentence to be imposed on an accused during resentencing – what was the effect of imposing a sentence without adhering to the law - Criminal Procedure Code, (cap 75), section 333(2).*

Criminal Procedure *– sentencing – remission of sentences - whether the date when a prisoner was first admitted to prison and not the date of the subsequent resentencing was the proper date to be considered for purposes of remission – Constitution of Kenya, 2010, article 20(3)(b); Prisons Act, (cap 90), section 46(2).*

Brief facts

The petitioners filed the instant petition claiming grave violations of their fundamental rights and freedoms. Those rights included the right to a fair trial and to benefit from the least prescribed sentence as guaranteed under article 50(2)(p) of the Constitution of Kenya, 2010 (Constitution). The petitioners claimed that under article 25(c) of the Constitution, the right to a fair trial could not be limited.

The petitioners claimed that they were persons whose sentences had not taken into account the time spent in custody while undergoing trial as required under sections 333(2) of the Criminal Procedure Code while others had not benefited from remission as provided for under section 46(2) of the Prisons Act. They, therefore, claimed that they were serving excessive sentences far from the intention of the sentencing courts. The petitioners further claimed that their right to equal benefits and equal protection of the law under article 27(1) of the Constitution had been violated.

Issues

i. What was the implication of the phrase "by taking into account the period that an accused had already spent in custody before they were sentenced", during sentencing as provided for in section 333(2) of the Criminal Procedure Code?
ii. What was the effect of imposing a sentence without adhering to the law?
iii. What were the options available to a person convicted and the sentence imposed did not take into account the period already spent in custody?
iv. Whether the High Court's supervisory jurisdiction could be invoked despite the dismissal of an appeal by a person sentenced in disregard of section 333(2) of the Criminal Procedure Code.
v. What were the factors to be considered by a court in determining the sentence to be imposed on an accused during re-sentencing?
vi. What was the effect of failing to take the cumulative period of custody into account during sentencing?
vii. Whether the date when a prisoner was first admitted to prison and not the date of the subsequent re-sentencing was the proper date to be considered for purposes of remission.

Relevant provisions of the Law

Criminal Procedure Code (cap 75)

Section 333 - Warrant in case of sentence of imprisonment

(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

Held

1. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that the accused had spent in custody before they were sentenced. Taking into account the period spent in custody meant considering that period so that the imposed sentence was reduced proportionately by the period already spent in custody. It was not enough for the court to merely state that it had taken into account the period already spent in custody and order the sentence to run from the date of the conviction because that amounted to ignoring altogether the period already spent in custody. The proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it meted out to the accused person.
2. A person on whom a sentence had been imposed which did not comply with section 333(2) of the Criminal Procedure Code had recourse to the court since he would by that fact have been subjected to serve a sentence that did not comply with the law. Such a person risked serving a sentence that was in excess of the one lawfully prescribed thus being deprived of his liberty contrary to the law. Imposing a sentence without adhering to the law hence subjecting the convict to serve a sentence that was over and above what was provided for, was depriving him of his freedom without a just cause.
3. A holistic consideration of articles 23(1), 165(3)(b) and (6) of the Constitution showed that the court had the power to redress a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and one such violation was the denial or threat of denial of freedom without a just cause such as where the sentence that a person risked serving was in excess of the sentence lawfully prescribed one by failing to comply with section 333(2) of the Criminal Procedure Code. The court was therefore empowered to do so in the exercise of its supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, as long as that person, body or authority was not a superior court. Therefore, a person who was faced with such a situation could well invoke the revision powers of the High Court pursuant to section 362 of the Criminal Procedure Code. An appeal was not necessary in those circumstances. Unless the sentence was substituted by the appellate court, the same position applied.
4. Where the appellate court considered the appeal and disallowed it without interfering with the sentence, the decision on sentencing remained that of the trial court and if that sentence was imposed in contravention of the provisions of section 333(2) of the Criminal Procedure Code, nothing barred the court in the exercise of its constitutional mandate pursuant to article 165 of the Constitution from redressing the situation.
5. Notwithstanding a dismissal of an appeal, a person sentenced in disregard of section 333(2) of the Criminal Procedure Code was not disentitled from invoking the court's supervisory jurisdiction to consider whether or not the sentence imposed was lawful. While it could be argued that in so doing the court would be interfering with the decision of the appellate court which in effect affirmed the decision of the trial court, that would not be the position where an appeal was simply dismissed without the sentence being reviewed. Even if the same was reviewed, the jurisprudence in Kenya held to the contrary.

6. Section 333(2) of the Criminal Procedure Code enjoined the trial court to take into account the period spent in custody where the person sentenced had, prior to such sentence, been held in custody. Section 333(2) did not create a distinction between initial sentencing and re-sentencing undertaken pursuant to a court order.
7. In undertaking a re-sentencing, the court was enjoined to find out the period for which the convict was in custody prior to the date of re-sentencing including the period he served pending his trial and after his initial conviction and sentencing. That whole period had to be taken into account in computing the sentence to be imposed on him in handing down the appropriate sentence during re-sentencing. Unless that was done, the re-sentence was likely to fall foul of article 50(2)(p) of the Constitution.
8. To fail to take the cumulative period of custody into account would amount to treating those who were earlier convicted differently from those who were being convicted based merely on the date of their conviction contrary to the provisions of article 27(1), (2), (4) and (5) of the Constitution.
9. Under section 46 of the Prisons Act, all convicted criminal prisoners were, upon their admission entitled to be credited with the full amount for remission to which they would be entitled at the end of their sentence if they lost no remission of sentence. It would seem that the prison authorities were interpreting the word admission to apply from the date of re-sentencing. To do so would mean that the prisoner was presumed to have been free prior to the date of the re-sentencing which was not the position.
10. To interpret section 46(2) of the Prisons Act in a way that did not take into account the period served before re-sentencing deprived the prisoner of his right to the benefit of the least severe of the prescribed punishments for an offence and also amounted to discrimination based merely on the ground that the prisoner was in custody prior to his re-sentencing. In determining admission for the purposes of section 46(2), the relevant date for the purposes of remission was the date when the prisoner was first admitted in prison and not the date of the subsequent re-sentencing. The court was alive to the provisions of article 20(3)(b) of the Constitution which enjoined the court in applying the provisions of the Bill of Rights, to adopt the interpretation that most favoured the enforcement of a right or fundamental freedom.
11. The court did not have the benefit of perusing the files before the trial court in order to determine whether what had been pleaded in the petition was correct. In any case, the issue of remission was an issue for the exercise of discretion by the prison authorities. In those circumstances, the best course would be for the petitioners to take the necessary steps in their respective matters in order to redress the wrongs. It could take some time to do so but experience had repeatedly shown that shortcuts invariably resulted in being more expensive and time-absorbing in the end and a shortcut in breach of a fundamental rule creating or occasioning remedial action could not escape the stigma of delay.

Petition partly allowed; no order as to costs.

Orders

i. *A declaration was issued that trial courts were enjoined by section 333(2) of the Criminal Procedure Code, in imposing sentences, other than the sentence of death to take account of the period spent in custody.*
ii. *A declaration was issued that those who were sentenced in violation of section 333(2) of the Criminal Procedure Code were entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences.*
iii. *A declaration was issued that section 333(2) of the Criminal Procedure Code applied to the original sentence as well as the sentence imposed during resentencing.*
iv. *A declaration was issued that in determining admission by the prison authorities for the purposes of section 46(2) of the Prisons Act, the relevant date was the date when the prisoner was first admitted to prison upon conviction and not the date of resentencing.*
v. *Any review of the sentences was to be considered on a case-to-case basis.*

Citations

Cases

Kenya

1. *Agui, Jackson & 1941 others v Cabinet Secretary, Ministry of Development and Planning & another* Constitutional Petition 1 of 2014; [2015] KEELC 4 (KLR) - (Explained)
2. *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others* Petition 371 of 2016; [2017] KEHC 8601 (KLR) - (Mentioned)
3. *Gachugi, Arthur Mukira v Kenya Tea Development Holdings Ltd & 3 others* Judicial Review 577 of 2016; [2016] KEHC 227 (KLR) - (Explained)
4. *Githua, Julia Wangeci v Commissioner General of Prisons & 2 others* Petition E045 of 2019; [2021] KEHC 1617 (KLR) - (Mentioned)
5. *Ikere, Jemimah Wambui v Standard Group Limited & another* Petition 466 & 416 of 2012; [2013] KEHC 636 (KLR) - (Explained)
6. *In Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43 - (Explained)
7. *Kibor, Bethwel Wilson v Republic* Criminal Appeal 78 of 2009; [2009] KECA 143 (KLR) - (Followed)
8. *Kittiny, William Okungu v Republic* Criminal Appeal 56 of 2013; [2018] KECA 851 (KLR) - (Explained)
9. *Macharia v Wanyoike* [1981] KLR 45 - (Applied)
10. *Mbura, Samuel Rukenya & 18 others (Suing for themselves and on Behalf of other Former Employees of Castle Brewing Kenya Limited) v Castle Brewing Kenya Limited & another* Civil Case 1119 of 2003; [2006] KEHC 2316 (KLR) - (Mentioned)
11. *Mitu-Bell Welfare Society v Attorney General, Kenya Airports Authority & Commissioner of Lands* Petition 164 of 2011; [2013] KEHC 6337 (KLR) - (Mentioned)
12. *Mohammed, Ahmad Abolfathi & Sayed Maisour Monsavi v Republic* Criminal Appeal 106 & 107 of 2013; [2016] KEHC 7438 (KLR) - (Followed)
13. *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR) - (Explained)
14. *Nguruman Limited v Shompole Group Ranch & another* Civil Application 90 of 2013; [2014] KECA 358 (KLR) - (Explained)
15. *Rai & 3 others v Rai & 5 others* Petition 4 of 2012; [2013] KESC 21 (KLR); [2013] 1 KLR 685 - (Followed)
16. *Shikuku, Protus Buliba v Attorney General* Constitutional Reference 3 of 2011; [2012] KEHC 5517 (KLR) - (Followed)

South Africa

Kate v MEC for the Department of Welfare, Eastern Cape [2005] 1 All SA 745 (SE) - (Mentioned)

Regional Court

1. *Kibutiri v Kibutiri* [1983] KLR 62; (1976-1985) EA 220 - (Followed)
2. *Lehmann's (East Africa) Ltd v R Lehmann & Co Ltd* [1973] EA 167 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 20(3); 23(3); 25(c); 27(1)(2)(4); 29(d)(f); 50(2)(p); 165(3)(b) - (Interpreted)
2. Criminal Procedure Code (cap 75) section 333(2) - (Interpreted)
3. Penal Code (cap 63) section 38 - (Interpreted)
4. Prisons Act (cap 90) section 46(1)(2) - (Interpreted)

Instruments

International Covenant on Civil and Political Rights (ICCPR), 1966

Advocates

Mr Ngetich for the respondent

JUDGMENT

Petitioners' Case

1. The petition before me is home-made petition and therefore it is not easy from the petition to discern their grievances. However, in the submissions filed, the substance of their case is capable of being identified though not without some difficulty. From the submissions, the following issues have been identified:

    1) That the petitioner's right to a fair trial have been violated by the fact that the time spent in remand was not taken into account as required under section 333(2) of the *Criminal Procedure Code* (the Code) hence violating article 50(2)(p) of the *Constitution*.

    2) That a number of petitioners are serving excessive sentences by the fact that the time spent in remand has not been taken into account as required under section 333(2) of the *Code* and therefore violating article 29(d) and (f) of the *Constitution*.

    3) That the petitioners have not been subjected to equal protection and equal benefit of the law by the fact that the time spent in remand has not been taken into account and therefore violating article 27(1),(2) and (4) of the *Constitution*.

    4) That this court has the power to order for judicial review in respect to petitioners 1 -51 and 88 whose sentences have not taken into account the time spent in remand and enforce the fundamental rights and freedoms of the petitioners while upholding the intention of the sentencing court.

    5) That petitioners 52-61 and 86 are persons who have exhausted their appeals been dismissed by the court of appeal and therefore this court has the power to order for inclusion of the time spent in custody while undergoing trial.

    6) That petitioner 62-85 and 87 are being subjected to illegal sentences by a wrong application of section 46(1) of the *Prisons Act* (the Act) which grants remission due to the fact that their sentences are in violation of section 46(2) of the Act since remission has not been calculated from the date of conviction by the Kenya Prisons Service.

    7) That petitioners 62-85 and 87 are serving ambiguous sentences which run effective the date of resentence in contravention with section 333(2) of the Criminal Procedure Code while the petitioners have been in custody for a considerable number of years and this violates the spirit and intention of section 333(2) of the *Code*.

    8) That not subjecting a considerable number of years to remission, as well as failure to take into account the time spent in custody, amounts to a violation of article 27(1) of the *Constitution* since 2 prisoners liable to a similar sentence end up serving different sentences in violation of the principle of equality.

    9) That this court orders that all the petitioners whose period that they spent in remand has not been computed in their sentences, be referred back to the trial court under article 23(3)(f) of the *Constitution* for inclusion of the period spent in remand only.

10) That this court orders that in the case petitioners 62-85 and 87 as well as all other persons affected by the improper application of section 46(2) of the *Act*, the Kenya prisons computes remission from the date of conviction as required by section 46(2) of the Act.

2. According to the petitioner, this petition raises grave violations of the petitioner's fundamental rights and freedoms which have been guaranteed under our Constitution. These rights include the right to a fair trial and to benefit from the least prescribed sentence as guaranteed under article 50(2)(P) of the *Constitution*. Under article 25(c) of the *Constitution* the right to a fair trial cannot be limited.

3. It was contended that the petitioners in this case are persons whose sentences have not taken into account the time spent in custody while undergoing trial as required under sections 333(2) of the *Code* while others have not benefited from remission as provided for under section 46(2) of the *Act* and therefore are serving excessive sentences far from the intention of the sentencing courts. The petitioners further claim that their right to equal benefit and equal protection of the law under article 27(1) has been violated. By failing to apply section 333(2) of the Code and section 46(2) of the *Act* results to the petitioners serving excessive sentences.

4. Was contended that there are various categories of persons in this petition viz;

1) There are those petitioners who have not exhausted their appeals while in some their appeals have taken unreasonable long and therefore they have ended up serving excessive sentences an example is petitioner 88 whose sentence would have expired on the August 18, 2019 had the court take into account the time spent in custody. This category comprises of petitioners 1-51 and 88.

2) The other category comprises of persons who have exhausted their appeals and the court failed to take into account the time spent in remand while undergoing trial thus occasioning inequality in terms of application of section 333(2) of the *Criminal Procedure Code*. This comprises of petitioners 52-61 and 86.

3) Finally, there is a category of petitioners who if their sentences are computed while taking into account the time spent in remand and the benefit of remission, their sentences would have expired. This comprises of petitioners 62-85 and 87.

5. According to the petitioners, based on based on *Ahmad Abolfathi v Republic* [2016] eKLR, the question on where the inclusion of the time spent in remand should take place lies with the sentencing which is the trial court. Based on the case of *William Okungu Kittiny v Republic* [2018] eKLR it was submitted that where there is a violation of fundamental rights substantive justice should prevail over procedural technicalities. In this case, it was submitted that it is clear that the time spent in remand has caused a violation of rights by a person serving an excessive sentence, and so the question is what should prevail. It should be noted that by including the time spent in remand while undergoing trial, affirms the intention of the court and therefore this is one of the few instances where a court should review its own decision where there has been an omission or an error when time spent in custody has not been taken into account.

6. The petitioners lamented that in reviewing their sentences under the principle laid out in Francis *Karioko Muruatetu & another v Republic*, Petition No 15 of 2015, the time spent in custody while undergoing trial has not been taken into as required under section 333(2) of the *Code* as well as a considerable number of years have not been subjected to remission as required under section 46(2) of the *Act*. This creates an ambiguity and a question as to whether a prisoner would have two dates of admission in terms of the application of section 46(2) of the *Act* and the petitioners end up serving a higher sentence than a similar convict liable to a similar sentence. It is therefore sought that the court

makes a decision on whether by computing remission from the date of review of sentence amounts to an illegality. Further by computing remission from the date on which the sentence was reviewed violates article 50(2)(p) of the *Constitution* which clearly states that where there are two circumstances as the one raised above that a person should benefit from the least.

7. Further, the *Constitution* under article 20(3) provides that a court should interpret a law that most favours a fundamental right. In this case, the Kenya prisons service has failed to exercise fair administrative action by computing remission of sentences from the date of conviction while in other cases computing from the date when the sentence was reviewed.

8. It was contended that the petitioners are aggrieved in that the time spent in remand while undergoing trial has not been taken into account. A substantial number of these persons have heard their appeals at the High Court and have been dismissed while the others have been heard by the Court of Appeal and their appeals have been dismissed. Further petitioners 62- 85 and 87 are persons who have been denied the benefit of the time spent in remand as well as a substantial number of years in terms of computation of remission which is occasioned by the failure to apply section 46(1) and (2) of the Act which states that remission should be computed from the date of conviction.

9. According to remission should be computed from the date of conviction. It was submitted that under article 165(3) of the *Constitution* this court has the jurisdiction to determine the issues posed by the petitioners based on the decision in *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others* [2017] eKLR, *Mitu-Bell Welfare Society v Hon Attorney General & 2 others* [2012] eKLR and *Kate v MEC for the Department of Welfare, Eastern Cape* [2005] 1 All SA 745 (SE) at para 16.

10. In respect to the failure to include the time spent in custody while undergoing trial under section 333(2) of the *Code*, it was contended that it is common ground that there is a clear violation of the petitioners' fundamental rights and freedoms. A considerable number of the petitioners are serving excessive sentences which amounts to inhuman and degrading treatment and therefore a violation of article 29(d) and (f) of the *Constitution*. Further the fact that the petitioner's sentences are not inclusive of the time spent in remand violates the principle of equality under article 27(1) of the *Constitution*. It was noted that the right to a fair trial extends to the sentence and by virtue of article 50(2)(p) of the *Constitution* an accused person should benefit from the least prescribed sentence.

11. The most problematic question, according to the petitioners, has been when to include the time spent in remand and this has caused an irregular application of section 333(2) of the Code where the High Court and the Court of Appeal have in some instances included the same while in other instances they have not. This problem has mainly been caused by the failure of the trial court to appreciate and to keep in touch with the provisions of section 333(2) as interpreted by the Court of Appeal. The question the petitioners therefore posed to this court to address is when time spent in custody has not been included, where and when it should be addressed.

12. The petitioners also raised an issue regarding the application of the provision of section 46(2) of the *Act*. According to them petitioners 62-85 and 87 have not been subjected to equal protection and benefit of the law by virtue of misapplication or failure to adhere to the said provision which provides that remission should be computed from the date of conviction while the said petitioners' sentences have not been computed from the date of conviction occasioning a violation of the petitioners right to fair trial, right equality and not to be treated in an in human and degrading manner. The petitioners right to a fair trial have been violated in that the time spent in custody while undergoing trial has not been taken into account. Further, the said petitioners have lost a considerable number of years in terms of

remission by the misapplication or failure to apply section 46(2) of the *Code* and therefore end up serving a higher sentence.

13. In support of the submissions, the petitioners relied on *Francis Karioko Muruatetu & another v Republic*, Petition No 15 of 2015, section 333(2) of the Code and *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR. In the petitioners' case the failure to include the time spent in custody while undergoing trial violates article 50(2)(p) of the *Constitution* a right which cannot be limited.

14. In the petitioners' view, the least prescribed sentence is one which takes into account the time spent in remand since it should be borne in mind that even though an accused person has been sentenced to a certain number of years, the accused person's liberty was lost once arrested. It should therefore follow that the sentence is deemed to start when liberty was lost. The court of appeal held that this is time that has been spent as part of the sentence and should therefore be reduced proportionately. The court finally held that sentences should then run from the date of arrest or when liberty was lost. Failure therefore to include this period amounts to a violation of the right to a fair trial.

15. As regards remission, it was submitted that the failure by the Kenya Prison Service to compute remission from the date of conviction amounts to an illegality and a violation of article 50(2)(p) of the *Constitution* since by section 46(1) all convicted prisoners should be fairly accorded remission up to one third of the cumulative sentence, while sub-section 2 provides that remission should be granted upon admission which is technically the date of conviction as if he lost no remission. In this case, petitioner 62-85 and 87 are persons who were initially serving death or life sentences and their sentences later reviewed under the *Francis Muruatetu* case and sentenced to a definite period.

16. It was submitted that the petitioners are being subjected to inhuman and degrading treatment. The fact that the time spent in remand has not been taken into account and the failure to compute remission from the date of conviction has led to serving excessive sentences and this amounts to inhuman and degrading treatment contrary to article 29(d) and (f) of *the Constitution*, Policy direction 7.10 of the Sentencing Policy Guidelines (2015) and the decision of Visram J (as he then was) in the case of *Samwel Rukenya Mburu v Castle Breweries*, Nairobi HCC 1119 of 2003.

17. According to the petitioners, while it may be argued that the petitioners are in lawful custody but it must be appreciated that once the sentences extend beyond that which may have been intended then it stops being lawful and becomes cruel. This court was therefore urged to find that the fact that the petitioners' sentences are not inclusive of the period spent in remand as an unconstitutional as it amounts to inhuman and degrading treatment. Secondly failure to compute petitioner 62-85 and 87 sentences from the date of conviction amounts to inhuman and degrading treatment.

18. Based on the foregoing, it was submitted that the failure to include the time spent in remand as required by section 333(2) of the *Code* and the failure to compute remission from the date of conviction as required section 46(2) of the Act in respect to petitioners 62-85 and 87 has led to a violation of the principle of equality under article 27 of *the Constitution*. They also relied on article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) and *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.

19. According to the petitioners, the failure to include the time spent in remand as provided for under section 333(2) of the *Code* goes against the principle of equal treatment and equal protection of the law. Two prisoners liable to a similar sentence for example 14 years end up spent different periods of time. Further failure to compute remission from the date of conviction as anticipated by section 46(2) of the *Prisons Act* puts two convicts liable to a similar sentence at different levels. This is as a result of the fact that a considerable number of years have not been subjected to remission. It should be remembered

that remission for all the prisoners should be computed from the date of admission as if it was not lost. This is a benefit which can only be curtailed according to the provisions of this statute.

20. This court was therefore urged to find that failure to include time spent is unconstitutional since it violates the spirit of equality. Further the failure to compute remission from the date of conviction in respect to petitioner 62-85 and 87 causes inequality from one prisoner against all other prisoners who are supposed to benefit from remission. Similarly, the court should find that failure to compute remission from the date of conviction violates the principle of equality.

21. In the petitioners' view, where the court does invoke the latter provision of section 333(2) it means the trial process is incomplete and therefore a violation of the right to a fair trial under article 50 of the *Constitution*. The only court that should have that duty is the trial court.

22. Based on article 23(1) and (3) of the *Constitution* with the holdings in *Jeminah Wambui Ikere v Standard Group Ltd and Anor Petition* No 466 of 2012, *Arthur Mukira Gachugi v Kenya Tea Development Holdings Ltd & 3 others* [2016] eKLR, *Re Bivac Internationale SA (Bureau Veritas)* [2005] 2 EA 43, *Jackson Agui & 1941 others v Cabinet Secretary, Ministry of Development and Planning & another* [2015] eKLR, *Nguruman Limited v Shompole Group Ranch & another* [2014] eKLR, *Ahmad Abolfathi v Republic* (*supra*) and *William Okungu Kittiny v Republic* [2018] eKLR, it was submitted that it is important that in this particular matter to address the petitioners according to their circumstances despite the fact that they face a similar predicament in terms of the fact that their sentences are not inclusive of the time spent in remand. In the petitioners' view, the only viable tool to enforce the petitioners' rights is through making an order for judicial review with orders to include the time spent in remand as part of the sentence. This according to the petitioners would get rid of the enormous applications of the same nature and would save time and resources. It was therefore submitted that this court has the power to order for judicial review and refer all the petitioners whose time spent in remand has not been taken into account to their respective courts for one specific order which is that the time spent in remand be included as part of the sentence.

23. Dealing with the category of petitioners who have already exhausted the appeal process and the court have not taken into account the time spent in remand, it was submitted that those petitioners have no other opportunity to have the time spent in custody taken into account. In this regard the petitioners relied on article 165(3) of the *Constitution*. In this regard they relied on the Supreme Court case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others* (2013) where the Chief Justice Mutunga and the case of *Protus Buliba Shikuku v Attoney General* [2012] eKLR and submitted that under article 165 this court has the power to address questions where fundamental freedoms have been violated.

24. On the issue of failure to include the time spent in remand as part of the sentence as well failure to compute remission from the date of conviction as required by section 46(2) of the *Act*, it was submitted that from the reading of section 46(1) all convicted offenders serving a number of years are entitled remission. This is regardless the gravity of the offence, the number of years serving, regardless of whether a convict was initially serving a death sentence or life sentence and now serves a defined sentence.

25. My lord, it is the duty of this court to interpret the law in a way that most favours a fundamental right. In this instance the petitioners' right to a fair trial and to benefit from the least prescribed sentence has been violated, further the petitioners' right to equal protection and equal benefit of the law and non-discrimination has been violated. The petitioners are further serving excessive sentences and therefore have been subjected to inhuman and degrading treatment. The ambiguity in relation to computation of remission has been created by the fact that the petitioners have been issued with sentences which

fail to take into account the period a convict has been in custody since conviction. This creating an ambiguity in terms of computation of remission and consequently leading to the petitioners serving excessive sentences.

26. As regards the remedies, it was held that the remedies sought herein can be actualized by the court categorizing the following petitioners as follows;

    1. That in relation to petitioners 1-51 and 88 whose rights to a fair trial, equality and inhuman and degrading treatment has been violated by the fact that their sentences is not inclusive of the time spent in remand; That this court declares that the fact that the time spent in remand was not taken into account violates the petitioners' fundamental rights and freedom and therefore unconstitutional;

    2. That petitioner 52-61 and 86 are convicts who have exhausted their appeals. Having established that this court has the jurisdiction to address the violation of the petitioners' fundamental rights while it is clear that the time spent in custody was not taken into account. It is the petitioners' humble prayer that this court orders that they appear before their respective trial courts on a date that the court will deem convenient for the purposes of inclusion of the time spent in custody while undergoing trial.

    3. That for petitioner 62-85 and 87 who are convicts who have lost a considerable number of years in terms of remission by the fact that they have been issued with fresh sentences. It was sought that this court orders for consolidation of the term of years and then the remission be computed from the date of conviction as required by section 46(2) of the *Prisons Act*.

    4. For those who if the time taken into account under section 333 (2) of the *Criminal Procedure Code* and section 46(2) of the *prisons act* their sentences would have already expired, it was sought that this court refers their dates of arrest from copies of their judgments for the p

    5. As regards those petitioners who who have not benefited from computation of remission as provided for under section 46(2) of the Act by the fact that they have been issued with fresh sentences which run effective the date of resentence, it was sought that this court orders that their remission be computed from the date of conviction as is required under section 46(2) of the *Prisons Act*.

27. The petitions then gave details so of the petitioners whose sentences may have expired if section 46(2) of the Act was applied properly in computation of their fresh sentences.

2nd Respondent's Case

28. The petition was only responded to by the 2nd respondent.

29. According to the 2nd respondent, the Director of Public Prosecutions (the DPP), upon perusal of the aforesaid material placed before this court, he was of the view that the same clearly point to some infringement on the rights of the petitioners at different levels which needed redress from this court.

30. While the second respondent was not opposed to the petitioners' cries being addressed, he was of the view that each grievance be addressed individually since the petitioners' grievances are of different in nature and may be categorized as follows;

    1) Petitioners who were tried convicted and sentenced but the time spent in remand during trial was not considered at the sentencing stage.

2) Petitioners who appealed and had their sentences reviewed but the new sentences passed were set to run from the date of re-sentencing.

3) Petitioners whose remission was computed from the date of resentencing as opposed to the date of conviction.

4) Prisoners whose sentences have expired but continue to be held due to conflicting implementation of the existing legislations.

31. Based on the decision of this court in Petition 44 of 2019 - *Julia Wangechi Githua v Commissioner General of Prisons, Director of Public Prosecutions and the Attorney General* the 2nd respondent, while not opposing the remedies sought was of the view that this court should order the petitioners to appear before respective trial courts on a date that the court will deem convenient for purposes of inclusion of the time spent in custody while undergoing trial.

Determination

32. I have considered the issues raised hereinabove.

33. From the foregoing, it is my view that the issues which have provoked this petition and that fall for determination are as follows:

1) That the trial courts are in some cases not applying the provisions of section 333(2) of the *Criminal Procedure Code*.

2) That as a result of the failure to apply the said section, there are those convicts who have exhausted their appellate options and have no recourse to the said section as opposed to those who are in the same position as themselves but have had the benefit of the said provision.

3) That in resentencing, the fresh sentences are being imposed without regard the period already served before the resentencing. In other words, the application of section 333(2) is only being made with reference to the resentencing and not the date of conviction.

4) That in applying remission, similarly the period served before resentencing is not being taken into account by the Prisons Authorities.

34. Section 333(2) of the *Criminal Procedure Code* provides as hereunder:

(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the *Penal Code* every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

35. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in computing the period of the sentence. I associate

myself with the decision in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR where the Court of Appeal held that:

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012." [Emphasis mine].

36. The same court in Bethwel *Wilson Kibor v Republic* [2009] eKLR expressed itself as follows:

> " By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at September 22, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

37. According to The Judiciary Sentencing Policy Guidelines:

> The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.

38. What then are the options available to a person who is convicted and the sentence imposed does not take into account the period spent in custody? In my view a person on whom a sentence has been imposed which does not comply with section 333(2) has recourse to this court since he would by that fact been subjected to serve a sentence which does not comply with the law. Such a person risks serving

a sentence which is in excess of the one lawfully prescribed thus being deprived of his liberty contrary to the law. Article 29(a) of the *Constitution* provides that:

> Every person has the right to freedom and security of the person, which includes the right not to be—
>
> (a) deprived of freedom arbitrarily or without just cause;

39. Imposing a sentence without adhering to the law hence subjecting the convict to serve a sentence that is over and above that provided for, is in my view, depriving him of his freedom without a just cause.

40. Article 23(1) of the *Constitution* provides that

The High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

41. Article 165(3)(b) of the *Constitution* provides that:

> Subject to clause (5), the High Court shall have—
>
> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

42. Article 165(6) of the *Constitution* provides that:

> The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

43. A holistic consideration of the above provisions clearly show that this court has the power to redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and one such violation is the denial or threat of denial of freedom without a just cause such as where the sentence that a person risks serving is in excess of the sentence lawfully prescribed one by failing to comply with section 333(2) of the *Criminal Procedure Code*. The court is therefore empowered to do so in the exercise of its supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, as long as that person, body or authority is not a superior court. Therefore, a person who is faced with such a situation may well invoke the revisionary powers of the High Court pursuant to section 362 of the *Criminal Procedure Code*. In my view, an appeal is not necessary in those circumstances.

44. What then is the position where as a result of the failure to apply the said provisions, a person has exhausted his appellate options? In my view, unless the sentence was substituted by the appellate court, the same position applies. Where the appellate court considered the appeal and disallowed the same without interfering with the sentence, it is clear that the decision on sentencing remains that of the trial court and if that sentence was imposed in contravention of the provisions of section 333(2) of the *Criminal Procedure Code*, nothing bars this court in the exercise of its constitutional mandate pursuant to article 165 of the *Constitution* from redressing the situation. Accordingly, notwithstanding a dismissal of an appeal, a person sentenced in disregard of section 333(2) aforesaid is not thereby disentitled from invoking this court's supervisory jurisdiction to consider whether or not the sentence imposed was lawful. While it may be argued that in so doing this court would be interfering with the decision of the appellate court which in effect affirmed the decision of the trial court, in my respectful view that would not be the position where an appeal is simply dismissed without the sentence being

reviewed. Even if the same was reviewed, the jurisprudence in this country holds to the contrary. In *Protus Buliba Shikuku v Attorney General* [2012] eKLR where the High Court while addressing the question of jurisdiction to hear a matter which the Court of Appeal had determined where there was a violation of fundamental rights held:-

> "(9) In a unique way the superior court is being asked to interfere with a decision of the court of appeal. We are in agreement that article 23 of the current 2010 Constitution as read with article 165(1)(3)(a)(b)(d)(i)(ii) have donated the same mandate without exception to this superior court and for this reason of donation of jurisdiction without exception we feel confident that we are properly seized of the petitioner's complaints which arise from an alleged act of omission or commission by the courts of this jurisdiction as laid out in the petition.
>
> (10) That the petitioner's complaints in the petition having been anchored on an alleged breach of a fundamental right, the legal prescriptions assessed under the article 2(5) of the 2010 Constitution as emanating from International Law Best Practices are in agreement with the current Municipal prescriptions as assessed that there are key principles which should be taken into consideration when dealing with complaints such as those laid by the petitioner namely:-
>
> (a) Equality before the law courts, tribunals and equal protection of the law is a fundamental right.
>
> (b) A right to have one's cause heard irrespective of its ultimate success is of paramount importance.
>
> (c) There is entitlement to a right to an effective remedy meaning one which is capable of enforcement with a leaning towards conferring of a right.
>
> (d) The sole purpose of enforcement of human rights is for purposes of preservation of the human dignity and enable the offending human being realize the full potential of himself/herself as a human being.
>
> (e) Adjudication of the rights are between the individual as the governed and the state as the governor and are not adjudicatable as between individuals under private law.
>
> (f) As found by judges in the persuasive authority of *Reyes v the Queen* (*supra*) the call both at the international level as well as the Municipal level is for the courts to interpret the said bill of Rights broadly and liberally in order to give effect to the enforcement of the right with an interpretation which favours the enjoyment of that is alleged to have been breached or has been threatened to be breached.
>
> (g) The interpretation should also bear in mind the need to observe respect and protect the dignity of the individual.
>
> (h) There is no prescribed period of limitation inbuilt either under the defunct section 84(1) provisions or current article 23 of

the 2010 Constitution as to when one loses the right to pursue infringement to a fundamental right.

(i) Even where no specific remedies were prescribed as being inbuilt in the defunct section 84(1) Provisions, the courts had jurisdiction to grant appropriate remedies known in law. Some of which have now been entrenched in article 23 with a rider that they are not exhaustive."

45. That position was approved by the Supreme Court (Mutunga, CJ) in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others* [2013] eKLR where he expressed himself as hereunder;

> "(111) ...The Kenyan Constitution has given the High Court the exclusive jurisdiction to deal with matters of violations of fundamental rights (article 23 as read with article 165 of the *Constitution*). The High Court, on this point, has correctly pronounced itself in a judgment by Justices Nambuye and Aroni, in *Protus Buliba Shikuku v R,* Constitutional Reference No 3 of 2011, [2012] eKLR.
>
> (112) The *Shikuku* case fell within the criminal justice system; it involved a claim of violation of the petitioner's fundamental rights by the Court of Appeal, in a final appeal. The trial court failed to impose against the petitioner the least sentence available in law, at the time of sentencing. On the issue of jurisdiction, the learned judges, relying on articles 20, 22, 23 and 165 of the *Constitution*, rightly held that the High Court had jurisdiction to redress a violation that arose from the operation of law through the system of courts, even if the case had gone through the appellate level. In so holding, the High Court stated with approval the dicta of Shield J, interpreting the provisions of the 1963 Constitution in *Marete v Attorney General* [1987] KLR 690:
>
> > "The contravention by the State of any of the protective provisions of the *Constitution* is prohibited and the High Court is empowered to award redress to any person who has suffered such a contravention."
>
> (113) Thus, in answer to Mr Nowrojee's first two questions posed to the Supreme Court, my answer is this: There is no injustice that the *Constitution of Kenya* is powerless to redress."

46. The third issue was in reference to imposition of fresh sentences in resentencing proceedings undertaken pursuant to the *Muruatetu* decision without regard the period already served before the resentencing. It is clear that section 333(2) enjoins the trial court to take into account the period spent in custody where the person sentenced has, prior to such sentence, been held in custody. That section does not create a distinction between initial sentencing and a resentencing undertaken pursuant to a court order. Therefore, in undertaking a resentencing, the court is enjoined to find out the period for which the convict was in custody prior to the date of resentencing including the period he served pending his trial and after his initial conviction and sentencing. That whole period must be taken into account in computing the sentence to be imposed on him in handing down the appropriate sentence during resentencing. Unless this is done, the resentence is likely to fall foul of article 50(2)(p) of the *Constitution* which provides that:

> Every accused person has the right to a fair trial, which includes the right—

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

47. To fail to take the cumulative period of custody into account, in my respectful view, would amount to treating those who were earlier convicted differently from those who are being presently convicted based merely on the date of their conviction contrary to the provisions of article 27(1),(2),(4) and (5) of the *Constitution* which provides that:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

48. It is also contended that in applying remission, similarly the period served before resentencing is not being taken into account by the Prisons Authorities. Section 46 of the *Prisons Act*, on the other hand provides that:

(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.

Provided that in no case shall -

(i) any remission granted result in the release of a prisoner until he has served one calendar month;

(ii) any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the Penal code or to be detained during the President's pleasure.

(2) For the purpose of giving effect to the provisions of subsection (1), each prisoner on admission shall be credited with the full amount for remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.

(3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period-

(a) spent in hospital through his own fault; or

(b) while undergoing confinement as a punishment in a separate cell.

(4) A prisoner may be deprived of remission -

(a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner;

(b) where the Cabinet Secretary for the time being responsible for Internal security considers that it is in the interests of public security or public order.

(5) Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground. [Act No 25 of 2015, Sch.].

49. What I understand by the said provision is that all convicted criminal prisoners are, upon their admission entitled to be credited with the full amount for remission to which they would be entitled at the end of their sentence if they lost no remission of sentence. It would seem that the prison authorities are interpreting the word admission to apply from the date of resentencing. With due respect, to do so would mean that the prisoner is presumed to have been free prior to the date of the resentencing which is not the position.

50. It is my view that to interpret section 46(2) of the *Act* in a way that does not take into account the period served before resentencing deprives the prisoner of his right to the benefit of the least severe of the prescribed punishments for an offence and also amounts to discrimination based merely on the ground that the prisoner was in custody prior to his resentencing. In determining admission for the purposes of section 46(2) of the *Prisons Act*, the relevant date for the purposes of remission is the date when the prisoner was first admitted in prison and not the date of the subsequent resentencing. In arriving at this determination, I am alive to the provisions of article 20(3)(b) of the *Constitution* which enjoins this court in applying the provisions of the Bill of Rights, to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

51. The petitioners seek that this court in the exercise of its judicial review jurisdiction refers all the petitioners whose time spent in remand has not been taken into account to their respective courts for one specific order which is that the time spent in remand be included as part of the sentence. This, according to the petitioners, would get rid of the enormous applications of the same nature and would save time and resources. With due respect to the petitioners, such an order would amount to short-circuiting the law. As the Court of Appeal in *James Njoro Kibutiri v Eliud Njau Kibutiri* 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220 cautioned, short cuts are fine, as long as you are absolutely sure they won't land you in a ditch.

52. In this case, this court does not have the benefit of perusing the files before the trial court in order to determine whether what has been pleaded in this petition is correct. In any case, the issue of remission is an issue for the exercise of discretion by the prison authorities. In those circumstances, I agree with the respondent that the best course would be for the petitioners to take the necessary steps in their respective matters in order to redress the wrongs. It may take some time to do so but as noted in *Macharia v Wanyoike* [1981] KLR 45, experience has repeatedly shown that short-cuts invariably result in being more expensive and time-absorbing in the end and a short-cut in breach of a fundamental rule creating or occasioning remedial action cannot escape the stigma of 'delay'. Similarly, as was held in *(Lehmann's East Africa) Ltd v R Lehmann & Co Ltd* [1973] EA 167 that:

> " The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision."

53. In the result I issue the following orders:

(a) A declaration that trial courts are enjoined by section 333(2) of the *Criminal Procedure Code*, in imposing sentences, other than sentence of death to take account of the period spent in custody.

(b) A declaration that those who were sentenced in violation of the said section are entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences.

(c) A declaration that section 333(2) applies to the original sentence as well as the sentence imposed during resentencing.

(d) A declaration that in determining "admission" by the prison authorities for the purposes of section 46(2) of the *Prisons Act*, the relevant date is the date when the prisoner was first admitted to prison upon conviction and not the date of resentencing.

(e) That any review of the sentences be considered on a case to case basis.

(f) There will be no order as to the costs.

54. Judgement accordingly.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 18TH DAY OF JANUARY, 2021.

G.V. ODUNGA

JUDGE

In the presence of:-

Mr Ngetich for the Respondent

CA Geoffrey