



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION 19 OF 2018

IN THE MATTER OF ARTICLE 10, 22 (1) & (2) (b), 23 (1), 24, 27, 47, 48, 57, 133 (1), 159 AND 165 (3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 296 (1) OF THE PENAL CODE, CAP 63 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTION 46 (II) AND 49 OF THE PRISON ACT, CAP 90 OF THE LAWS OF KENYA

AND

IN THE MATTER OF PART VII RULE 95, 96, 97 AND 98 OF PRISON SERVICE REGULATIONS

AND

IN THE MATTER OF SECTION 17 OF THE POWER OF MERCY ACT NO.21 OF 2011

BETWEEN

DANIEL LANGAT KIPROTICH.....1ST PETITIONER

JAMES KARIUKI KIWAGANA.....2ND PETITIONER

BONIFACE KARIUKI KARANJA.....3RD PETITIONER

VERSUS

COMMISSIONER GENERAL OF PRISONS.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF INTERIOR AND CO-ORDINATION

OF NATIONAL GOVERNMENT.....3RD RESPONDENT

ATTORNEY GENERAL.....4th RESPONDENT

RULING

The Petitioners **DANIEL LANGAT KIPROTICH, JAMES KARIUKI KIWAGANA and BONIFACE KARIUKI KARANJA** are adult persons currently serving lawful sentences at the Nakuru G. K. Prisons having been charged in various Courts for the offence of Robbery contrary to section 296 of the Penal Code and were convicted and sentenced accordingly.

The 1st Respondent **COMMISSIONER GENERAL OF PRISONS** is in charge of all the correctional facilities including prisons and youth correctional institutions/ centres within the Republic of Kenya.

The 2nd Respondent the **DIRECTOR OF PUBLIC PROSECUTIONS** is in charge of the prosecutions in Kenya as provided under Article 157 of the Constitution and the outcomes of this petition will have a direct impact on the nature of prosecutions and sentences awarded to convicted persons in Kenya.

The 3rd Respondent **THE CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT** is a Cabinet Secretary responsible for matters relating to prisons and correctional service in Kenya.

The 4th Respondent the **ATTORNEY GENERAL** is the Principal legal advisor to the Government of Kenya.

The Petitioners filed the Petition amended on the 14th of November 2018 following leave granted on the 19th of October 2018. The Petitioners pray for the following orders:

- a. A declaration that Section 46 (ii) of the Prisons Act CAP 90 is discriminatory and therefore unconstitutional
- b. A declaration that all prisoners convicted under section 296 (1) and (2) of the Penal Code have a right to remission
- c. A declaration that sentence of 24 years awarded to the 1st Petitioner violates Section 191 of the Children's Act and Article 53 of the Constitution of Kenya, 2010.
- d. A declaration that Section 49 of the Prisons Act violates Article 10 of the Constitution of Kenya.
- e. A declaration that failure by the 3rd Respondent to appoint pardon officers to be stationed at all prisons establishments in Kenya violates the Petitioners right to enjoy equal protection and equal benefits of the law.
- f. A declaration that life sentence is equivalent to life expectancy applicable in Kenya which is 63.4 years.
- g. A declaration that undetermined period of life sentence is unconstitutional.

Analysis and determination.

The applicants filed written submissions through the firm of Maragia Ogaro & Co Advocates on 21st June 2019. The Submissions are headed "**WRITTEN SUBMISSIONS ON (SIC) RESPECT TO REMISSION**".

He submits that the 1st and 2nd Petitioners were charged in Molo CMCR Case no 1545 of 2003 and 1266 of 2015 respectively and the 3rd Petitioner in Nakuru CMCR Case no 3889 of 2011. They were each convicted of Robbery with Violence. Upon appeal the petitioners received determinate sentences of imprisonment ; 1st Petitioner was sentenced to two consecutive terms of 12 years each, the 2nd Petitioner to a term of 20 years and the 3rd to a term of 15 years.

He further submits that the Petitioners had abandoned the other prayers and were now only seeking the declaration that the provisions of s. 46(1)(ii) of the Prisons Act were discriminatory and a violation of Article 50(2) (p) of the Constitution as read with Article 27 (1) and (2) of the Constitution. Counsel proceeded to cite several authorities including the Petitioners judgments on appeal. The others are **Jared Ochieng Jura v R (2019) eKLR** Cherere J held that a prisoner serving a finite sentence qualified for remission subject to the exclusions in s. 46, **Tyson George Ngowa v R (2016) eKLR** WK Korir J citing **Francis Opondo v R (2017) eKLR** and **Hudson Okunda Ochola v R (2018) eKLR** made similar orders.

The offending **Section 46 of the Prison Act** which provides for remission of sentence states

(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)

(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. (Paragraph 46(1)(ii) declared Unconstitutional by Criminal Petition No. 68 of 2018).

Article 50(2) of the Constitution states: 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;

It is argued on their behalf that the exclusion made by **s. 46(1) (ii) of the Prison's Act with regard to persons sentenced to life imprisonment denies them the right to benefit** from remission. They argue that this is in violation of their rights under **Article 50(2) (p) of the Constitution**.

From the prayers and submissions the only issues arising for determination is **the constitutionality of s. 46(1) (ii) of the Prison Act**

It is clear from the foregoing that the High Court has dealt with this issue since the filing of the Petition on 20th November 2018.

In **Kenneth Otieno Odhiambo & 4 others v Republic [2019] eKLR (20^{eighth} March 2019)** (Cherere J) declared the said provision unconstitutional and the same is entered in the Prison Act as such. The Judge held:

5. Section 46 (ii) of the Prisons Act, Cap 90 which excludes prisoners 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 from remission is inconsistent with Article 50(2) (p) of the Constitution on account of being discriminatory.

W. Korir J in **Brown Tunje Ndago v Commissioner-General of Prisons [2019] eKLR (12th April 2019)** dealing with a similar issues made the following orders:

35. *For avoidance of doubt, orders shall issue as follows:-*

a. Section 46(1) of the Prisons Act, Cap. 90 is declared unconstitutional to the extent that it denies remission to persons imprisoned for an offence contrary to Section 296(1) of the Penal Code;

b. A declaration is issued that the Petitioner being a prisoner serving a fixed or definite or determinate period of imprisonment is entitled to remission of his sentence in accordance with the provisions of Section 46 of the Prisons Act, Cap. 90;

c. The Commissioner-General of Prisons shall forthwith proceed to calculate remission of sentence for the Petitioner; and

d. The Deputy Registrar of Malindi High Court is directed to forthwith transmit a certified copy of this judgment to the Commissioner-General of Prisons who shall be guided accordingly in respect of all the other prisoners in the same situation with the Petitioner.

Similarly in **Sammy Musembi Mbugua & 4 others v Attorney General & another [2019] eKLR (27th August 2019)** Odunga J in a Judgment that took a long look at the issues, and having had sight of W Korir J's judgment above rendered himself thus;

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 judgment 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.

The legitimate expectation here is that with such orders from the High Court, the Commissioner of Prisons ought to have acted already and that by the time this matter came for hearing on 29th November 2019, no prisoner in the Petitioners' position would be seeking similar orders.

That is why I have deliberately chosen not to write yet another judgment but to point out that this court has already rendered itself on the

issue. I am in concur with their decisions and there really is nothing useful to add. I have also not seen any appeal judgment to the contrary or orders of stay of execution.

Hence: I add my voice to that of my brothers and sister and and echo their orders. I direct the Deputy Registrar, High Court of Kenya at Nakuru, to serve similar orders on the Commissioner of Prisons.

In Conclusion: I reiterate the following orders as already issued by this Court in the cases cited herein above.

A. Section 46(1) (ii) of the Prisons Act CAP 90 has already been declared discriminatory and unconstitutional. A declaration to issue that section 46(1) (ii) of the Prisons Act Cap 90 is discriminatory against the Petitioners herein.

B. A declaration that all prisoners convicted under section 296 (1) and (2) of the Penal Code and serving determinate terms of imprisonment have a right to remission. Any limitation to the benefit of remission of their sentences is discriminatory and unconstitutional hence null and void.

C. For emphasis the Deputy Registrar High Court of Kenya at Nakuru to transmit these orders to the 1st respondent.

D. Pursuant to C above the 1st Respondent to proceed without delay calculate remission of sentence for the Petitioners serving determinate sentences.

Dated, delivered and signed at Nakuru this 9th day of April 2020.

Mumbua T Matheka

Judge

In the Presence of: Via ZOOM

2nd Petitioners

3rd Petitioners

1st Petitioner Absent