



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CONSTITUTIONAL PETITION 4 OF 2019**

**IN THE MATTER OF ARTICLES 22(1), (2) (B), 23(1), 24, 27, 48, 159, AND 165 (3) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 46(II) AND 49 OF THE PRISONS ACT CAP 90 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 296(1) OF THE PENAL CODE CAP 63 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF PART VII RULES 95,96, 97 AND 98 OF PRISONS SERVICE REGULATIONS**

**BETWEEN**

**NAK/3354/18/LS RICHARD KIMINING .....1<sup>ST</sup> PETITIONER**

**NAK/502/19/LS NICHOLAS AMBUGA LIMANYE ..... 2<sup>ND</sup> PETITIONER**

**NAK/302/019/LS BENARD TANUI .....3<sup>RD</sup> PETITIONER**

**NAK/3355/19/LS GEOFFREY NJIU MWANGI ..... 4<sup>TH</sup> PETITIONER**

**VERSUS**

**COMMISSIONER GENERAL OF PRISONS .....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS .....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The petitioners are adult persons currently serving their sentences at Nakuru G.K. prison. They were charged in Nakuru Naivasha and Molo Law Courts respectively with the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code and convicted and sentenced accordingly. They have brought this petition seeking the following prayers:

- a) A declaration that all prisoners convicted and sentenced under Section 296(1) of the Penal Code has a right to earn remission.*
- b) A declaration that Section 46(i) (ii) of the Prisons Act Chapter 90 Laws of Kenya is discriminatory in nature and thus unconstitutional.*
- c) A declaration and or make an order to the 1st Respondents to compute the period already spent in custody and include remission on the 18 years now as commuted from life sentence by the High Court. In line with apex court decision.*

**d) An order to the 3rd respondent and other relevant agencies to prepare a professional legal advisory opinion to parliament for amendment of Section 46(i) (ii) of the Prisons Act Chapter 90 Laws of Kenya.**

**e) Any other order the court deem fit.”**

These prayers are sought with respect to:

ü The 1<sup>st</sup> respondent as the in charge of all correctional facilities in Kenya including youth correctional centers.

ü The 2<sup>nd</sup> respondent as the in charge of prosecution in Kenya and;

ü The 3<sup>rd</sup> Respondent as the Principal legal advisor to the Government of Kenya

The Petitioners grievance is set out as follows:

**“The petitioners state that the Respondents have contravened, violated and infringed their constitutional rights and freedoms as provided in the constitution as follows:**

**(a) The 1<sup>st</sup> respondent acting on the provision of Section 46(i) (ii) of Prisons Act has discriminated the petitioners hence denying them a right to earn remission which is contrary to the constitution. That is:**

**Section 46(i) convicted criminal prisoners sentenced to imprisonment... for a period exceeding one month may by industry and good conduct earn remission at one third of their sentences provided that in no case shall:**

**(ii) any remission be granted to prisoners sentenced to imprisonment for life or for an offence under Section 296(1) of penal code.**

**(b) The 1<sup>st</sup> respondent has failed without any reason to exercise power to release on parole the prisoners whose conduct is good and serving a sentence of or exceeding four years due to release.**

**(c) The petitioners are petitioning this Honourable court in good faith to protect his rights and freedoms.**

The Petition is supported by the affidavit of the 1<sup>st</sup> petitioner **RICHARD KIMINING** where he depones inter alia;

**“...THAT Section 46 (i) (ii) of Prisons Act Chapter 90 Laws of Kenya conflicts with Article 27 (1) (4) of the Constitution.**

**THAT the class of prisoners specified in Section 46 (i) (ii) of the Prisons Act Chapter 90 Laws of Kenya are discriminated by this law in denying them a right to earn remission thus discriminatory in nature...**

The Petitioners rely on the following authorities:

1. **BROWN TUNJE NDAGO V COMMISSIONER GENERAL OF PRISONS (2019) eKLR**

2. **ROBERT MUTASHI AUDA V R (2018) KLR**

3. **FRANCIS KARIOKO MURUATETU AND ANOTHER V R (2017) eKLR**

4. **KENNETH OTIENO ODHIAMBO AND OTHERS V R (2019) eKLR**

### **Analysis and Determination**

In the recent **Nakuru High Court Petition Number 19 of 2018 Daniel Langat Kiprotich, James Kariuki Kiwagana and Boniface Kariuki Karanja vs Commissioner General Of Prisons & 3 Others** where similar prayers were made, I noted that the High Court has already rendered itself on the issue of **Section 46(ii) of the Prisons Act Cap 90 Laws of Kenya**.

The same has been declared unconstitutional in so far as it denies a prisoner serving any determinate sentence remission.

In line with the various determination of the High Court on this issue, and in the absence of an appeal, it is only appropriate that that Attorney General takes the requisite steps to see to the amendment of that provision of the law. This will give guidance to the Prison Authorities to act accordingly in similar matters and bring to an end the Petitions on this provision of the law.

**Sammy Musembi Mbugua & 4 others vs Attorney General & another [2019] eKLR Brown Tunje Ndago vs Commissioner-General of Prisons [2019] eKLR Kenneth Otieno Odhiambo & 4 others vs Republic [2019] eKLR Nakuru HC Petition No. 10 of 2018 Daniel Lang'at Kiprotich and two others vs Commissioner General of Prisons and two others**

Hence, based on the above decisions, from which I find no reason to depart I grant the Petition in the following terms:

- a) *A declaration that the Petitioners herein have the right to earn remission.*
- b) *A declaration that **Section 46(1) of the Prisons Act Chapter 90 Laws of Kenya** is discriminatory in nature and thus unconstitutional to the extent that it denies remission to persons imprisoned for an offence contrary to **Section 296(1) of the Penal Code**.*
- c) *The Commissioner-General of Prisons shall forthwith proceed to calculate remission of sentence for the Petitioners.*
- d) *It is recommended to the 3<sup>rd</sup> Respondent, the Attorney General and other relevant agencies to prepare a legal advisory opinion to Parliament for the amendment of **Section 46(i) (ii) of the Prisons Act Chapter 90 Laws of Kenya** in accordance with the decisions of the High Court.*
- e) *The Deputy Registrar High Court of Kenya at Nakuru is directed to forthwith transmit a certified copy of this judgment and for emphasis, the other similar judgments cited herein, to the Commissioner-General of Prisons who shall be guided accordingly in respect of all the other prisoners in the same situation with the Petitioner.*

**Dated, delivered and signed this 26<sup>th</sup> day of May, 2020.**

**Mumbua T Matheka**

**Judge**

**In the presence of: VIA ZOOM**

Edna Court Assistant

Petitioners - 1<sup>st</sup> N/A

- 2<sup>nd</sup> Petitioner present

- 3<sup>rd</sup> Petitioner present

- 4<sup>th</sup> Petitioner was released

For respondent Ms Wamboi

**Mumbua T Matheka**

**Judge**

**26<sup>th</sup> May 2020**