



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CONSTITUTIONAL PETITION NO. 2 OF 2018**

**ALBERT BARASA MUKONESI.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The petitioner has filed an undated application that was filed in court on the 7<sup>th</sup> November, 2019 seeking for orders:-

*(1) That this honourable court be pleased to order for judicial review of a non-custodial sentence under the Probation Act Cap 64 Laws of Kenya vide Butali SPMC Criminal Case No. 156 of 2009.*

*(2) That this honourable court be pleased to give direction on how the petitioner will serve his remaining 1 and ½ years under probation service in the interest of justice.*

2. The application is premised on the grounds that the petitioner is serving a prison term of 18 years for the offence of robbery with violence. That with remission of part of the sentence the jail term is expiring on 21/9/2021. That he is remaining with 1½ years to finalize his jail term. That in the interests of justice it is proper if the remaining sentence is served under probation. That he is a suitable candidate for release on probation. That he has undergone various vocational and industrial training courses in prison. That he has a family. That he has a good record with his family and community members. That he is willing to abide with the orders of this court and probation service orders as well as keep law and order throughout the probation period. That he has no case pending with the courts.

3. The State did not respond to the petition. The state counsel left the matter to the consideration of the court.

4. The matter was filed as a constitutional petition under Articles 22, 20, 23, 27, 48 and 165 of the Constitution of Kenya and under the Probation Act Cap 64 Laws of Kenya.

5. The petitioner was convicted of the offence of robbery with violence at Butali Law Courts and sentenced to death. His appeal to the High Court was unsuccessful but the court substituted the death sentence with life imprisonment. His appeal to the Court of Appeal did not bear fruit. Later Ochieng J. of the High Court Kisumu reviewed the sentence of life imprisonment and substituted it with imprisonment of 20 years commencing from 12<sup>th</sup> October, 2009.

6. I have considered the application. The petitioner has exhausted all avenues of appeal that were open to him. He applied for review of his sentence and he was re-sentenced to 20 years imprisonment.

7. The current application is filed as a constitutional petition. The application however does not raise any constitutional issues. The application does not state any article of the constitution that has been infringed. It does not cite the section of the Probation Act that grants powers to a court to release a prisoner on probation. I have not seen any such section in the Probation Act. What the law envisages is remission of a sentence which the petitioner concedes he has been granted. The petition therefore has no legal basis.

8. In the premises there is no merit in the petition. The same is accordingly dismissed.

9. The court has however noted that there was a letter filed herein from the officer in charge Kakamega main prison that indicates that the petitioner is serving 18 years imprisonment as per the orders of the court in Kisumu High Court Petition No. 90 of 2018. A signal filed herein in respect to High Court Petition No. 90 of 2018 indicates that the petitioner was re-sentenced to 20 years imprisonment commencing 12/10/2009. The prison authorities therefore need to check the exact sentence meted out to the petitioner by the High Court and report to this court. Petitioner to be produced in court for that purpose on 30/1/2020.

**Delivered, dated and signed in open court at Kakamega this 23<sup>rd</sup> day of January, 2020.**

**J. NJAGI**

**JUDGE**

**In the presence of:**

Mr. Mutua for State/Respondent

Petitioner - present

Court Assistant - Polycarp

14 days right of appeal.