REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 6 OF 2018

HUDSON OKUNDA OCHOLA...................................PETITIONER

VERSUS

REPUBLIC...RESPONDENT

JUDGEMENT

1. The Petitioner, Hudson Okunda Ochola was convicted and sentenced to death by this Court for the offence of murder. On appeal, the Court of Appeal substituted the offence of murder with that of manslaughter and sentenced the Petitioner to 12 years imprisonment. He has brought this petition pursuant to Articles 20(1), (2) and (4), 22(1) and 3(c), 23(1) and (3), 25(a) and (b), 28, 29(a), (c) and (f), 35(1) and (2), 48, 50(1), (2) and (6)(a), 258(1) and 259(1) and (3) of the Constitution and Section 46 of the Prisons Act, Cap. 90.

2. In summary the Petitioner prays for:

a) A declaration that he is entitled to the right and qualifies to benefit from Section 46 of the Prisons Act which provides for remission of sentence;

b) A declaration that the executive order against remission of sentences imposed between 8th May, 2015 and 1st December, 2015 is discriminatory as it breaches Article 27(1), (2) and (4) of the Constitution;

c) An order directing the Respondent to apply remission to the Petitioner's sentence; and

d) Any other order that the court deems fit to grant.

3. In opposition to the petition, the Republic represented by the Office of the Director of Public Prosecutions filed a preliminary objection on the ground that this court lacks jurisdiction to adjudicate and determine the issue of remission of sentence as the same falls within the sole purview of the Kenya Prisons Service as per Section 46 of the Prisons Act.

4. The question raised through this petition is whether the Petitioner, who was convicted and sentenced between 8th December, 2014 and 15th December, 2015 when remission of sentences had been removed from the Prisons Act is entitled to remission of his sentence. The main provision of Section 46(1) of the Prisons Act states:

> **"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…."**

5. The facts of this matter are not disputed. By the Statute Law (Miscellaneous Amendments) Act, 2014 Section 46 of the Prisons Act which provided for remission of sentence was deleted. Section 46 was reinstated on 15th December, 2015 through the Statute Law (Miscellaneous Amendments) Act, 2015 thus bringing back remission of sentence to the Prisons Act.

6. The Petitioner submits that having been convicted during the absence of remission, the prisons authorities have decreed that he will serve the full 12 years without the benefit of remission. His view is that the decision by the prisons authorities contravenes the cited provisions of the Constitution.

7. The Respondent's reply is that this court has no power to grant remission. Reliance was placed on the decision of this court in **Francis**

Opondo v Republic [2017] eKLR wherein it was stated that the power of remission lies with the prisons authorities and the court should not usurp such power. I will come back to the cited case in a short while.

8. The power to grant remission should not be confused with the right to remission. In **Francis Opondo** (supra) 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. In that matter, I 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. What I stated in that case begs restating:

> **"5. I did not understand why Mr. Owiti was of the view that the remission of sentence was not available to the Appellant simply because he was imprisoned at a time when remission of sentence had temporarily been removed from the Prisons Act. Section 46 is clear that remission of sentence is available to convicted criminal prisoners. The Appellant was a convicted criminal prisoner when remission of sentence was reintroduced and he is entitled to benefit from remission, if he meets the conditions for remission of sentence. The only persons who could not receive remission of sentence were those sentenced and had completed their prison terms during the time that remission of sentence was removed from the law. Otherwise all convicted criminal prisoners whether convicted during the existence of the initial right to remission of sentence, during the period that remission had been removed or after remission had been reintroduced in 2015 are all entitled to remission of sentence as provided by Section 46 of the Prisons Act. This is on condition that they meet the provisions of the said Section.**
>
> **6. I support my position using Article 50(2)(p) of the Constitution which states that:**
>
> **"(2) Every accused person has the right to a fair trial, which includes the right-**
>
> **(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."**
>
> **7. In the case of a convicted criminal prisoner, the least severe sentence is the one to which remission has been applied. It is immaterial that they were convicted during the period that remission had been removed from our statute books.**
>
> **8. I am however not convinced by Mr. Owiti's assertion that if indeed remission of sentence was not available to the Appellant then this Court should take that fact into account and allow the State's concession to the appeal. The power of remission lies with the prisons authorities and this Court should not usurp such power. If the State was correct that the Appellant is not entitled to remission, then that is not a good reason for conceding the appeal since the three years imprisonment imposed on the Appellant would still be lawful."**

9. In my view the finding in **Francis Opondo** (supra) holds true to the Petitioner's case. By the time remission was reintroduced, the Petitioner was a convicted criminal prisoner. His sentence does not fall into proviso (ii) of Section 46(1) of the Prisons Act. The proviso bars granting of remission to **"a prisoner sentenced to imprisonment for life or for an offence under Section 296(1) or 297(1) of the Penal Code (Cap. 63) or to be detained during the President's pleasure."** He was therefore entitled to remission on the strength of being a convicted prisoner. It is immaterial that the law was amended when he was already serving sentence. Had Parliament intended to deny remission to those imprisoned when remission had been removed from the statute books it would have said so. Denying the Petitioner the right to remission is equivalent to saying that anybody born prior to the promulgation of the Constitution of Kenya, 2010 is not entitled to the good tidings brought by the Constitution.

10. In **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, the Supreme Court stated that:

> **"(59) Before considering this question, it is necessary to revisit the issue of retrospective or retroactive legislation. *Black's Law Dictionary* (6th Edition) to which we have been referred, defines retrospective law as:**
>
> ***" A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring , or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred."***
>
> **(60) Most constitutions in common law jurisdictions almost invariably frown upon retroactive or retrospective criminal statutes. This general prohibition finds expression in Article 50 (2) (n) of the Constitution. That article provides that:**
>
> ***"Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law".***
>
> **(61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (*Halsbury's Laws of England*, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:**
>
> ***(i) is in the nature of a bill of attainder;***

(ii) impairs the obligation under contracts;

(iii) divests vested rights; or

(iv) is constitutionally forbidden.

(62) Applying these legal principles to the matter before us, it is clear that what is in question is not the seeming retroactive elements (if any) of section 15(1) of the Supreme Court Act, but *whether Article 163 (4) (b) of the Constitution was intended to confer appellate jurisdiction upon the Supreme Court the exercise of which would have retrospective effect upon the vested rights* of individuals. At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution."

11. In the cited case, the Supreme Court gave guidance on how to determine if a Constitution is retrospective or prospective. The same principles apply to laws made by Parliament. Denying the Petitioner remission of sentence would be in breach of Article 27(1) of the Constitution which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. When Section 46 of the Prisons Act was reinstated on 15th December, 2015, it did not apply to those convicted after 15th December, 2015 only. It also applied to every person who was already serving sentence.

12. In my view, this petition has merit and a declaration is issued directed at the Commissioner General of Prisons to consider the Petitioner for remission of sentence in compliance with Section 46 of the Prisons Act. The remission will only be applicable to the sentence that the Petitioner was yet to serve on 15th December, 2015 when remission of sentences for convicted criminal prisoners was reintroduced.

13. In **Republic v Karisa Chengo & 2 others [2017] eKLR; Petition No. 15 of 2015** the respondents' challenge to the constitutionality of the hearing of their appeals by panels of judges including those from the Environment and Land Court and the Employment and Labour Relations Court was upheld by the Court of Appeal. Aggrieved, the Republic moved to the Supreme Court where its appeal was dismissed. In doing so, the Court held that:

"[113] It therefore follows that, in the light of the terms of Article 2(4) of the Constitution, despite the drawback our decision will have on the backlog of cases in our Courts, we have no choice but to accede to the respondents' plea that their appeals at the High Court level be re-heard. Our decision must of necessity have a similar effect on all the appeals that were determined by similarly empaneled High Court Benches."

14. I am aware that there are several prisoners in similar predicament to that of the Petitioner. It is not necessary for each prisoner to file a petition like that of the Petitioner herein. In the circumstances, I direct that this judgement be served upon the Commissioner General of Prisons who shall ensure that all prisoners, who are still serving sentences and were convicted between 8th December, 2014 and 15th December, 2015, are considered for remission of sentence in accordance with Section 46 of the Prisons Act.

Dated, signed and delivered at Malindi this 19th day of December, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT