REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 28 OF 2018

BROWN TUNJE NDAGO.....PETITIONER

VERSUS

COMMISSIONER-GENERAL OF PRISONS.....RESPONDENT

JUDGEMENT

1. In his petition filed on 5th April, 2018, Brown Tunje Ndago prays for orders as follows:-

> **"(i) That may this Hon. Court invoke its jurisdiction in Articles 19(3)(a), 20(1),(2) and 27(1),(2),(4) of the Constitution and declare Section 46 of the Prisons Act unconstitutional, null and void and proceed to order that equally the petitioner is entitled as a right and qualifies to benefit for remission on the twelve (12) years imprisonment from the date of conviction replaced-substituted by the High Court on the 7th March, 2018 at Malindi Law Courts.**
>
> **ii) That may this court declare and order that the petitioner is entitled as a right to equality before the law, equal protection and benefit of the law under the provisions of Article 27 of the Constitution and proceed to grant reliefs-remedies accruing from application of remission on the twelve years (12) imprisonment from the date of conviction.**
>
> **a) Declare and order that the 12 years sentence be recomputed to exclude one year (1) and eight (8) months the petitioner spent in prison remand custody.**
>
> **b) Declare and order the respondent to allow the computation of the new sentence in number (a) above to include remission on the sentence.**
>
> **c) Any other orders this Hon. Court may deem fit to grant."**

2. The background of this petition as gleaned from the pleadings filed in court is that the Petitioner was tried, convicted and sentenced to suffer death by the Chief Magistrate's Court at Kwale for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. His appeals to this Court and to the Court of Appeal on both conviction and sentence were unsuccessful. The Petitioner later moved this Court (Said Chitembwe, J) through Malindi High Court Constitutional Petition No. 1 of 2014 for certain orders. In a judgement delivered in that matter, the death sentence imposed on the Petitioner was set aside and replaced with a sentence of twelve years imprisonment from the date of his conviction.

3. It is the Petitioner's case that he has been denied remission of sentence by the Commissioner–General of Prisons ("the Commissioner") for no apparent reason resulting in the breach of his constitutional rights. According to the Petitioner, Section 46 of the Prisons Act, Cap. 90 entitles him to remission of sentence like every other prisoner. His view is that the actions of the Commissioner violates his right to the equal protection and equal benefit of the law as guaranteed by Article 27 of the Constitution.

4. The Respondent through the Office of the Director of Public Prosecutions opposed the petition through a Preliminary Objection dated 18th June, 2018 on the ground that the grant or denial of remission falls within the remit of the Commissioner. The Respondent did not file anything else in response to the petition. The Respondent's Preliminary Objection challenges the jurisdiction of this court to hear and determine this petition on the ground that this court has no authority to grant remission to a prisoner. According to the Respondent remission as provided by Section 46 of the Prisons Act is not an absolute right and can be waived by the Commissioner upon whom the power to grant remission is vested. This argument is supported by one line in my decision in **Francis Opondo v Republic [2017] eKLR** that **"[t]he power of remission lies with the prisons authorities and this Court should not usurp such power."**

5. In response to the question of jurisdiction Mr Mochere, who came on record for the Petitioner in the course of the petition, submitted that

the Commissioner is indeed the person to whom the power to grant remission has been donated to by the Prisons Act. In that regard, counsel asserted, the Commissioner is under the supervisory jurisdiction of this court, by virtue of Article 165(6) of the Constitution, as to how he exercises that power. Further, that this court has power to interrogate any decision of the Commissioner as provided under Article 47 of the Constitution and the Fair Administrative Action Act, 2015.

6. My understanding is that the Petitioner is questioning the decision by the Commissioner to deny him remission. In the case of **David Oloo Onyango v Attorney General [1987] eKLR,** the appellant who had been jailed for 5 years had the remission credited to him by virtue of Section 46(2) of the Prisons Code revoked by the Commissioner of Prisons. The High Court dismissed the appellant's challenge to the decision of the Commissioner of Prisons. His appeal to the Court of Appeal was successful and the decision denying the appellant remission was set aside.

7. In reaching its decision the Court of Appeal held that:-

> **"The decision in that case is persuasive authority for the proposition that notwithstanding that the Commissioner might regard the issue for his consideration under the sub-section as an internal disciplinary matter, all the same because rights of an inmate would be affected, the Courts have a duty, unless their jurisdiction is clearly excluded by some statutory provision, to concern themselves with the manner in which the Commissioner considers before he concludes. There is no provision in the Prisons Act which excludes the jurisdiction of Courts to concern themselves with the rights of inmates however circumscribed by a penal sentence. In order to consider fairly, the Commissioner has to observe the basic principles of fundamental justice. That would require that the inmate affected be fully informed of the disciplinary offence which he is alleged to have committed, that he be given sufficient time to prepare his case, that in his consideration the Commissioner takes into account the material presented by the inmate and the Commissioner indicates that he has weighed all evidence before him before reaching the conclusion to deprive remission."**

8. The cited statement of the Court of Appeal clearly shows this court has supervisory jurisdiction over the exercise of the power of remission by the Commissioner. Indeed my statement in the **Francis Opondo** case that the power to grant remission lies with the Commissioner remains correct. It is only the manner in which he exercises that power that becomes the concern of this court. Nowhere in my judgment did I state that this court has no power to exercise supervisory jurisdiction over the Commissioner. The Petitioner has demonstrated that he challenges the exercise of the power of remission by the Commissioner. That is an issue that falls within the jurisdiction of this court. I therefore find that the Preliminary Objection of the Respondent is without merit and the same stands dismissed. That leaves the petition unopposed.

9. An interrogation of the instant petition will show that the Commissioner is in a dilemma as to whether the Petitioner is entitled remission considering the nature of the offence for which he was convicted. This is indeed a vexing matter for the issue arises following the decision of the Supreme Court in the **Francis Karioko Muruatetu & another v Republic [2017] eKLR** which invalidated Section 204 of the Penal Code **"to the extent that it provides for the mandatory death sentence for murder."**

10. In **William Okungu Kittiny v Republic [2018] eKLR** , the Court of Appeal held that:

> **"[9] From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution."**

11. The two decisions created a cadre of prisoners not envisaged by Section 46 of the Prisons Act. These are the death row convicts whose sentences, like that of the Petitioner, have now been substituted with determinate prison sentences. Although Section 46(1) of the Prisons Act did not expressly bar remission for prisoners sentenced to death, it goes without saying that a prisoner sentenced to suffer death cannot benefit from remission. This also applies to a prisoner serving a life sentence. Not only is it difficult to calculate remission in these two instances but even if calculation is done the remission will serve no purpose for a prisoner who is to be hanged or expected to serve the remainder of his/her natural life behind bars.

12. It is important for the purpose of this judgment to reproduce Section 46 of the Prisons Act which grants the power to the Commissioner to remit sentences. It states:

> **"46. Remission of sentence**
>
> **(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."

13. The said provision allows the Commissioner to grant remission of sentence to any prisoner on condition that he has served one calendar month and is not sentenced to imprisonment for life or for an offence under Section 296(1) of the Penal Code or is detained at the President's pleasure.

14. It is understandable why prisoners sentenced to life imprisonment or detained at the President's pleasure cannot benefit from remission. Their sentences are indeterminate and at the time of admission it is not possible for the Commissioner to credit the full amount for remission to which the prisoner ought to be entitled to at the end of the sentence as required by Section 46(2) of the Prisons Act.

15. I, however, cannot fathom why, among all the offences created by the Penal Code and all the other statutes, Parliament decided to exclude those convicted for committing the offence of robbery punishable by Section 296(1) of the Penal Code from benefitting from remission. Section 296(1) provides that:-

"Any person who commits the felony of robbery is liable to imprisonment for fourteen years."

16. The question as to whether a person convicted for committing an offence contrary to Section 295 of the Penal Code as read with Section 296(1) of the same Code is not before this court. However, if this petition succeeds it will follow that a person convicted for what is commonly known as "simple robbery" is also entitled to remission of sentence.

17. Counsel for the Petitioner urged this court to find that Section 46 of the Prisons Act violates Articles 27 and 29 of the Constitution. Article 27(1) & (2) of the Constitution provides that:-

"27.Equality and freedom from discrimination

(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."

18. Article 29 of the Constitution states that:-

"Every person has the right to freedom and security of the person, which includes the right not to be-

(a) deprived of freedom arbitrarily or without just cause;

(b) ….;

(c) ….;

(d) ….;

(e) ….; or

(f) treated or punished in a cruel, inhuman or degrading manner."

19. A reading of Section 46 of the Prisons Act will show that every person convicted and sentenced to a definite term of imprisonment exceeding one month is entitled to remission. The only exemption is a prisoner convicted and sentenced to serve imprisonment for "simple robbery."

20. In **Francis Karioko Muruatetu** (supra) the Supreme Court declined to address a prayer seeking a declaration that Section 46 of the Prisons Act is unconstitutional for excluding prisoners serving life sentences from being considered for remission. The Court gave reasons for avoiding the question as follows:-

> **"[77] Similarly we note that counsel for the *amici curiae* asked this Court to declare Section 46 of the Prisons Act, Chapter 90 of the Laws of Kenya (Prisons Act) unconstitutional because it excludes prisoners serving life sentences from being considered for remission. We wish to restate our finding in an earlier ruling dated 28th January 2016, in *Francis Karioko Muruatetu & another v. Republic & 5 others* Petition No. 6 of 2016; [2016] eKLR where the Court limited the role and function of the *amici curiae* as follows:**
>
> ***"[43] … Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed. Further, such issues are matters relating to the interpretation of the Constitution, and we cannot allow them to be canvassed in this Court for the first time, as though it was a Court of first instance. We recognize the hierarchy of the Courts in Kenya, and their competence to resolve these constitutional questions…."***
>
> **[78] Based on the above pronouncement, we will not delve into the issue of the unconstitutionality of Section 46 of the Prisons Act because none of the primary parties to the dispute have raised it. This issue has also not been properly canvassed at the High Court and Court of Appeal. We reaffirm this Court's decision in *Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others, Supreme Court Petition No. 2 of 2012, [2012] eKLR*, where this Court declined to assume jurisdiction and address issues that have not gone through the hierarchy of courts."**

21. If a person convicted for the offence of manslaughter can have his/her sentence remitted, why should a person given a determinate prison sentence for murder not enjoy the same benefit? The two offences fall into the same genre as they involve the taking away of human life unlawfully.

22. In my view, the Petitioner has a valid point when he submits that denying him the benefit of remission of sentence is discriminatory and thus a violation of the law. In agreeing with him, I am guided by the reasoning of the Supreme Court in **Francis Karioko Muruatetu** (supra). In that case the Court in explaining why section 204 of the Penal Code was discriminatory stated that:-

> **"[63] Article 27 of the Constitution provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence. Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, Section 204 of the Penal Code violates Article 27 of the Constitution as well."**

23. In my view, some provisions of Section 46 of the Prisons Act have to a large extent been rendered sterile by the recent developments in law. The language used by the Court of Appeal in **Godfrey Ngotho Mutiso v R, Cr. App. No. 17 of 2008,** as cited in paragraph 68 of the **Francis Karioko Muruatetu** case, is apt for this piece of legislation:-

> **"As will be seen shortly, and indeed it is axiomatic, human society is constantly evolving and therefore the law, which all civilized societies must live under, must evolve in tandem. A law that is caught up in a time warp would soon find itself irrelevant and would be swept into the dustbins of history."**

24. It should be noted that as drafted Section 46(1) of the Prisons Act only discriminates against those sentenced for an offence under Section 296(1) of the Penal Code. It cannot be said that it is discriminatory against those sentenced to imprisonment for life or those detained during the President's pleasure. For this category of prisoners their period of imprisonment is never fixed by the court.

25. As of now imprisonment for life means imprisonment for the natural life term of a convict. Nobody knows how long each human being will live. For such a sentence the prison term cannot be fixed to enable the Commissioner credit remission to the convict.

26. The same position applies to those detained at the President's pleasure. The custodial period is not known. I am aware that detention at the President's pleasure has been declared unconstitutional – see **A.O.O. & 6 others v A.G. & another [2017] eKLR.** In that regard, detention at the President's pleasure is no longer available as a punishment in this country.

27. Also, once a person is sentenced to suffer death, such a convict will have no use for remission. Although Section 46 of the Prisons Act does not specifically state that a person given the death sentence is not entitled to remission, common sense dictates that such a convict cannot have his sentence remitted. There is nothing remittable in a death sentence.

28. It is clear then to me that there is no reason why a convict with a determinate or definite prison term should not benefit from remission. For a prisoner, remission is one of the beacons of hope of life outside prison. It is a motivating factor towards reformation. There is no reason why a person who commits murder, robbery with violence or "simple robbery" should be denied remission if they have been sentenced to serve fixed prison terms. It is true that these are indeed very serious offences. They are, however, not the only grave offences. The gravity of the offences cannot be good reason for denying these convicts remission for those convicted of grave offences like sexual offences are entitled to remission of their sentences. It is therefore discriminatory and indeed unconstitutional to deny remission of sentence to a certain category of prisoners serving definite sentences.

29. In the circumstances, I find that the petition herein succeeds to the extent that every convict, whatever offence they are convicted of,

serving a determinate, definite or fixed prison term is entitled to remission. Although the Petitioner urged this court to declare Section 46 of the Prisons Act unconstitutional, I find that no case has been made for declaring the entire Section unconstitutional. Such a step will end up outlawing remission of sentence which, ironically, the Petitioner is fighting for through this petition.

30. For clarity, the only part of Section 46(1) of the Prisons Act declared unconstitutional is that which denies remission to persons sentenced to imprisonment for an offence under Section 296(1) of the Penal Code.

31. The Petitioner urged this court to deduct one year and 8 months from his custodial sentence of 12 years. He claims that this is the period he spent in remand prior to his conviction and sentence. His counsel cited several authorities from foreign jurisdictions in support of the assertion that the period spent in remand custody should be taken into account during sentencing.

32. Counsel for the Petitioner needed not have travelled outside our borders in support of this legal principle. Section 333(2) of the Criminal Procedure Code provides that:-

> **"Subject to the provision of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.**
>
> **Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."**

33. The law is therefore clear that the period spent in custody prior to conviction and sentence ought to been taken into account by a trial court when imposing a custodial sentence. One case in which this point was stated is that of **John Kathia M'itobi v Republic [2018] eKLR** where the Court (Majanja, J) stated that:-

> **"The petitioner remained in pre-trial custody for a period of two years from the time he was charged in 2004 upto the time he was convicted in 2006. This court, in sentencing an accused, is entitled to take into account the period spent in pre-trial custody by dint of the proviso to section 333(2) of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*."**

34. Turning to the facts of this case, I find that the Petitioner did not supply me with the judgment in Malindi High Court Constitutional Petition No. 1 of 2014 in which he was sentenced to 12 years imprisonment. Although I read that judgment on behalf of my brother Justice Said Chitembwe, I cannot recall what was said before the sentence was imposed. I cannot presume that a Court of coordinate jurisdiction failed to take into consideration the relevant sentencing principles before imposing sentence on the Petitioner. For that reason, I cannot deduct 1 year and 8 months from the Petitioner's sentence. The prayer by the Petitioner for a re-computation of his sentence therefore fails.

35. For avoidance of doubt, orders shall issue as follows:-

> **a. Section 46(1) of the Prisons Act, Cap. 90 is declared unconstitutional to the extent that it denies remission to persons imprisoned for an offence contrary to Section 296(1) of the Penal Code;**
>
> **b. A declaration is issued that the Petitioner being a prisoner serving a fixed or definite or determinate period of imprisonment is entitled to remission of his sentence in accordance with the provisions of Section 46 of the Prisons Act, Cap. 90;**
>
> **c. The Commissioner-General of Prisons shall forthwith proceed to calculate remission of sentence for the Petitioner; and**
>
> **d. The Deputy Registrar of Malindi High Court is directed to forthwith transmit a certified copy of this judgement 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 and Signed at Nairobi this 12th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 30th day of May, 2019

R. Nyakundi,

Judge of the High Court