



**Kathiga v General & 3 others (Constitutional Petition E012 of 2022)
[2023] KEHC 23946 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CONSTITUTIONAL PETITION E012 OF 2022
LM NJUGUNA, J
OCTOBER 17, 2023**

BETWEEN

EMB/889/18/LS: KENNEDY MURIITHI KATHIGA PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

**THE CHAIRMAN JUSTICE & LEGAL AFFAIRS COMMITTEE 2ND
RESPONDENT**

KENYA LAW REFORMS COMMISSION 3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT

RULING

1. The petitioner is serving a sentence of life imprisonment at Embu GK prison. In Embu Criminal Case No. 924 of 2013, he was charged with the offence of robbery with violence contrary to sections 295 and 296(2) of the *Penal Code*. He was convicted and sentenced to death in 2016. However, under Article 133 of the *Constitution*, the then President commuted the sentence to life imprisonment. The petitioner has now filed a petition, seeking, inter alia, that the sentence of life imprisonment be declared unconstitutional, inhumane and it does not consider the role of prison service in rehabilitation.
2. The 1st and the 2nd respondents have each filed a notice of preliminary objection dated 23rd January 2023. The 1st respondent seeks that the petition be dismissed as the Attorney General should not be a party to the suit based on the provisions of Article 156(4)(b) of the *Constitution*. The 2nd respondent seeks that the application and petition be dismissed with costs as the same is res judicata and that the court lacks jurisdiction to determine the issues as it is barred under the doctrine of “exhaustion”. Further the 2nd respondent avers that there are alternative methods of resolving the issues arising for instance under Section 46(1) and (5) of the *Prisons Act* and Article 159 of the *Constitution*.



3. In response, the petitioner filed his reply to the notice of preliminary objection by the 2nd respondent, stating that his constitutional rights have been violated and he deserve a chance to be heard on the issues raised in the petition and that this court possesses the right jurisdiction to hear and determine the petition. That other forms of alternative dispute resolution cannot be of assistance at this point because the petitioner's criminal case is pending at the Nyeri Court of Appeal. He stated that the Supreme Court when faced with the question of constitutionality of life imprisonment, declined to determined it and stated its reasons in the case of *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR. On the issue of costs to the 2nd respondent, he stated that due to the prevalent prisoner's earning scheme rates, he cannot afford to pay costs if the court chooses to allow the preliminary objection.
4. The court directed that the preliminary objection be canvassed by way of written submissions and the parties complied.
5. It was the appellant's submission that nothing in Article 156(4) of the *Constitution* barred him from suing the Attorney General as this is a constitutional petition and not a criminal matter. That the Attorney General is sued as the principal legal advisor of the government, who has failed in advising on the necessary legal reforms. That the directions arising from the Supreme Court's decision in *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR were to be effected by the Attorney General in order to initiate the process of law reform. It was his argument that he has sufficiently demonstrated that his rights have been infringed as provided for under the *Constitution*. That the petition is properly before the court as this court is vested with jurisdiction to determine constitutional petitions of this kind.
6. He stated that section 46 of the *Prisons Act* cannot be of assistance to him because the sentences of life imprisonment cannot be remitted as barred by Section 46(1) proviso (ii). That any recourse whatsoever under Article 159(2) of the *Constitution* has also been overtaken by events. He urged the court to end the ambiguity of the sentence meted out to him and apply the principles discussed in *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR. That the 2nd respondent's argument that the petition is res judicata does not hold water as the decision in the unreported case of Malindi Court of Appeal Criminal Appeal no. 12 of 2021 *Julius Kitsao Manyeso v Republic* in fact defines the life sentence as 40 years imprisonment and this court is bound by that decision while declaring the life imprisonment sentence unconstitutional. He urged the court to dismiss the preliminary objections.
7. In its submissions, the 1st respondent relied on the case of *Kenya Section of the International Commission of Jurists v Attorney General & 2 Others* (2012) eKLR where the court stated that the Attorney General is excluded from criminal proceedings and that it is the role of the Office of the Director of Public Prosecutions. As to whether the Attorney General should be sued as the chairperson of the Power of Mercy Committee, he stated that the procedure for petitions under the *Power of Mercy Act* No. 21 of 2011 and the *Constitution* is clear. That the petitioner erred in suing the Attorney General as the chairperson to the Power of Mercy committee instead of suing the Committee in its entirety. That the Petitioner ought to follow the correct procedures as laid out in the Act in order to table his grievances to the Power of Mercy Committee.
8. The 2nd respondent submitted that the petitioner should demonstrate with precision, that his rights under the *Constitution* have been infringed as was stated in the cases of *Anarita Karimi Njeru v Republic* (No.1) (1979) 1KLR 154 and *Mumo Matemu v Trustes Society of Human Rights Alliance* (2013) eKLR as quoted in the case of *Racheal Muthoni Wanyoike & Another v Mentor Sacco Society Limited* (2021) eKLR. They also relied on Rule 4 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*. They urged the court to down its tools



for lack of jurisdiction as was stated in Owners of Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Limited (1989) eKLR.

9. They also argued that the petition fails due to the doctrine of exhaustion as was discussed in the case of Jeremiah Memba Ocharo v Evangeline Njoka & 3 others (2022) eKLR, adding that the petitioner has not exhausted all available avenues for recourse before filing this petition. That the petitioner has not explored recourse under Section 46(1) and (5) of the *Prisons Act* which provides for remission of sentences and not the court as was stated in the case of Ibrahim Onyango Omondi v Republic (2020) eKLR. On their argument that the petition is res judicata, they relied on Section 7 of the *Civil Procedure Act* and the case of Francis Karioko Muruatetu & Another v Republic (2017) eKLR where the court stated that it is now upon the legislature to provide law reform on the orders granted, and not the courts.
10. They also relied on the unreported case of Malindi Court of Appeal Criminal Appeal no. 12 of 2021 Julius Kitsao Manyeso v Republic where the court held that the decision of the supreme court in the case of Francis Karioko Muruatetu & Another v Republic (2017) eKLR (supra) also applies to sentences of life imprisonment, terming the same as unjustifiable discriminatory, unfair and repugnant to the principle of equality under Article 27 of the *Constitution*. They urged the court not to entertain the petition as the issues raised have already been exhaustively dealt with in other cases.
11. Upon perusal of the notice of preliminary objections, the responses and the submissions of the parties, in my view, the issue for determination is:
 - a. Whether the court has jurisdiction to determine the petition in light of the doctrine of exhaustion;
12. While it is true that this court is vested with the right jurisdiction to determine the constitutional petition, I take note that the *Constitution* does not operate in isolation of statute and other written law. In fact, it is the basis upon which all statutes are validated and thereby become applicable. With the *Constitution* as a yardstick, the operations of statute are powerful and must be regarded as such by litigants. In the instant case, the preliminary objections have been brought based on the grounds inter alia that this court lacks jurisdiction to determine the petition based on the doctrine of exhaustion. Whenever it arises, the issue of jurisdiction is most important and must be determined before all else. In the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) eKLR the court held thus:

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
13. The 2nd respondent argues that the petitioner has not exhausted all available avenues in law before bringing this petition. Specifically, they cite that remission of his sentence is available for him under section 46(1) of the *Prisons Act*. In his response and arguments, the petitioner submitted that Section 46(1) at proviso (ii) bars him from having his sentence remitted thereby forcing him to pursue the petition herein. Section 46(1) of the *Prisons Act* provides:

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.

14. The doctrine of exhaustion demands that where there is a different path towards resolving an issue outside court, parties should endeavour to explore those avenues first before bringing a case to court. In the case of *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, the Court of Appeal stated that:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.”

15. The petitioner also argued that Article 159 of the *Constitution* is beyond reach and that no alternative mechanism can help his claim except the court. However, when I look at Section 46(5) of the *Prisons Act*, I see an option available for the petitioner in line with remission of his sentence, especially because he has repeatedly indicated that he has positively and exceptionally contributed to industry. Section 46(5) of the *Prisons Act* provides:

“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.”

16. In my view, the petitioner should have taken advantage of this provision of the *Prisons Act* before filing his petition. When a similar issue arose before the court in the case of *Ibrahim Onyango Omondi v Republic* (2020) eKLR, the court held that the power to remit a sentence rests with the prison authorities under section 46(1) of the *Prisons Act*. Moreover, it is evident from the petition and accompanying documents that the petitioner has filed a second appeal which is pending before the court of Appeal in Nyeri.

17. I am aware that the court of appeal has since declared Section 46(1) proviso (ii) of the *Prisons Act* unconstitutional in the case of *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR). I have read the decision and I am well guided by the sentiments of the superior court, whose decision is binding to this court. However, in as much as the unconstitutionality of Section 46(1) proviso (ii) was declared after the petition was filed, nothing takes away the petitioner's option under section 46(5) of the *Prisons Act*.



18. It is my view that in light of the doctrine of exhaustion and the fact that the petitioner’s appeal is pending before the Court of Appeal, this court is devoid of jurisdiction to determine the petition. That having been said, I shall not go any further in determining the other issues arising in the preliminary objections as to do so will amount to an illegality.
19. Therefore, the preliminary objection by the 2nd respondent is allowed with orders as follows:
- a. The undated petition filed on 21st December 2022 is hereby struck out;
 - b. No order as to costs.
20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF OCTOBER, 2023.

L. NJUGUNA

JUDGE

.....for the Petitioner
.....for the 1st Respondent
.....for the 2nd Respondent
.....for the 3rd Respondent
.....for the 4th Respondent

