



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

PETITION NO. 16 OF 2019

(CORAM: ODUNGA, J)

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER
ARTICLE 22(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 27(1)(2)(4), 28, 51(1),
24(1), 25(A) AND 29(F) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

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

BETWEEN

SAMMY MUSEMBI MBUGUA.....1ST PETITIONER

NICHOLAS MUKILA NDETEI.....2ND PETITIONER

SAMMY KITONGA MUKUSYA.....3RD PETITIONER

JOHN MUOKI MBATHA.....4TH PETITIONER

PAUL MUMO MUIA.....5TH PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA PRISON SERVICE.....2ND RESPONDENT

JUDGEMENT

1. The Petitioners herein are long time prisoners serving various sentences ranging from 15 years to 40 years respectively. They were all charged and convicted of the offence of Robbery with Violence contrary to section 296(2) of the *Penal Code*.

2. The 1st Respondent, the Attorney general is the principal legal adviser to the Government while the 2nd Respondent, the Kenya Prison Service is described as the principal implementing agency of the *Prisons Act*, Cap 90, Laws of Kenya (hereinafter referred to as "the Act") and has a key role in implementing the *Persons Deprived of Liberty Act*.

3. According to the Petitioners, the 1st Respondent is under section 7(1) of the Sixth Schedule to the Constitution required to advise the Government and the 2nd Respondent to ensure that section 46(1)(ii) of the Act is construed with the alterations, adaptations,

qualifications and exceptions necessary to bring the provision into conformity with the Constitution. The 2nd Respondent, on the other hand administers remission both as a rehabilitation tool and corrective measure. It was contended that while the said respondent may in certain circumstances require forfeiture of remission, the Act provides that each prisoner on admission shall be credited with the full amount of remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.

4. It was the Petitioners' case that section 46(1)(ii) of the said Act in so far as it provides that no remission is to be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(2) of the **Penal Code**, treats them unequally and discriminately in computing their term of imprisonment.

5. The Petitioners averred that following sustained queries by the affected persons as to the position of the law in relation to remission of part sentence for robbery with violence convicts the 2nd Respondent has not issued any information regarding the basis of denying persons convicted to term imprisonment under section 296(2), 203 and 204 of the **Penal Code**, only arguing that the law is not clear and that they are seeking the interpretation of the relevant law, which is now the basis of this petition in which the Petitioners argue that the provision denying convicts under section 296(1) of the **Penal Code** remission of part of sentence is discriminatory.

6. It was the Petitioners' contention that a terrorist act and robbery with violence are by all characterizations violent offences with varying degrees of premeditation and fore planning, yet upon conviction and admission to prison on term imprisonment, except for a robbery with violence, all other offenders are credited with remission equivalent to one third of the term stated in the warrant of imprisonment. The Petitioners therefore contended that the provision is unconstitutional in that it amounts to discrimination and creates inequality and denies, violates, infringes, threatens rights and fundamental freedoms in the Bill of Rights and is not justified under Article 24 of the Constitution.

7. It was pleaded that Part VII of the **Prison Rules**, 1963 detail the period and remission of sentence, including release under supervision. The same Part explains the calculation of remission, requirement to explain remission system to prisoners, keeping of records and computation of sentence, for the purpose of remission where capital sentence has been commuted to a sentence of imprisonment. The rules further outline circumstances where remission may be forfeited.

8. It was contended that since under Article 27(1) and (2) of the Constitution every person is equal before the law and has the right to equal protection and equal benefits of the law which equality includes enjoyment of all rights and fundamental freedoms, measured against section 46(1)(ii) of the **Prisons Act** sanctions inequality. According to the Petitioners, under Article 27(4) of the Constitution, the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth and when held up against this constitutional provision, section 46(1)(ii) of the same Act sanctions discrimination through the law.

9. It was the Petitioners' case that the notion of equality springs directly from the oneness of human family and is linked to the essential dignity of an individual. That being the case, that principle cannot be reconciled with the notion that a given group has the right to privileged treatment or mistreatment because of its perceived superiority/inferiority and that it is impermissible to subject human beings (including prisoners) to differences in treatment that are inconsistent with the Constitution.

10. The Petitioners' case was that the limitation of rights provided for under section 46(1)(ii) of the **Prisons Act** is unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom under Article 24(1) of the Constitution and is therefore unconstitutional. It was further contended that the Respondents' actions and the discrimination and limitation provided under the provision is contrary to a number of international legal instruments ratified by Kenya, including the International Covenant on Civil and Political Rights (ICCPR), United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) and the African Charter on Human and Peoples' Rights (ACHPR).

11. The Petitioners therefore prayed for:

1. A declaration that section 46(1)(ii) of the **Prisons Act**, to the extent that it is inconsistent with the provisions of Article 27(1)(4) of the Constitution on the right to equality before the law and the right to equal protection and equal benefit of the law including that State shall not discriminate directly or indirectly against any person, is unconstitutional.

2. A declaration that the limitation on benefiting from remission of part of sentence for convicts under section 296(1), 296(2), 203 and 204 of the **Penal Code**, under section 46(1)(ii) of the **Prisons Act** is unconstitutional to the extent that it is inconsistent with the intention of the Supreme Court decision in Francis Karioko Muruatetu case.

3. A declaration that the treatment accorded to convicts under sections 203, 204, 296(1) and 296(2) of the **Penal Code** violates Articles 28, 29(f) and 51(1) of the Constitution.

4. An order that each petitioner be credited with remission as is appropriate and that the same order extends to other prisoners in similar circumstances as the petitioners.

5. The court be pleased to make such other orders(s) as it shall deem just.

12. It was submitted by the Petitioners that the power to grant remission should not be confused with the right to remission. Based on **Francis Opondo vs. Republic Criminal Appeal No. 13 of 2015**, it was submitted that a question had arisen as to whether the appellant was entitled to remission considering that he was sentenced during the period when remission of sentences had been removed from the **Prisons Act** and the Court held that the appellant had a right to remission of sentence though the power to determine whether he deserved remission belonged to the Commissioner General of Prisons.

13. Based on Article 50(2)(p) of the Constitution, it was submitted that the least severe sentence is the one to which remission has been

applied and it is immaterial that the appellant was convicted during the period the remission had been removed from the statute books. It was therefore submitted that whereas the grant of remission falls within the remit of the Commissioner-General of Prisons, the Commissioner is under the supervisory jurisdiction of this court under Article 165(6) of the Constitution. Therefore, this court has the power to interrogate any decision of the Commissioner under Article 47 of the Constitution and ***Fair Administrative Action Act, 2015***.

14. It was submitted that remission is the reduction of the term of a prison sentence, usually due to good behaviour or conduct and it refers to a structured system with criteria for prisoners to meet in order to encourage good behaviour, rehabilitation and self-improvement, with the ultimate benefit being the released of the prisoner and it is provided for by the statute. It was therefore submitted that the principle of a penal system involving remission arises from the belief that a prisoner's desire for self-improvement will increase significantly if their conduct directly affects their jail-term, essentially placing their fate into their own hands. Such system allows prisoners to take charge of their own lives; to develop a sense of responsibility, as well as providing an incentive to serve one's time productively, with a mind-set of moving forward. In this regard the Petitioners relied on **John Clay, *Maconochie's Experiment* (John Murray Publishers Ltd, London, 2001)**. The Petitioners also cited the experience of other countries such as Canada, United States, United Kingdom, Ireland with respect to the application of remission.

15. The Petitioners relied on the decision of **Korir, J** in ***Brown Tunje Ndago vs. Commissioner of Prisons (2019) eKLR*** in which he quoted **Godfrey Ngotho Mutiso vs. Cr. App. No. 17 of 2008** where the Court of Appeal held that it is axiomatic that human society is constantly evolving and therefore the law which all civilised 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.

16. It was the Petitioners' view therefore that there is no reason why a convict with a determinate or definite prison term should not benefit from remission and the court was urged to grant the prayers sought in the petition.

17. Though served with the petition the respondents neither appeared nor responded to the petition. Accordingly, the petition is unopposed.

Determinations

18. I have considered the issues raised in this petition. In fact, the only issue for consideration is the constitutionality of section 46(1)(ii) of the ***Prisons Act*** and in particular whether it contravenes Article 27 of the Constitution which provides as hereunder:

(1) Every person is equal before the law and has the right to protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

19. Section 46 of the ***Prisons Act***, on the other hand provides that:

(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.

Provided that in no case shall -

(i) any remission granted result in the release of a prisoner until he has served one calendar month;

(ii) any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the Penal code or to be detained during the President's pleasure.

(2) For the purpose of giving effect to the provisions of subsection (1), each prisoner on admission shall be credited with the full amount for remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.

(3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period-

(a) spent in hospital through his own fault; or

(b) while undergoing confinement as a punishment in a separate cell.

(4) A prisoner may be deprived of remission -

(a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner;

(b) where the Cabinet Secretary for the time being responsible for Internal security considers that it is in the interests of public security or public order.

(5) Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground. [Act No. 25 of 2015, Sch.].

20. What I understand by the said provision is that all convicted criminal prisoners are, upon their admission entitled to be credited with the full amount for remission to which they would be entitled at the end of their sentence if they lost no remission of sentence. The said remission is earned by industry and good conduct and is for one-third of their sentence or sentences. There is however, a residual power given to the Commissioner to grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground.

21. However, the remission only applies to a prisoner who has served at least one calendar month sentence. In other words, where the application of the remission would result in the prisoner serving less than one-month calendar sentence, it would not apply. Similarly, the remission does not apply 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.

22. However, just like a bank gives a borrower a loan and credits his account with the sum advanced and as the borrower continues servicing the loan, the account is debited with the sum paid, a prisoner whose account" has been credited with the period of remission may have that credit debited with the period spent in a hospital through his own fault or for the period the prisoner is undergoing confinement as a punishment in a separate cell. This is understandable because remission is a reward" for industry and good conduct and a person who is in hospital through own fault cannot be termed as being industrious while a person undergoing confinement as a punishment is definitely not of good conduct. Based on the same reasoning, a prisoner may lose remission as a result of its forfeiture for an offence against prison discipline.

23. There is however a power given to the Commissioner-General of Prisons to deprive a prisoner of the credited remission where he considers that it is in the interests of the reformation and rehabilitation of the prisoner that the said deprivation be undertaken. In other words, remission must only inure to those prisoners who have by industry and conduct manifested that they have reformed and have been rehabilitated to be sufficiently released back to the society. Apart from the powers given to the Commissioner, the Cabinet Secretary for the time being responsible for Internal security may also exercise the power to deprive a prisoner of remission where he considers that it is in the interests of public security or public order that the prisoner be so deprived.

24. The law however expressly denies those prisoners who are serving life imprisonment or for an offence under section 296(1) of the *Penal Code* or those detained during the President's pleasure. While it is understandable that those serving life sentences and those detained at the President's pleasure ought not to benefit from the remission, since their sentences being indeterminate, it is not possible to calculate the one third of their sentence, the Petitioners' "beef" is directed at those prisoners sentenced pursuant to section 296(2) of the *Penal Code*. That section provides that:

If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

25. On the face of it, the exclusion of remission to those convicted of offences under section 296(2) of the *Penal Code* makes sense since the law provides for, *a prima facie*, mandatory death sentence to which one third remission cannot apply. To that extent I agree with **Korir, J** in **Brown Tunje Ndago vs. Commissioner-General of Prisons [2019] eKLR** where he expressed himself as hereunder:

"The two decisions [Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR and William Okungu Kittiny vs. Republic [2018] eKLR] 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...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. 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. 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. 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.”

26. What is perplexing, however, is that the said section does not expressly exclude the other provisions under which death sentence is similarly, *prima facie*, mandatory. However, the *prima facie* mandatory death sentence has now been declared unconstitutional in this jurisdiction. This was the position of the Supreme Court decision in *Francis Karioko Muruatetu & Another vs. Republic*, Petition No. 15 of 2015, where it expressed itself as hereunder:

“47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

[49] With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.

[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.

[52] We are in agreement and affirm the Court of Appeal decision in *Mutiso* that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.”

27. That being the current state of the law, it follows that a person convicted of an offence under section 296(2) of the *Penal Code*, or for that matter any other offence is not liable to mandatory death sentence. This is my understanding of the decision of the Court of Appeal in *Jared Koita Injiri vs. Republic* [2019] eKLR, a decision I respectfully associate with, where it held that:

“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic* (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”

28. That being the position, it defeats reasoning to still uphold the provisions of section 46(1)(ii) of the *Penal Code* in cases where a person

convicted with an offence under section 296(2) of the *Penal Code* is neither sentenced to death nor serving life sentence. It is contended by the Petitioners that to exclude such prisoners from the benefit of the remission is discriminatory.

29. This contention calls for a determination of what constitute discrimination and under what circumstances the court can interfere in allegations of discrimination. In [Peter K. Waweru vs. Republic \[2006\] eKLR](#) discrimination was defined in the following terms:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

30. Similarly, in [Andrews vs. Law Society of British Columbia \(1989\) 1 SCR 321](#), Wilson J., defined discrimination as a:

“distinction which whether intentional or not but based on grounds relating to personal characteristics of individual group (which) has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.”

31. In his decision in [Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 \[2008\] KLR 688](#), Nyamu, J (as he then was) held:

“The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification...The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally, it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim.”

“The *Blacks Law Dictionary* defines discrimination as follows: “The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” *Wikipedia, the free encyclopedia* defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as follows:- “A particular form of differentiation on illegitimate ground.”...The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs vs. Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found “to disqualify Negroes at a substantially higher rate than white applicants”.

32. The learned Judge proceeded:

“Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word “discriminatory” in section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question; (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification...”

33. Similarly the South African Constitutional Court in [Minister of Home Affairs vs. Fourie \[2005\] ZACC 19; 2006 \(1\) SA 524 \(CC\); 2006 \(3\) BCLR 355 \(CC\) at para 60](#) held that:

“Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human dignity requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma.”

34. As was appreciated by the South African Constitutional Court in President of the Republic of South Africa vs. Hugo [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) (Hugo) at para 41:

“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievements of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.”

35. In Jacques Charl Hoffmann vs. South African Airways, CCT 17 of 2000 a case cited in Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General [2011] eKLR, the court stated that:

“This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of Section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.”

36. In S vs. Makwanyane [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 156 it was held by the South African Constitutional Court that:

“Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action, or decision making, is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow.”

37. The same Court in Prinsloo vs. Van der Linde [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25 held that:

“In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.”

38. In Minister of Finance vs. Van Heerden [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (Van Heerden) para 27 it was held that:

“It is...incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but ‘situation-sensitive’ approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.”

39. At para 37 was held that:

“When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.”

40. It is against the principle that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts and the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation” (Tom Bingam; *The Rule of Law*, London Penguin Press, 2010).

41. In my view, the differentiation in treatment of persons sentenced to determinate periods from those facing indeterminate sentences is justifiable where it is not possible to calculate what would be the period of remission. However, where the sentence is certain and determinate, such differentiation cannot be legitimate. The question that one asks is whether such differentiation bears a rational connection to a legitimate purpose. I agree with the Petitioners that the purpose of remission is to act as an incentive to the prisoner and encourage good behaviour, rehabilitation and self-improvement if a prisoner knows that his or her conduct directly affects his or her jail-term thus placing his or her destiny in his or her own hands. In *Muruatetu Case* (supra) the Supreme Court referred to Article 10(3) of the *International Covenant on Civil and Political Rights (ICCPR)* which stipulates that:

“[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”

42. To therefore maintain that those convicted of offences under section 296(2) of the *Penal Code* are not entitled to consideration for remission, presupposes that such offenders are incapable of reform. First there is no empirical evidence before me to enable be justify such a conclusion. Secondly, and to paraphrase the Supreme Court in the *Muruatetu Case* Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected and it is for this Court to ensure that all persons enjoy the rights to dignity. Failing to consider the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity. The dignity of the person is ignored if he is denied remission that is available to others serving similar sentences simply on the irrational presumption that he is incapable of reforming. The differential culpability can be addressed in Kenya by allowing the authorities concerned to consider the individual prisoner’s industry and conduct rather than by treating them the same. To my mind a formal equal treatment for unequal conduct is not in keeping with the tenets of fair reformation and rehabilitating process.

43. It ought also to be appreciated that the High Court in *Joseph Kaberia Kahinga & 11 Others vs. Attorney General [2016] eKLR* found that sections 295, 296(1) and 296(2) do not meet the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with particularity. In other words, the Court found that the manner in which the said offences are couched does not clearly demarcate and differentiate clearly the distinctive ingredients of the respective offences. That being the position one wonders why those charged under sections 295 and 296(1) of the *Penal Code* should be treated differently from those charged under section 296(2) of the same Act.

44. Under the current constitutional dispensation, clause 7 of the *Transitional and Consequential Provisions* provide as follows:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with conformity with this Constitution.

45. Therefore, the provisions of the *Prisons Act* must be construed with the said adaptations, qualifications and exceptions when it comes to the question of remission in order to ensure that it takes into account the dignity of the individuals as mandated under Article 28 of the Constitution as appreciated in the *Muruatetu Case*.

46. I therefore associate myself with the position adopted by *Korir, J* in *Brown Tunje Ndago vs. Commissioner-General of Prisons* (supra) 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.”

47. However, as appreciated by the Petitioners, the power to grant remission should not be confused with the right to remission. While there is a right to remission, the power to exercise it and the circumstances under which it is to be exercised must remain as provided for under section 46 of the *Prisons Act*. Just like my learned brother in the above case, I find that the only part of section 46(1) of the *Prisons Act* that is unconstitutional is that which denies remission to persons sentenced to imprisonment for an offence under section 296(2) of the *Penal Code*.

Orders

48. In the premises I hereby grant the following orders:

- 1. A declaration that section 46(1)(ii) of the *Prisons Act*, to the extent that it denies remission to persons imprisoned for an offence contrary to Section 296(1) of the *Penal Code* is inconsistent with the provisions of Article 27(1)(4) of the Constitution on the right to equality before the law and the right to equal protection and equal benefit of the law and is therefore unconstitutional, null and void.**
- 2. A declaration that the limitation on benefiting from remission of part of sentence for convicts serving determinate and definite sentences pursuant to section 296(2) of the *Penal Code*, under section 46(1)(ii) of the *Prisons Act* is similarly unconstitutional.**
- 3. A declaration is issued that the Petitioners being prisoners serving a fixed or definite or determinate period of**

imprisonment are entitled to remission of their sentence in accordance with the provisions of Section 46 of the Prisons Act, Cap. 90;

4. Subject to order (3) above, the Commissioner-General of Prisons to forthwith proceed to calculate remission of sentence for the Petitioners; and

5. The Deputy Registrar of Machakos High Court 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 Petitioners.

49. There will be no order as to the costs of this petition.

50. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 27th day of August, 2019.

G V ODUNGA

JUDGE

In the presence of:

The Petitioners

Mr Kaberia representing the Petitioners

CA Geoffrey