REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL APPLICATION NO.352 OF 2011

IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR RELEASE FROM IMPRISONMENT ON MEDICAL AND HUMANITARIAN GROUNDS

AND

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 24(1), (2) & (3) OF THE CONSTITUTION OF KENYA

AND

IN THTE MATTER OF AN APPLICATION UNDER ARTICLE 133 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 47(1) & (3) OF THE CONSTITUTION OF KENYA

AND

IN THTE MATTER OF AN APPLICATION UNDER ARTICLE 35(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 51(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION UNDER THE PRISONS ACT (CAP 90) OF THE LAWS OF KENYA, RULE 27 OF THE PRISON RULES

AND

IN THE MATTER OF AN APPLICATION UNDER THE PRISONS ACT (CAP) 90 OF THE LAWS OF KENYA,

RULE 2, 3, AND 4 OF THE PRISON (MPRISONS COUNCIL) RULES

BETWEEN

JOHN BISHOP.....APPLICANT

AND

KENYA PRISONS SERVICE.....RESPONDENT

RULING

The applicant, **JOHN BISHOP**, was convicted for the offence of **DRUG TRAFFICKING**, and was then sentenced to 13 years imprisonment.

He has now moved this court by way of an Originating Notice of Motion, seeking orders for his release. The reasons why he is seeking release are that he is suffering a life-threatening illness, and that therefore it would be in the interests of justice to release him on humanitarian grounds.

The applicant informed the court that he is suffering from a life-threatening **DEEP VENOUS THROMBOSIS**, which carries with it a high risk of a blood-clot breaking-off and causing instant death.

He says that he weighed about 114 Kilogrammes as at 17th January 2010, when he was arrested at the Jomo Kenyatta International Airport. Before his arrest, he used to be in robust health, walking long distances between rural villages in Uganda, as part of his duties as a Church Missionary.

After his arrest, he fell ill whilst at the Industrial Area Prison. However, it was not until he lost consciousness that he was taken to the Kenyatta National Hospital.

He had been diagnosed and treated at various intervals with pneumonia, hernia tuberculosis and a prostrate infection.

Due to his ill health, the Prison Authorities at the Kamiti Main Prison had placed him on a special diet. They hoped that the said diet would help improve the applicant's health.

The court was informed that the applicant was admitted at the Kenyatta National Hospital for 5 weeks, due to the Deep Venous Thrombosis.

After his last admission at that hospital, the doctors discharged the applicant;

"because there was nothing more that they could do for me medically, as my condition was not improving."

It is the medical officers at Kenyatta National Hospital who advised him that the Deep Venous Thrombosis in his legs, carried a high risk of a blood clot breading-off and travelling to his heart or lungs. If that did happen, the applicant would die instantly.

As a consequence, the applicant has a real apprehension of imminent death. He prays to the court to be released, so that he can link up with his elderly parents, before it was too late.

Miss Muthoga, the learned advocate for the applicant, submitted that whereas penal incarceration was intended for;

(1) Punishment, or

(2) Reform; or

(3) Deterrence;

The applicant's medical condition whilst he is in custody, constitutes torture.

Meanwhile, the Prisons Act is said to have no procedures spelt out for the exercise of the prerogative of mercy.

At the same time, although **Article 133 of the Constitution of Kenya, 2010,** sets out the Advisory, the applicant pointed out that the same had not yet been actualized.

Therefore, he concluded that there was no other way of addressing his urgent situation, other than through the application herein.

In support of his application, the applicant relied on the decision of **JOSEPH MUNGA KURIA VS REPUBLIC, CRIMINAL APPEAL NO.72 OF 2003**. That was a case in which the first appellate court declined to order that the appellant be retried. That decision was pegged on the appellant's medical condition, which required constant medical care and review.

The applicant also cited the authority of **IMANYARA VS REPUBLIC [1991] KLR 308**. In that case, the doctors attending to Mr. Imanyara had told the court that the patient was in danger of suffering from fits, and that those fits could cause him injury or loss to life. Porter J., who heard the patient's application for bail, rejected the same, notwithstanding the patient's medical condition. However, the learned Judge ordered that the patient be admitted at the Kenyatta National Hospital, where his medical condition would be managed.

In other words, although bail was denied, the court directed that the patient be accorded appropriate medical attention.

The third authority cited by the applicant was **JESSICA CHELANGAT SIGILAI VS REPUBLIC CRIMINAL APPEAL NO.30 OF 2002**.

In that case, the Court of Appeal dismissed the appeal, but nonetheless, recommended;

"that the Committee on the Prerogative of Mercy or any other authority concerned do consider the possibility of the pardon and recommend her release from incarceration and that by doing so, the ends of justice will be seen to have been met."

It is the applicant's contention that even when he has had to be admitted to hospital, there was nothing more that the hospital could do to improve his health.

In answer to the application, Mr. Mukofu, learned state counsel, submitted that the court must bear in mind the fact that the applicant was challenging neither his conviction nor the sentences that was handed down by the trial court.

As far as the respondent was concerned, the conviction and sentence were justified. Therefore, if the applicant wishes to have the sentence reduced, his recourse was to the Commissioner of Prisons, who would give his recommendation for the Prerogative of Mercy.

In the alternative, the respondent suggested that the applicant could make the Provisions of **Section 46(4) of the Prisons Act**, to seek further remission of the sentence.

It was the respondent's submission that the legal authorities cited by the applicant were wholly distinguishable from this case.

Having set out above, the gist of the decisions relied upon by the applicant, I do generally agree with the respondent.

In the case of **KURIA VS REPUBLIC**, Lesiit J. allowed the appeal because a portion of the prosecution was handled by an unqualified prosecutor.

As the appeal had succeeded on the basis of a defective trial, the state asked the court to order for a retrial.

However, because the appellant had already served 2 years imprisonment, and because he was only left with 2 more years, (if he earned the one-third remission); and bearing in mind his medical condition, the court held that a retrial would be prejudicial to the applicant.

It is clear that in that case, the appeal was successful. In contrast, there is no appeal before me. The applicant must therefore be deemed to have conceded the efficacy of both the conviction and the sentence.

There cannot therefore, be any legal basis upon which I can find that the continued imprisonment of the applicant would be prejudicial to his legal interests or to the interests of justice, when the sentence is, in itself lawful.

Meanwhile, in the case of **IMANYARA VS REPUBLIC** (supra), the applicant sought bail pending trial.

Although the court dismissed the application, it nonetheless directed that the applicant be held in custody at the Kenyatta National Hospital. The learned Judge went further and directed that if the hospital authorities held the considered view that the applicant should not remain at the hospital, the applicant would have had to make a specific application to the court.

In contrast to Mr. Imanyara, the applicant herein has already been convicted. He is not awaiting trial. Furthermore, he has not filed any appeal. He is therefore not seeking to be released on bail.

He is seeking absolute freedom, even though he appreciates that both his conviction and the sentence are

lawful.

In **JESSICA CHELANGAT SIGILAI VS REPUBLIC, CRIMINAL APPEAL NO.30 OF 2002**, there was an appeal.

After the appeal was dismissed, the Court of Appeal went ahead to make a recommendation to the committee on the Prerogative of Mercy.

As soon as the Court of Appeal dismissed the appeal, Ms Sigilai was in the same kind of position as that in which the applicant herein finds himself.
Should I then derive guidance from the Court of Appeal, and recommend that the applicant be considered for release from incarceration?
Pursuant to section 46(4) of the Prisons Act;

"Notwithstanding the provisions of subsection (1) of this section, on the recommendation of the Commissioner, the Minister may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special grounds."

The applicant seems to be saying that he is suffering from permanent ill-health. If that be the position, he would fall squarely under this provision, and would probably be entitled to further remission.

The applicant has not demonstrated to this court that he has invoked the provisions of section 46(4) of the Prisons Act. Perhaps, he should strive to exhaust the options available to him.

But, in any event if the Advisory Committee on the Power of Mercy, (envisaged under **Article 133 of the Constitution**) is yet to be constituted, this court cannot usurp its functions.

Parliament is supposed to formulate legislation to guide the Advisory Committee. Through such legislation, it is contemplated that the exercise of the power of Mercy shall be structured in an objective manner, to enhance transparency and fairness.

I do urge the Legislature to undertake the task of formulating appropriate legislation, soonest. In the meantime, the applicant may wish to consider invoking the provisions of section 46(4) of the Prisons Act.

But whilst those steps are being undertaken, the prison authorities are directed to take all necessary steps to continue preserving the applicant's dignity, as contemplated under Article 24 of the Constitution. For the avoidance of any doubt, such steps will include the provision of appropriate diet and medical facilities.

However, I decline to order that the applicant be released on the grounds that he is suffering a life-threatening illness or on humanitarian grounds, as asserted by the applicant.

Dated, Signed and Delivered at Nairobi this 6th day of October, 2011

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FRED A. OCHIENG
JUDGE