



Nyamai & another v ODPP Makueni & another (Constitutional Petition E014 of 2023) [2025] KEHC 12578 (KLR) (12 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CONSTITUTIONAL PETITION E014 OF 2023**

TM MATHEKA, J

SEPTEMBER 12, 2025

IN THE MATTER OF ARTICLE 22(1) 23(1), 3(D), 24(10)(D), 2(A) (B) (C) 25(A) 20(1) (2) (3(A)., 47,48, 51(1) 52, 165(3(D) 258(1), 259(1) OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF SECTION 3&4(B) OF THE PROBATION
OF OFFENDERS ACT CAP 64 LAWS OF KENYA**

AND IN THE MATTER OF CASE NO 440/2020 AT MAKINDU LAW COURTS

BETWEEN

SHANE KING'OKU NYAMAI 1ST PETITIONER

FELIX KINGA SAMUEL 2ND PETITIONER

AND

ODPP MAKUENI 1ST RESPONDENT

PROBATION AND AFTER CARE SERVICE 2ND RESPONDENT

JUDGMENT

1. What is before me are two 'Petitions' filed separately by each of the Petitioners but consolidated because they arose out of the same trial in Makindu MCCRC 440 of 2020. The Petitioners aver that their application is brought inter alia pursuant to article 22 (1) of *the Constitution* of Kenya and the CoK 2010, Protection of Rights and Fundamental freedoms, practice and procedure rules 2013
2. They aver that the the petition is about the *Probation of Offenders Act*, section 3 and 4(b) thereof which they aver, allows them to seek orders of this court directing that they serve the remainder of their sentence as a non custodial sentence.



3. Each has sworn an affidavit in support of the Petition, stating simply that they were charged , tried , convicted and sentenced to 7 years imprisonment on 22nd September 2021, for the offence of dealing with an endangered species c/s 92(2) of the Wildlife Conservation & Management Act , 2013.
4. The Petitioners had not disclosed that they filed appeals that were consolidated in HCCRA 116, 93 and 95 of 2021 which were heard and dismissed vide the Judgment of Dulu J on 29th November 2022 where he upheld both the conviction and sentence.
5. This Petition is founded on the fact that the Petitioners have served most of their sentence and now seek review to a non-custodial sentence.
6. The Prosecution did not file a response and there were no submissions.
The issue is whether the Petition is merited.
7. Article 22(1) of the Constitution provides for the Enforcement of Bill of Rights. It states:
 - (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened
8. The petitioners have not alleged that any of their rights or fundamental freedoms been denied, violated or infringed, or is threatened. They have not provided any evidence to bring this petition within the ambit of Article 22(1).
9. They have also not provided the court with evidence that any of the Articles of the Constitution cited herein above have been violated with regard to their rights and fundamental freedoms. Nothing has been placed before me to demonstrate the reason why ODPP and PACs and the respondents.
10. That notwithstanding I have looked into the averment that the PACs Act allows them to bring this application. I did not find a section 3 in the Probation of Offenders Act. Section 4 gives the court the power to permit conditional release of offenders in the following terms
s.4(2) states:

Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the age, character, antecedents, home surroundings health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.
11. In this case the Petitioners had already been heard in the appeal and this Court (Dulu J) upheld the conviction and the sentence.
12. Clearly therefor that provision of the law is not applicable to them.
13. The Power of Mercy Act Cap. 94 of the Laws of Kenya provides for situations such as the one presented by the Petitioner. At s. 20 it states
 20. Commencing a petition
 - (1) An application for the exercise of the power of mercy shall be by a petition in the prescribed form.(



- 2) The petition referred to in subsection (1) shall comply with the requirements set out in the Third Schedule.
- (3) For the avoidance of doubt, a petition that provides the requisite information shall not be incompetent only for the reason that—
 - (a) it does not accord strictly with the prescribed format; or
 - (b) it has been commenced in person or through a representative other than an advocate.
- (4) A petition under this section may be lodged by electronic means.
- (5) The Cabinet Secretary and Committee shall ensure that the relevant forms and information are supplied to all the correctional facilities

Further at s. 21 it states:

21. Consideration of petitions, notification of victims, etc.
 - (1) Upon receipt of a petition for the exercise of the power of mercy, the Committee shall —
 - (a) determine the admissibility of the petition;
 - (b) have all the necessary powers to determine the petition under this section, including—
 - (i) calling for evidence;
 - (ii) where appropriate conducting interviews;
 - (iii) conducting investigations;
 - (iv) receiving and reviewing the necessary reports from appropriate government agencies or officials; and
 - (c) make appropriate recommendations to the President in accordance with *the Constitution*.
 - (2) In determining the admissibility of the petition under subsection (1)(a), the Committee may consider—
 - (a) whether the convicted criminal prisoner has served at least one-third of the sentence pronounced by a court;
 - (b)

Article 133 of *the Constitution* provides for the reliefs that the Power of Mercy Committee may recommend:

133. Power of mercy

- (1) On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by—



- (a) granting a free or conditional pardon to a person convicted of an offence;
- (b) postponing the carrying out of a punishment, either for a specified or indefinite period;
- (c) substituting a less severe form of punishment; or
- (d) remitting all or part of a punishment.

14. Section 22 of Cap 94 provides the applicable criteria:

- (1) The Committee shall, in making a recommendation under Article 133 of *the Constitution* and section 21(1)(c) consider—
 - (a) the age of the convicted criminal prisoner at the time of the commission of the offence;
 - (b) the circumstances surrounding the commission of the offence;
 - (c) whether the person, for whose benefit the petition is made, is a first offender;
 - (d) the nature and seriousness of the offence;
 - (e) the length of period so far served by the convicted criminal prisoner;
 - (f) the length of period served by the convicted criminal prisoner in remand;
 - (g) the personal circumstances of the offender at the time of making the petition, including mental and physical health and any disabilities;
 - (h) the interest of the State and community;
 - (i) the post-conviction conduct, character and reputation of the convicted criminal prisoner;
 - (j) the official recommendations and reports from the State organ or department responsible for correctional services;
 - (k) where the petitioner has opted to pursue other available remedies, the outcome of such avenue; and
 - (l) the representation of the victim where applicable.

15. The Committee has the discretion to get progress reports from the prison and also seek probation officer's report.

16. It is evident to me that the Petitioners are not without recourse and are encouraged to seek relief from the Power of Mercy Committee, taking into consideration the fact that they filed an appeal, which was heard and determined by this court.

17. Any other relief from court would have to be sought from the Court of Appeal.

18. In the circumstances I find that the Petition is without Merit and the same is declined.

DATED, SIGNED AND DELIVERED VIA CTS THIS 12TH DAY OF SEPTEMBER 2025

MUMBUA T MATHEKA

JUDGE



