REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL PETITION NO.10 OF 2018

IN THE MATTER OF ARTICLES 22, 23,25,27,28,47,48,50 AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 46(1) (II) OF THE PRISONS ACT, CAP 90, LAWS OF KENYA

YUSUF ABDULAHI CHUTE.....1ST PETITIONER

MARCARIOUS ITUGA KANYONI .....2ND PETITIONER

AND

THE HON. ATTORNEY GENERAL ..... 1ST RESPONDENT

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

JUDGMENT

The petitioners were tried and convicted of felonies of manslaughter and robbery with violence respectively; the former offence was based on section 202 as read with 205 of the Penal Code, cap. 63 while the latter was hinged on section 296(2) of the same Code. For their convictions, the respondents were respectively subjected to 12 years imprisonment and death. The latter's conviction and sentence were later to be quashed and set aside in this court's criminal appeal No. 53 of 2007 as a result of which he was set at liberty more particularly on 13 June 2019.

On 18 May 2018, the petitioners filed the present petition invoking articles 2(3), 2(5), 10, 19, 20, 21, 22, 23, 24, 25, 27(1), 28, 51(1), 156(6), 157(7), 158(1), 258, 259, 159, 160 and 161 of the Constitution and sought several reliefs which have been framed in the following terms:-

> **a. A declaration that the petitioners' rights to protection and equal rights of the law; right to inherent dignity of a human person; the freedom from torture, cruel inhuman and degrading treatment of punishment; the right of access to justice to all persons; the right to expeditious, effective, lawful, reasonable and procedurally fair administrative action; the right to equality and freedom from discrimination, have been violated, denied and or infringed.**
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> **b. A declaration to the effect that failure by the state and state organs to observe, respect, protect, promote and fulfill rights and fundamental freedoms of the said category of prisoners stated herein is a clear contravention of article 21(1) of the constitution of Kenya 2010 and as such the state and the state organs responsible ought to be taken to task.**
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> **c. A further order to the effect that all inmates denied the right accorded under section 46(1) (i) of the Prisons Act be granted the same forthwith without any further delays.**
>
> **d. A further order that the Hon. Attorney General and the speakers of both houses of parliament be directed to move with speed to enact necessary amendments to ensure that the provisions of Section 46 (1)(ii) of the Prisons Act conforms with the provisions of Article 27 of the Constitution of Kenya 2010.**

In their quest for these reliefs, the petitioners cited the Supreme Court decision in **Francis Karioko Muruatetu & Another versus Republic [2017] eKLR** and urged that Section 46(1) (ii) of the Prisons Act, cap. 90 is inconsistent with and contravenes article 27 of the Constitution.

The crux of the Muruatetu decision was to outlaw mandatory death sentence in capital offences such as murder and robbery with violence;

the Supreme Court was of the opinion that depending on the circumstances under which the offence in issue is committed, amongst other considerations, a trial court should have some measure of discretion in meting out an appropriate sentence. Following this decision, many prisoners, particularly those condemned to die because of the mandatory nature of the penalty for the offences for which they had been convicted have petitioned the courts for a reconsideration of their sentences.

It is against this background that the petitioners think that, while many of the convicts of capital offences may end up serving definite prison terms, they are unlikely to enjoy the benefit of remission of sentences for which other prisoners are eligible under section 46(1) of the Prisons Act. This state of affairs, so they argue, deprives them of the right to dignity and the right to equal protection and equality before the law; to this end, articles 27 and 28 of the Constitution have been violated and continue to be violated.

In the same breath, they have argued that they are entitled to the right to a fair administrative action under article 47 of the Constitution; the right to access to justice under article 48 of the Constitution; the right to a fair trial under article 25(c) of the Constitution and the right to freedom from torture, cruel, inhuman and degrading treatment or punishment contrary to article 25(a) of the Constitution.

At the hearing of the petition, the petitioners did not state in any certain terms how their rights, at a personal level, have either been infringed or are threatened with violation; rather, they contended that they lodged the present petition in the public interest.

I have noted that as much as they cited more than a dozen articles of the Constitution in their petition, the petitioners only focused on the inconsistency of section 46 of the Prisons Act with the Constitution. In this regard, the 1st petitioner urged that section 46 of the Act is discriminatory in its effect and, in particular, contrary to article 27 of the Constitution. According to the 1st petitioner, this provision of the law does not accord equal protection to all inmates. The 2nd petitioner did not have anything to say in prosecution of his petition.

On their part, the respondents opposed the petition and motion filed alongside it. The 1st respondent filed grounds of objection urging, inter alia, that section 46 of the Prisons Act sets out conditions for remission of sentences to which all convicts eligible for such remission are entitled; it was the 1st respondent's argument that this provision of the law should not be subjected to selective interpretation. In any event, so the 1st respondent urged, the petitioners have not demonstrated how the 1st respondent has denied, violated or infringed their constitutional rights.

Of several sticking points in the petition and the submissions by parties, one that stands out is that except for prayer (c) and (d), the reliefs sought by the petitioners are, in my humble view, generalised. Again, besides what they have stated in their petition about articles 25, 27, 28,47 and 48 the petitioners have not demonstrated how the rest of the provisions of the Constitution which they cited have been infringed or are being infringed or are threatened with infringement to their detriment. This may not be surprising considering that the petitioners have held themselves out as crusaders for the rights of those convicts who cannot take advantage of section 46 of the Prisons Act.

As noted, the 2nd petitioner's conviction and sentence for the offence of robbery with violence had been quashed and set aside respectively while the 1st petitioner was serving a sentence of 12 years imprisonment for which, as will soon become clear, he was eligible for remission of sentence under section 46(1)(ii) of the Prison Act. It is thus apparent from the outset that the petitioners have not suffered any grievance in any material particular.

The trouble with the position they have adopted is that it is not sufficient to literally throw a whole gamut of the provisions of the constitution at the court and hope that, somehow, it will work out whether they have been infringed; certainly it is not the business of the court to speculate on the manner the petitioner may have been or will be aggrieved. Hypothetical grievances will also not do. The petitioner or the petitioners, as in the present instance, bear the burden of demonstrating how each of these provisions has either been violated, is being violated or is threatened with violation. In other words, there has to be a correlation between the violation, real or threatened, and the particular articles of the Constitution. In **Anarita Karimi Njeru versus The Republic (No.1) (1976-1980) KLR 154** this Court dismissed the petitioner's petition for, among other reasons, lack of correlation between the petitioner's complaints and the provisions of the Constitution alleged to have been infringed and the manner in which they are alleged to have been violated. (See also **Meme versus Republic (2004) 1KLR).**

For all that has been pleaded and stated, what emerges as the petitioners' primary supposed grievance is centered around section 46 of the Prisons Act; for the reasons I have given, it is, to a large extent a moot point, but I will address it anyhow should my assessment of the petitioners' petition be found wanting.

This section provides for, among other things, remission of sentences of convicted prisoners for up to a third of the prison term subject to certain specified conditions. It states as follows:

> **46. (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].

The provision in focus here is section 46(1)(ii); it suggests that except for prisoners sentenced to either serve life imprisonment or suffer death or are held at the president's pleasure, virtually all prisoners serving any other prison term are eligible for remission of their sentences. The only conditions attached to the remission are that any prisoner eligible for such remission must be 'industrious and of good conduct'. These qualities have not been defined in the Act and therefore it is reasonable to assume that it is left to the good sense and wisdom of the Commissioner to judge whether a particular prisoner's disposition fits the bill. It is also worth noting that the benefit of remission of sentence is discretionary and a prisoner eligible for such remission cannot argue that it is a benefit to which he is entitled merely because he is of industry and good conduct.

The bone of contention that would have been central to the petitioners' petition is the restriction of eligibility for remission to a certain category of prisoners to the exclusion of others. To be specific, the petitioners think that to deprive convicts of death or life sentence the eligibility to benefit from remission of sentences is discriminatory and an affront to article 27 of the Constitution that guarantees every individual the right to equal protection and benefit before the law; for clarity this part of the Constitution states as follows:

(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.

Nobody can question the fact that nobody, regardless of his status or station in life, is above the law and that the law applies to all and sundry in equal measure; similarly, neither can the law be made nor interpreted in such a way that it protects a certain class of persons or a section of the society to the detriment of the other. Every person, as the constitution puts it, is entitled to equal protection and benefit of the law.

The question at hand is this: is section 46 (1)(ii) of the Prisons Act discriminatory in any way; to be more precise, does this provision of the law accord different people different treatment or protect and benefit certain class of persons or members of society to the exclusion of others? I doubt it does and, in my humble view, this law ought not to be looked at from such a perspective.

My understanding of this provision of the law is simply this: there are certain offences which in the legislature's wisdom are so grave that any person convicted of having committed any of them should serve his full sentence. It follows that convicts of this category offences cannot be heard to argue that they should be eligible to the same benefit that the law accords, say, a petty thief or any other person convicted of having committed a misdemeanour or a lesser grave offence. The restriction of this benefit which, as earlier noted, is not an entitlement even to those who are eligible, is not, in my humble view discriminatory in any shape or form and, in any case, in any manner that may have been contemplated under article 27 of the Constitution.

If there is any 'discrimination,' as the petitioners would want the court to believe, it is the gravity of offences, and not the law, that 'discriminates' one category of offenders from the other. It is for this reason that I suppose different offences, of necessity, attract different penalties; it stands to reason the graver the offence the severer the sentence and so, the lesser the chance for remission. A person convicted of robbery with violence and sentenced to death or to life imprisonment cannot possibly argue that he is discriminated against because some other person convicted of, say, the offence of child neglect has been given non-custodial sentence and put on probation. Of course, the two are both convicts but they deserve different treatment; the consequences that naturally flow from their actions cannot be a basis for a claim, by any one of them, for a relief against discrimination, for there is simply none.

That said, I need not belabour the point that the petitioners never demonstrated the manner of violation of their rights; they conceded as much and, on this point, alone their petition fails. Nonetheless, I do not, for my part, see any hint of discrimination in section 46(1)(ii) of the Prisons Act. In conclusion, I hold that there is no basis to grant any of the reliefs sought; the petition fails and it is thus dismissed but with no order as to costs.

Dated, signed and delivered in open court this 28th day of January 2020

Ngaah Jairus

JUDGE