REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 44 OF 2019

(Coram: Odunga, J)

JULIA WANGECI GITHUA.....APPELLANT

VERSUS

COMMISSIONER GENERAL OF PRISONS.....1ST RESPONDENT

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

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

1. The Petition before me is home-made petition. According to the petitioner, a prisoner serving custodial sentences, she was arrested and charged in Criminal Case No. 658 of 2012 at Mavoko Law Court with the offence of Robbery with Violence Contrary to section 296(2) of the ***Penal Code*** and convicted and sentenced to death. The said sentence was however subsequently set aside and substituted with a sentence of 10 years imprisonment in Criminal Appeal No. 68 of 2016.

2. Apart from that offence she was similarly charged in Machakos Chief Magistrate's Criminal Case No. 544 of 2012 with Robbery with Violence Contrary to section 296(2) of the ***Penal Code*** for which she was convicted and sentenced to serve 5 years imprisonment.

3. The Petitioner was also charged in Machakos Chief Magistrate's Criminal Case No. 1440 of 2012 with Stupefying in Order to Commit a felony contrary to section 230 of the Penal Code and sentenced to serve 7 years imprisonment.

4. In this petition, the petitioner is challenging the provisions of section 37 of the ***Penal Code*** as well as section 92(1) of the ***Prisons Act***. According to her the effect of the application of the said provisions is that the appellant and those in her circumstances are treated unequally and are discriminated against when it comes to computation of their sentences. It was her case that the said sections are in conflict with section 333 of the ***Criminal Procedure Code*** and violates the constitutional principle of fair trial. According to the petitioner the said principle requires the court to consider the overall criminality and whether the principle of consecutive serving of sentences is excessive. To the petitioner, she and those in her circumstances have a right to equal protection and equal benefit of the law.

5. The Petitioner seeks the following reliefs:

1) A declaration that section 37 of the penal code chapter 63 laws of Kenya is unconstitutional.

2) An order directing the 1st respondent to produce committal warrants in criminal case no. 544/2012, criminal case 1440 of 2012 and criminal case no. 568/2012 in court.

3) An order directing sentence of 10 years in criminal case no.568/2012, 7years in criminal case no. 1440/2012 and 5years in 544/2012 to run concurrently.

4) Order directing the 1st respondent to compute the sentences in criminal case no. 544/2012, criminal case 1440 of 2012 and criminal case no. 568/2012 and include period already spent in custody within the meaning of section 333 of the criminal procedure code.

5) Order directing the 1st respondent to compute the sentences of all other prisoners in the same situation to run concurrently and within the meaning of section 333 of the criminal procedure code.

6) Any other Order that the court may deem appropriate in the circumstances.

6. In her submissions, the Petitioner contended that the matter is about provisions of Section 37 of the ***Penal Code,*** Section 14 of the ***Criminal Procedure Code,*** and Section 92 (1) of the ***Prisons Act*** which both provides for sentences when cumulative, and the conflict between these two Sections of law and Section 333 of the ***Criminal Procedure Code***. The above provisions under the ***Prisons Act*** and ***Penal Code***, it was submitted legally discriminates prisoners sentenced to cumulative sentences upon admission to prison after conviction. This in effect sanctions inequality before the law for such prisoners. They are treated unequally and discriminated against in computing a term of imprisonment, which treatment is unconstitutional.

7. The petitioner contended that both Section 37 of the ***Penal Code,*** Section 14 of the ***Criminal Procedure Code,*** and Section 92 (1) of the ***Prison Rules*** conflicts with Section 333 of the ***Criminal Procedure Code*** and the **Constitution**.

8. The Petitioner claims that her rights under Articles 25, 27, 29, 47, 48, and 50 (2) of the constitution have been violated by the conflicting nature of Section 37 of the ***Penal Code***, Section 92 (1) of the ***Prisons Act***, and Section 333 of the ***Criminal Procedure Code***. As I understand it, the Petitioner has not in any way approached this court in a manner to suggest that she would like her conviction reviewed. The Petitioner clearly submits that her criminal case had run its course. The Petitioner comes to this court seeking redress for alleged violation of her rights under the Bill of Rights. This being the case, then we beg this court to find that it does have the jurisdiction to entertain this matter by virtue of Article 22, 23 and 165 (3) (b) of the Constitution.

9. The Petitioner detailed the cases the subject of this petition as hereunder.

10. In Criminal Case No. 544 of 2012, the Appellant herein together with another person were charged with the offence of **Robbery with Violence Contrary to Section 295 as Read with Section 296(2)** of the ***Penal Code***. The particulars were that on the 6th June, 2012 at Primarosa Stage along Mombasa-Nairobi Highway, Athi River District within Machakos County, the Appellant jointly with others not before court robbed **Joseph Njoroge Kibathi** of items valued at Kshs 821,500/= and that at the time of the said robbery, they used actual violence to the said **Joseph Njoroge Kibathi**. There was an alternative charge of handling stolen goods contrary to section 322(1) as read with section 322(2) of the ***Penal Code*** arising from the same transaction. After hearing the case, the Petitioner was convicted of the alternative charge of handling stolen goods. She was on 11th June, 2014 sentenced to serve **5 years'** imprisonment.

11. In Criminal Case No. 1440 of 2012, the Appellant was charged with the offence of **Stupefying in Order to Commit Felony Contrary to Section 230** of the ***Penal Code***, the particulars being that on the 24th September, 2012 along Mombasa-Nairobi Highway at Emali Trading Centre, within Makueni County, the Petitioner jointly with others not before the court with intent to commit a felony administered unknown stupefying or overpowering drug to **Daniel Waigwa Githinji** and stole from him items valued at Kshs 6,500/=. She also faced the charge of attempted theft of goods in transit contrary to section 279(c) as read with section 389 of the ***Penal Code*** the particulars being that on the same day at the same place she jointly with others not before court attempted to steal goods valued at Kshs 5,060,028.32 the property of Safina Traders Company Ltd. In Count three she faced the charge of stealing contrary to section 275 of the ***Penal Code*** the particulars being that on the same day at the same place at the same time she stole goods valued at Kshs 6.500/- the property of **Daniel Waigwa Githinji**. After hearing she was convicted in all the three counts and sentenced to serve 7 years, 3 years and 1 year in counts I, II and III respectively. The said sentences were directed to run concurrently.

12. In criminal case no. **658 of 2012**, the Petitioner was charged with two counts of **Robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*.** The particulars of the first count were that on 28th August, 2012 at Daystar Junction in **Athi River** District in Machakos County, jointly with others not before court robbed **Paul Mbugua** of items valued at Kshs 2,514,000/= and at the time of such robbery used actual violence to the said **Paul Mbugua Gichaga**. The particulars of the second count were that on the same day at the same place jointly with others not before court, she robbed **George Njuguna Mbugua** items worth Kshs 21,700/= and at the time of such robbery used actual violence to the said **George Njuguna Mbugua**. She was convicted of the said counts and sentenced to death for the first count while the sentence for the second was, as is the law in such matters, kept in abeyance. Aggrieved by the said decision, the Appellant appealed to this court vide Criminal Appeal No. 68 of 2016 and on hearing of the said appeal, **Nyamweya, J** upheld her conviction on both counts but set aside the death sentence imposed upon the Appellant and after considering her mitigation and her previous convictions sentenced her to serve 10 years for each count with the terms running concurrently taking into account the time the petitioner had spent in custody.

13. According to the Petitioner, all these offences were committed from the 6th June 2012 to 24th September 2012, and upon her arrest, the petitioner was charged with a variety of cases and sentenced on different dates to various sentences. According to the petitioner, by being subjected to serve these sentences consecutively, the petitioner suffers a double jeopardy in the sense that she is discriminated against and subsequently suffers mental and physical torture as a result of the conflict of various statutory sections in our criminal law jurisprudence.

14. The various provisions of the law which the petition revolves around were then set out and while not questioning her conviction, the petitioner insisted that Section 37 of the ***Penal Code,*** Section 14 of the ***Criminal Procedure Code,*** and Section 333 (2) of the ***Criminal Procedure Code*** are conflicting. According to her, she was charged before different courts under different jurisdictions and sentenced on different dates for various offences. Under Section 37 of the ***Penal Code,*** and Section 14 of the ***Criminal Procedure Code***, the procedure for a person who has previously been convicted and sentenced before any court and subsequently is once more convicted of another offence, earlier before sentence, any sentence, other than death sentence, which is passed upon him under the subsequence conviction, shall be executed after the expiration of that sentence. There is a disclaimer that the court may order for the sentences to run concurrently. The petitioner has no issue with the disclaimer but by the fact of executing a sentence after the expiration of the other.

15. If the same person is taken to prison after the subsequent conviction and sentence, the prison authorities apply Section 92 (1) of the ***Prisons Act*** in computing this person's sentence and more so when he has been convicted and sentenced while serving the previous sentence. In this case the petitioner was first sentenced on 11th June 2014 to serve a sentence of five years imprisonment before she was subsequently sentenced in another case to serve seven years imprisonment and again sentenced to serve ten years imprisonment.

16. Section 92 (1) of the ***Prisons Act*** is very clear on what the computing prison officer should do in such instances. Where a person after conviction for an offence is convicted of another different offence, either before or after sentence is passed upon him under the first conviction, or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence. Once more, this section which is coached in similar wording with Section 37 of the ***Penal code*** provides a disclaimer for serving a concurrent sentence. However, if no such order is expressed on the committal warrant the authorities follow the requirements of the law.

17. It was submitted that these being orders from different courts; all the sentencing judicial officers may not have applied the disclaimer, meaning during computation the prison authority will do what they usually do in such instances.

18. According to the petitioner the fact that she will have to serve the subsequent sentence after the expiry of the earlier one implies that there is an assumption that the petitioner has been admitted in prison for the first time after the expiry of the previous sentence, to begin the second sentence when the fact is that she has been at the same prison where she will continue to be for a number of years and this definitely amounts to an excessive sentence.

19. It was submitted that pursuant to Section 333 (2) of the ***Criminal Procedure Code***, subject to the provisions of section 38 of the ***Penal Code***, each and every sentence **shall** be deemed to commence from, and to include the whole of the day of, the date of which it was pronounced, except where otherwise it is provided in this Code. This means that a sentence should therefore commence upon pronunciation of the same and should include the whole day of the pronunciation unless there is some different provision under the Criminal Procedure Code. The same statute further proceeds to Provide 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. Based on the decision of the Court of Appeal in the case of **Ahamad Abolfathi Mohammed & Another –vs- Republic 2018 eKLR**, it was submitted that there is clearly a conflict between the above Sections as to the commencement of sentences that should be meted out to offenders and that conflict is compounded further by the issue of serving consecutive sentences.

20. It was submitted that if a convict is sentenced today, the law is clear that his or her sentence should commence from the day of arrest when he or she was deprived of his or her liberty. This simply means that to accord a defendant a fair trial, this should be adopted in all sentences. When Parliament amended Section 333 (2) of the ***Criminal Procedure Code*** in 2007, its intention was to allow courts to include the period spent in custody as part of the sentence they mete to an accused person. Today, most of the courts are complying with this provision when passing a sentence and so this is the current law on sentencing. However, the problem arises when Section 37 of the ***Penal Code*** and Section 14 of the ***Criminal Procedure Code*** come into play. If the court finds that an accused person should serve consecutive sentences, the conflict alluded to above complicates the whole issue as then the prison authorities don't know which law to apply in computing a consecutive sentence.

21. In the current petition, it was submitted that the petitioner is serving three consecutive sentences. She is expected to complete all of them cumulatively meaning she will begin serving each of the sentences after completing the first sentence. The subsequent sentences will commence on the day she starts serving the new sentence whereas the law is clear that the sentence should include all the time the petitioner has spent in prison. This is a clear conflict and a violation of the petitioner's constitutional rights.

22. According to the Petitioner, the conflict between the aforementioned Sections of the ***Penal Code***, ***Prisons Act*** and ***Criminal Procedure Code*** infringes on her right to a fair trial under Article 50 of the Constitution. A trial encompasses the report being made to the police, investigations, the trial in court, conviction and sentencing. Of course even the act of serving a sentence is part of a fair trial. The petitioner's rights under the constitution have been infringed by the fact of serving the above stated consecutive sentences. To the petitioner, Article 259 of the Constitution provides that the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance. The Constitution should be given a purposive interpretation where all provisions are read as a whole with each provision sustaining the other.

23. It was submitted that since it is clear under Section 14 (3) (a) of the ***Criminal Procedure Code***, that no one should be imprisoned to serve cumulative sentences aggregating to more than fourteen years, the petitioner is bound to serve a sentence amounting to twenty two years if she serves the sentences cumulatively which is again contrary to the law.

24. The Petitioner therefore complained that her constitutional rights to equality and freedom from discrimination guaranteed under Article 27 have been violated. In support of her submissions the petitioner relied on ***Willis v The United Kingdom.***

25. It was submitted that from the above definition, it is safe to state that the Constitution only prohibits unfair discrimination and unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization. According to the petitioner, the principle of equality attempts to make sure that no member of society is made to feel that they are not deserving of equal concern, respect and consideration, and that the law or conduct complained of is likely to be used against them more harshly than others who belong to other groups. It was contended that the test for determining whether a claim based on unfair discrimination should succeed was laid down by the South Africa Constitutional Court in **Harksen vs. Lane NO and Others** as well as the decision of the High court of Botswana in **Mmusi and Others vs. Ramantele and Another.**

26. The petitioner's complaint in this case is that the substance of the Petitioners' complaint is that the impugned provisions of the ***Penal Code*** and the ***Criminal Procedure Code*** target those persons convicted to serve consecutive sentences only. To be understood correctly, the petitioners' contestation is that the impugned provisions do not apply against other convicts. The section does target only this particular group of persons. The Petitioner argues that in the enforcement of the above provisions, she and others suffering the same fate, have been subjected to various discriminatory acts on the basis of their sentences.

27. For instance, the Petitioner deposed in her affidavit that she had been subjected to physical and mental torture, and discriminatory acts

because of waiting to serve one sentence after another without considering that she has been in this same prison since her arrest and the law allows for the calculation of that period spent in custody since arrest, which is not done on her sentences, when her fellow colleagues serve sentences which include the time they had served in prison, specifically years spent in remand.

28. In support of her case the petitioner cited the case of **Dawood vs. Minister of Home Affair** to submit that Section 10 of the South African Constitution is similar to our Article 28 which guarantees every person's inherent dignity and the right to have the dignity respected. She also relied on Article 2 (5) and (6) of the Constitution as read with Article 5 of the ***ACHPR*** as well as the provisions in the ***ICCPR*** and the ***ICESCR*****.** She further cited the case of **Republic vs. Kenya National Examinations Council Ex-parte Audrey Mbugua Ithibu** as supporting her submission on the right to dignity as well as **Coetzee vs. Government of the Republic of South Africa** and **Nel vs. Le roux** and submitted that to have a defendant serve longer sentence than is necessary is also an encroachment to the right. Also cited was **S vs. Makwanyane.**

29. According to the petitioner, she has been remorseful of her engagement in crime. She has spent a considerable period of time in prison which has been very instrumental for her change of personality and behaviour. Keeping her longer in prison does not serve the purpose of rehabilitation which is apparent in the constitutional language which describes our prisons as correctional centres instead of punishment centres.

30. The Court was urged to make a declaration that Section 37 of the ***Penal Code*** Chapter 63 Laws of Kenya, Section 14 of the ***Criminal Procedure Code***, and Section 92 (2) of the ***Prisons Act*** is unconstitutional. In the circumstances, to also make the order directing the sentences of 10 years in Criminal Case 568 of 2012, and 7 years in Criminal Case 1440 of 2012 and 5 years in 544 of 2012 to run concurrently and order the 1st Respondents to compute the sentences in Criminal Case 544 of 2012, Criminal Case No.1440 of 2012 and in Criminal Case 568 of 2012, and include period already spent in custody within the meaning of Section 333 (2) of ***Criminal Procedure Code*****.** I also urge this court to issue orders directing the 1st Respondent to compute the sentences of all other prisoners in the same situation to run concurrently and within the meaning of Section 333 (2) of ***Criminal Procedure Code*****.**

31. In response the 2nd Respondent filed the following grounds of opposition:

1) That the instant petition is frivolous, vexatious and an abuse of the court process.

2) That the prosecution proved their cases against the petitioner in criminal cases no. Mavoko Cr. No. 658/2012, Mavoko Cr. No. 549/201 and Machakos Cr.No. 1440/2012 beyond reasonable doubt and she was sentenced and convicted as per the law.

3) That criminal case Mavoko Cr 658/2012, Mavoko Cr.No. 544/2012, Machakos Cr 1440/2012 are three different and distinct offences committed at different times against different complainants, tried by different courts therefore the sentences passed cannot run concurrently as they are distinct matters.

4) That sentencing is courts discretion and in exercising its discretion the court noted the petitioner's mitigation, the gravity of the offence and being a habitual offender.

5) That the provisions of Article 50(2) of the constitution are not applicable to the petitioner as the petitioner is no longer an accused person, she has already been tried, sentenced and convicted by the court.

6) That if the orders sought are granted then the courts would be overwhelmed by the number of criminal cases that would be opened.

32. It was submitted on behalf of the 2nd Respondent that the petitioner was charged in three different courts and she was sentenced and convicted by the various courts. The petition revolves around Machakos Criminal Case No.544/2012, Mavoko Criminal Case No. 1440/2012 and Mavoko Criminal Case No. 658/2012

33. In criminal case no. 544 of 2012 the petitioner was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars were that the on the 6th June, 2012 at Primarosa stage along Mombasa Nairobi Highway, Athi River District within Machakos county, the petitioner jointly with others not before court robbed **Joseph Njoroge** of items valued at 821,150/= and at the time of such robbery, they used actual violence to the said **Joseph Njoroge**. She also faced an alternative count of handling stolen property contrary to sec 332(1) as read with section 322(2) of the ***Penal Code*** which arose from the same transaction. The petitioner was convicted in the alternative count and sentenced to serve 5 years imprisonment.

34. In Criminal Case No. 1440 of 2012, the Appellant was charged with the offence of Stupefying in Order to Commit felony contrary to section 230 of the ***Penal Code***, the particulars being that on the 24th September, 2012 along Mombasa-Nairobi Highway at Emali Trading Centre, within Makueni County, the Petitioner jointly with others not before the court with intent to commit a felony administered unknown stupefying or overpowering drug to **Daniel Waigwa Githinji** and stole from him items valued at Kshs 6,500/=. She also faced the charge of attempted theft of goods in transit contrary to section 279(c) as read with section 389 of the ***Penal Code*** the particulars being that on the same day at the same place, she jointly with others not before court attempted to steal goods valued at Kshs 5,060,028.32 the property of Safina Traders Company Ltd. In Count three she faced the charge of stealing contrary to section 275 of the *Penal Code* the particulars being that on the same day at the same place at the same time she stole goods valued at Kshs 6.500/- the property of **Daniel Waigwa Githinji**. After hearing she was convicted in all the three counts and sentenced to serve 7 years, 3 years and 1 year in counts I, II and III respectively. The said sentences were directed to run concurrently.

35. In Criminal Case No. 658 of 2012, the Petitioner was charged with two counts of robbery with violence contrary to section 295 as read with section 296(2) of the ***Penal Code***. The particulars of the first count were that on 28th August, 2012 at Daystar Junction in Athi River

District in Machakos County, jointly with others not before court robbed **Paul Mbugua** of items valued at Kshs 2,514,000/= and at the time of such robbery used actual violence to the said **Paul Mbugua Gichaga**. The particulars of the second count were that on the same day at the same place jointly with others not before court, she robbed **George Njuguna Mbugua** items worth Kshs 21,700/= and at the time of such robbery used actual violence to the said **George Njuguna Mbugua**. She was convicted of the said counts and sentenced to death for the first count while the sentence for the second was, as is the law in such matters, kept in abeyance.

36. It was submitted that looking closely at the various charges the petitioner faced in the trial courts, it is evident that the criminal cases are distinct and they were tried by different courts. The three cases were tried in different court station namely Machakos and Mavoko. The offences the petitioner faced were stupefying and robbery with violence. The complainants were three different people namely, **Joseph Njoroge Kibathi, Daniel Waigwa Githinji** and **Paul Mbugua**.

37. In support of her case, the Petitioner reproduced Sections 7(1), 12, 14, 37 and 333(2) of the ***Criminal Procedure Code*** and relied on the case of **Peter Mbugua Kabui vs. Republic [2016] eKLR**, paragraph 495 of ***Halsbury's Laws of England*** and the case of **Julia Wangeci Githua vs. R (2019) eKLR**.

38. The basis of this proposition is that the appellant had been charged with three distinct offences with every charge constituting independent transactions from the other. The current position in the law is that where a trial judge or magistrate is faced with multiple charges or offences an appropriate decision on the aggravating and mitigating factors has to be borne in mind in each distinct sentence. The position taken by the trial court in ordering for concurrent sentences has the anchor in law in the principles elucidated in the case of **Ngibuini vs. Republic [1987] eKLR**. In this case the appellant was tried in separate cases where the complainants were neither the same nor did the offences arise out of the same transactions. The court formed the opinion that the offences formed a series of offences of the similar character and ordered that the sentences to run concurrently in substitution of an earlier order of consecutive sentence.

39. It was therefore submitted that Section 92 of the ***Prisons Act*** clearly spells out that the different and distinct offences should be punished differently as they emanated from different transactions. The drafters of the ***Prisons Act*** had in mind such a scenario where a convict is facing more than one sentence resulting from different scenarios. In regard to Section 37 of the ***Penal Code***, it provides for sentencing where an accused person is facing more than one count in one charge. Here the sentence can be ordered to run concurrently or consecutively as they emanate from the same transaction.

40. The 2nd Respondent's position was that there is no evidence of unlawful, selective or malice committed against the Petitioner by the law. Furthermore, the Petitioner has not stated which rights have been violated and has not demonstrated the same. To the 2nd Respondent, the petitioner has failed to frame the issues of the violations of his rights with precision as required in constitutional petitions. The petitioner did not state the alleged rights violated in the bill of rights and the acts or omissions complained of and the public interest violated which she seeks to protect with reasonable precision. Apart from citing the provisions of the constitution, the petitioner provided neither particulars of the alleged infringements of her rights or the manner of the alleged violations of public interest she seeks to protect. In this respect, the 2nd Respondent cited the case of **Mumo Matemu vs. Trusted society of Human Rights Alliance & 5 Others (2013) eKLR**.

41. The 2nd Respondent contended that the petitioner has failed to demonstrate that her rights have been violated in any manner to trigger the High court's intervention. It was its case that this petition is misconceived, an abuse of the court process, merely meant to circumvent the criminal justice in Kenya and should therefore be dismissed.

Determination

42. I have considered the issues raised hereinabove.

43. According to the 2nd Respondent, the Petitioner has not stated which rights have been violated and has not demonstrated the same. To the 2nd Respondent, the petitioner has failed to frame the issues of the violations of his rights with precision as required in constitutional petitions since she did not state the alleged rights violated in the bill of rights and the acts or omissions complained of and the public interest violated which she seeks to protect with reasonable precision. Apart from citing the provisions of the constitution, the petitioner provided neither particulars of the alleged infringements of her rights or the manner of the alleged violations of public interest she seeks to protect. In this respect, the 2nd Respondent cited the case of **Mumo Matemu vs. Trusted society of Human Rights Alliance & 5 Others (2013) eKLR**.

44. It is important o point out that the decision in **Mumo Matemu vs. Trusted society of Human Rights Alliance & 5 Others** (supra) was an approval of the earlier decision in the oft cited case of **Anarita Karimi Njeru vs. Republic, (1979) KLR 154.** It is however my considered view that the decision in ***Anarita Karimi Njeru*** must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that a petitioner ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a constitutional petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. What it means is that:

> **"the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice."**

See **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.**

45. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a constitutional court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted.

46. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of, would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former.

47. Mine is not a lone voice shouting in the wilderness. The Court of Appeal in **Peter M. Kariuki vs. Attorney General [2014] eKLR,** declined to adopt the ***Anarita Karimi*** (supra) position, line, hook and sinker when it expressed itself *inter alia* as follows:

> **"Although *section 84(1)* was, on the face of it, abundantly clear, it was, from the early days of post independence Kenya constitutional litigation, interpreted in a rather pedantic and constrictive manner that made nonsense of its clear intent. Thus in decisions like *ANARITA KARIMI NJERU V REPUBLIC (NO. 1), (1979) KLR 154,* the High Court interpreted the provision narrowly so as to deny jurisdiction to hear complaints by an applicant who had already invoked her right of appeal…The narrow approach in *ANARITA KARIMI NJERU* was ultimately abandoned in Kenya, in favour of purposive interpretation of *Section 84(1)*."**

48. I associate myself with the decision in **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261** to the effect that.

> **"A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing…Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution."**

49. While I agree that this petition was a home-made pleading, it was not contended by the Respondents that they were unable to discern the complaints raised therein. Accordingly, I find no merit in that objection.

50. In this petition, it is contended by the Petitioner that Section 37 of the ***Penal Code,*** Section 14 of the ***Criminal Procedure Code,*** and Section 92 (1) of the ***Prisons Act*** which both provides for cumulative sentences are in conflict with Section 333 of the ***Criminal Procedure Code***. The above provisions under the ***Prisons Act*** and ***Penal Code***, it was submitted legally discriminates prisoners sentenced to cumulative sentences upon admission to prison after conviction. This in effect sanctions inequality before the law for such prisoners since they are treated unequally and discriminated against in computing a term of imprisonment, which treatment is unconstitutional.

51. It is therefore important to set out what these provisions provide.

52. Section 37 of ***Penal Code*** provides that:

> ***Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof.***

53. Section 92 (1) of the ***Prisons Act*** Chapter 90 on the other hand states that*:* -

> ***Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction, or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof.***

54. Put in context, the above sections apply where, for example, a person is convicted of the offence, A, and before he is sentenced or before the expiry of that sentence, he is again convicted of another offence, B. In those circumstances the sentence for B is to be executed after the sentence for A, unless the Court directs that the sentences be executed concurrently.

55. Section 14 of the ***Criminal Procedure Code*** states as follows: -

> ***(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.***

(3) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(4) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences:-

a. of imprisonment which amount in the aggregate to more <u>that fourteen years or twice the amount of imprisonment</u> which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less or

b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

56. It is clear that section 14(1) applies to situations where a person is convicted <u>at one trial</u> of two or more distinct offences in which event, when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently. That subsection gives the trial court where the person is convicted in one trial to decide whether or not the sentences will run concurrently or consecutively. For reasons which will be explained hereunder that subsection does not strictly apply to the circumstances of this petition since the cases in question were not tried and conviction made at one trial. As regards the issue whether or not the trial courts properly exercised their discretion, as rightly appreciated by the petitioner, this petition is not challenging the respective sentences but only the manner in which they are to be served hence that issue does not fall for determination in this petition.

57. Section 333 (2) of the ***Criminal Procedure Code,*** provides:

(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 of which it was pronounced, except where otherwise it is 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.

58. Section 38 of the ***Penal Code*** applies to sentence on an escaped convict.

59. Before dealing with this provision it is important to set out the circumstances giving rise to this petition.

60. In criminal case no. 544 of 2012, the Appellant herein together with another person were charged with the offence of Robbery with Violence Contrary to Section 295 as Read with Section 296(2) of the ***Penal Code***. The particulars were that on the 6th June, 2012 at Primarosa Stage along Mombasa-Nairobi Highway, Athi River District within Machakos County, the Appellant jointly with others not before court robbed **Joseph Njoroge Kibathi** of items valued at Kshs 821,500/= and that at the time of the said robbery, they used actual violence to the said **Joseph Njoroge Kibathi**. There was an alternative charge of handling stolen goods contrary to section 322(1) as read with section 322(2) of the ***Penal Code*** arising from the same transaction. After hearing the case, the Petitioner was convicted of the alternative charge of handling stolen goods. She was on 11th June, 2014 sentenced to serve 5 years' imprisonment.

61. In Criminal Case No. 1440 of 2012, the Appellant was charged with the offence of Stupefying in Order to Commit Felony Contrary to Section 230 of the ***Penal Code***, the particulars being that on the **24th September, 2012** along Mombasa-Nairobi Highway at Emali Trading Centre, within Makueni County, the Petitioner jointly with others not before the court with intent to commit a felony administered unknown stupefying or overpowering drug to **Daniel Waigwa Githinji** and stole from him items valued at Kshs 6,500/=. She also faced the charge of attempted theft of goods in transit contrary to section 279(c) as read with section 389 of the ***Penal Code*** the particulars being that on the same day at the same place she jointly with others not before court attempted to steal goods valued at Kshs 5,060,028.32 the property of Safina Traders Company Ltd. In Count three she faced the charge of stealing contrary to section 275 of the ***Penal Code*** the particulars being that on the same day at the same place at the same time she stole goods valued at Kshs 6.500/- the property of **Daniel Waigwa Githinji**. After hearing she was convicted in all the three counts and sentenced to serve 7 years, 3 years and 1 year in counts I, II and III respectively. The said sentences were directed to run concurrently.

62. In criminal case no. 658 of 2012, the Petitioner was charged with two counts of Robbery with violence contrary to section 295 as read with section 296(2) of the ***Penal Code*****.** The particulars of the first count were that on 28th August, 2012 at Daystar Junction in **Athi River** District in Machakos County, jointly with others not before court robbed **Paul Mbugua** of items valued at Kshs 2,514,000/= and at the time of such robbery used actual violence to the said **Paul Mbugua Gichaga**. The particulars of the second count were that on the same day at the same place jointly with others not before court, she robbed **George Njuguna Mbugua** items worth Kshs 21,700/= and at the time of such robbery used actual violence to the said **George Njuguna Mbugua**. She was convicted of the said counts and sentenced to death for the first count while the sentence for the second was, as is the law in such matters, kept in abeyance. Aggrieved by the said decision, the Petitioner appealed to this court vide Criminal Appeal No. 68 of 2016 and on hearing of the said appeal, **Nyamweya, J** upheld her conviction on both counts but set aside the death sentence imposed upon her and after considering her mitigation and her previous convictions sentenced her to serve 10 years for each count with the terms running concurrently taking into account the time the petitioner had spent in custody.

63. What I understand the petitioner to be saying is that since under section 333(2) of the ***Criminal Procedure Code***, every sentence is deemed to commence from, and to include the whole of the day of, the date of which it was pronounced, to the extent that Section 37 of the ***Penal Code,*** Section 14 of the ***Criminal Procedure Code,*** and Section 92 (1) of the ***Prisons Act*** provide for consecutive sentences, they are in conflict with section 333(2) of the ***Criminal Procedure Code.***

64. It is clear that a reading of section 333(2) only subjects it a provision to the contrary under the ***Criminal Procedure Code***. Strictly speaking therefore, section 333(2) cannot be subjected to that Section 37 of the ***Penal Code*** and/or Section 92 (1) of the ***Prisons Act*** both of which are not provisions under the Code.

65. The provisions of section 333(2) of the ***Penal Code*** was the subject of the decision of the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs. 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 19th June 2012."**

66. If I understand the petitioner correctly, her first limb of the argument is that the effect of Section 37 of the ***Penal Code*** and/or Section 92 (1) of the ***Prisons Act*** is that at the time of her sentencing she was deprived of the benefit of the period she was in custody. In other words, the period she was in custody must apply to all the three sentences so that the period to be served by her in each conviction must take into account the period she was in custody. To my mind such an interpretation with due respect is what is likely to lead to unfairness. It would mean that if at the time of her sentencing to say 5, 7 and 10 years respectively and she was in custody for 1 year, she would only serve 4, 6 and 9 years respectively. If the sentences were consecutive it would in effect mean that she would have been in custody for cumulative period of 17 years. On the other hand, her co-accused, if had been admitted to bond would serve 5, 7 and 10 years hence would have served cumulative period of 22 years merely because they were admitted to bail. While therefore I agree that the period spent in custody ought to be taken into account, it is my view that where the person was arrested the same day and faced different offences committed at different periods against different persons before different courts, unless the court determines otherwise, the period spent in custody cannot be applied in such a manner as to deem the period she was in custody to be more than the period actually spent.

67. I therefore find the first limb of the argument unmerited. I however find that even in cases falling under Section 37 of the ***Penal Code*** and/or Section 92 (1) of the ***Prisons Act*** an accused person must benefit from the provisions of section 333(2) of the ***Criminal Procedure Code*** and since the benefit when it comes to sentencing ought to be given to the accused person, in taking into account the period spent in custody, it is the longest sentence that ought to be considered. In other words, in the example given above, it is the 10 years sentence that ought to be considered in taking into account the period spent in custody.

68. The second limb of the argument is not however as easy to deal with. Section 333(2) of the ***Criminal Procedure Code*** provides that every sentence is deemed to commence from, and to include the whole of the day of, the date of which it was pronounced. The section applies what is known in law as "deeming" provision. As was held in **Prof. Peter Anyan'g Nyong'o and 10 Others vs. Attorney General of Kenya & Others EACJ Reference No. 1 of 2006 [2007] 1 EA 5; [2007] 2 EA 5; [2008] 3 KLR (EP) 397**:

> **"The word "deemed" is commonly used both in principal and subsidiary legislation to create what is referred to as *legal or statutory fiction* and the legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist...The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."**

69. The application of the deeming provision in the circumstances of the Petitioner is that all the sentences passed against the petitioner are to commence on the day when they were pronounced. In other words, the deeming effect renders consecutive sentencing untenable. It would in effect nullify those provisions that provide for consecutive sentencing.

70. In effect the position being fronted by the Petitioner is that since the said provisions are inconsistent and the provisions of section 333(2) of the ***Criminal Procedure Code*** are latter in time, the provisions of Section 37 of the ***Penal Code*** and/or Section 92 (1) of the ***Prisons Act*** are deemed to have been repealed by the former.

71. Dealing with that issue the Court in **Meme vs. Republic [2004] 1 EA 124; [2004] 1 KLR 637** held that:

> **"The courts will only with reluctance infer an intention to repeal a previous statutory provision from the nature of the subsequent statutory enactment and the prior provision will be repealed by implication if, but only if, it is so inconsistent with or repugnant to the subsequent provision that the two are incapable of standing together."**

72. The Supreme Court of Uganda on its part in **Attorney General vs. Silver Springs Hotel Ltd and Others SCCA No. 1 of 1989** held that:

> **"…unless the earlier Act and the later one are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied. It is well settled that the court does not construe a later Act as repealing an earlier one unless it is impossible to make the two Acts or the two sections of the Acts stand together i.e. if the section of the later Act can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act…No competent court should proceed upon the assumption that the Legislature has made a mistake. Whatever the real fact may be a court of law is bound to proceed on the assumption that the Legislature is an ideal person that does not make a mistake…It is also well**

settled rule of law that special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together…Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects especially dealt with by the earlier legislation, that earlier and special legislation is not to be held indirectly repealed, altered or derogated from, merely by force of such general words, without any indication of a particular intention to do so. The presumption is that a subsequent general enactment is not intended to interfere with a special enactment unless the intention to do so is very clearly manifested… It is the duty of the Court at present to declare the law as it stands, and there are several well-known principles of construction. First of all there is the guidance to be gained concerning repeals. The general presumption is against such a repeal, if any had existed, would be declared in express terms; but is not necessary that any express reference be made to Statute which is to be repealed. The prior Act would be repealed by implication: -

(i) if its provisions were wholly incompatible with a subsequent Act, or

(ii) if the two Acts together would lead to a wholly absurd consequences, or

(iii) if the entire subject matter were taken away by the subsequent Act.

In English Law, the maxim is *generalia specialibus non derogat.* Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by the earlier legislation, that earlier legislation is not to be held indirectly repealed, altered or derogated from, merely by force of such general words, without any indication of a particular intention to do so…It is trite law that special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or there is necessary inconsistency in the two Acts standing together."

73. In my view the ***Criminal Procedure Code*** is an Act of general application dealing with the procedure in criminal matters while the ***Penal Code*** is a special enactment in so far as sentences is concerned.

74. This apparent conflict in my view strictly speaking does not render the earlier enactments unconstitutional. To declare that an enactment has been impliedly repealed is not the same thing as saying that it is contrary to the Constitution. In my view, to hold that a person who commits a subsequent offence should only be subject to one sentence, would fly in the face of criminal justice system. One would imagine for example where a person serving a custodial sentence of say 3 years, commits an offence while in custody commits another offence and is sentenced to say one year having served only one year. Accepting the petitioner's argument, the effect would be that the person would never be punished for the subsequent offence.

75. The petitioner argues that our progressive Constitution intended that we don't punish offenders as before, but giving them an opportunity to rehabilitate. However, according to **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015:**

"[91] In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: "deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim."

[92] The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

"Sentences are imposed to meet the following objectives:

1. *Retribution: To punish the offender for his/her criminal conduct in a just manner.*

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct."

76. Clearly therefore retribution remains as one of the objectives of sentencing though I associate myself with the opinion expressed by the Supreme Court of India in **Alister Anthony Pereira vs. State of Maharashtra** at paragraphs 70-71 that the twin objective of the sentencing policy is deterrence and correction.

77. It is for that reason that there is a discretion given to the prison authorities to grant remission to those in custody for good behaviour. I do

not see any reason why remission should not benefit the petitioner herein in respect of each of the three sentences she is serving if she is found to deserve the same due to her good behaviour since remission applies to the period of sentence to be served in a particular conviction.

78. I wish to reiterate what this court stated in the case of **Julia Wangeci Githua vs. R (2019) eKLR** that regarding the other issues raised such as the health of the petitioner and her good behaviour and conduct while in custody, section 46(5) of the ***Prisons Act*** provides as follows:

> ***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.***

79. Therefore, nothing prevents the petitioner from petitioning the Commissioner General of Prisons to exercise his powers pursuant to the above provisions if she feels that her status constitutes special grounds for further remission over and above that contemplated under section 46(1) of the ***Prisons Act***.

80. In determining his petition, this Court must be alive to the principles guiding constitutionality of statutes since this petition challenges the constitutionality of legislation. On that issue the US Supreme Court in **U.S vs Butler, 297 U.S. 1[1936]** expressed itself as follows:

> ***"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."***

81. According to **Majanja, J** in **Mark Obuya & Others vs. Commissioner of Domestic Taxes & 2 Others [2014] eKLR**:

> **"The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the Constitution, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court licence to declare it unconstitutional."**

82. The general rule is therefore that every statute passed by the Legislature enjoys a rebuttable presumption of constitutionality as the Court of Appeal of Tanzania in **Ndyanabo vs. Attorney General [2001] 2 EA 485**, noted;

> **"In interpreting the Constitution the court would be guided by the general principles that…there was a rebuttable presumption that legislation was constitutional, and…the onus of rebutting the presumption rested on those who challenged the legislation's status save that, where those who supported a restriction on a fundamental right relied on claw back or exclusion clause, the onus was on them to justify the restriction."**

83. In determining the constitutionality of a statute it was held in **Olum and Another vs. Attorney General [2002] EA**, that:

> **"To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional."**

84. In **The Queen vs. Big M. Drug mart Ltd, 1986 LRC (Const.) 332**, the Supreme Court of Canada stated that:

> **"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity."**

85. As appreciated in **Alister Anthony Pareira vs. State of Maharashtra, {2012}2 S.C.C 648** at para 69:-

> **"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances."**

86. Therefore, in determining the issue whether Section 37 of the ***Penal Code*** and/or Section 92 (1) of the ***Prisons Act*** are unconstitutional, this court is enjoined to consider the purpose and effect of the two provisions. In my view the purpose of consecutive sentencing under the two sections is meant to achieve the objective of imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is committed. In this case different offences were committed on different occasions against different complainants. The Courts cannot be expected to turn a blind eye to some offences simply because the

offender has been punished in respect of other offences. In determining whether the punishment already imposed on the offender suffices for the purposes of the subsequent offence the court is expected to take into account all the facts and circumstances of each case and it is for this reason that the trial courts are given discretion despite the said two provisions to decide whether or not the sentences would run concurrently. In other words, the two sections are not cast in stone. Whether or nor that discretion is properly exercised is a matter for an appellate court and not a Constitutional Court.

87. While I find no contravention of the Constitution the complaint by the petitioner that there is a *prima facie* inconsistency between Section 37 of the ***Penal Code*** and/or Section 92 (1) of the ***Prisons Act*** on one hand and section 333(2) of the ***Criminal Procedure Code*** on the other hand cannot be said to be without any merit. Accordingly, I direct the Deputy Registrar of this Court to serve a copy of this judgement on the Hon Attorney General with a view to appropriate steps being taken to reconcile the said provisions.

88. I must however appreciate the efforts of the parties herein and their legal advisers for raising the issues raised herein which issues cannot certainly be termed as frivolous.

89. Therefore, having held that the period spent in custody should be directed at the longest sentence, since the Petitioner was arrested on 25th September, 2012 and the longest sentence she is serving is 10 years imposed upon her in Mavoko Criminal Case No. 658 of 2012, the period of the said sentence shall run from 25th September, 2012. Otherwise I find no merit in this Petition which I hereby dismiss but with no order as to costs.

90. It is so ordered.

91. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic.

Judgement read, signed and delivered in open court at Machakos this 30th day of September, 2020

G.V. ODUNGA

JUDGE

In the presence of:

The Petitioner vide Skype

Mr Kaberia for the Petitioner

Mr Ngetich for the 2nd Respondent

CA Geoffrey