REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI.

LESIIT, J.

MISCELLANEOUS CRIMINAL APPLICATION NO. E199 OF 2020

AS CONSOLIDATED WITH MISC. CRIM. APPL. NO. E198 OF 2020

SMM.....1ST APPLICANT

AAM.....2ND APPLICANT

VERSUS

OFFICER IN CHARGE KAMITI MAXIMUM PRISON.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

RULING

1. The Applicants, **SMM,** hereinafter referred to as the 1st Applicant**,** and **AAM,** the 2nd Applicant, approached this court through a Notice of Motion dated 24th July 2020, filed under certificate of urgency. The Applicants seek the following court orders:

> **1. The Applicant to be taken to the Aga Khan University Hospital where he was referred to by the Kenyatta National Hospital, for a comprehensive medical checkup, having missed several medical appointments following the limitation of movements of prisoners due to the onset of Covid 19, Corona virus pandemic**
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> **2. A comprehensive report on the health status and continued management and treatment of the Applicant to be filed in court and served on the parties for follow up.**
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> **3. Any other orders that the court will find fit and just to issue so as to afford the Applicant the best health care under the circumstances in protection and preserving the right to access medical care and management at the best medical facilities if and when resources allow.**
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> **4. Every party to meet their respective costs.**

5. The Applicants have premised the application on 8 grounds. In summary, they give a background of the charge which culminated to their imprisonment at Kamiti Maximum Prison on the 6th May, 2013. They contend that they were being facilitated by Kamiti Prison to receive hospital/medical appointments outside of the prison as the expertise and professionalism required by each of them due to their conditions was not available at Kamiti Maximum Prison Hospital.

6. The two Applicants contend that for unexplained reasons the facilitation was discontinued since the onset of the Corona Virus pandemic and the Ministry of Health Advisory. They contend that their health has deteriorated, and that they stand to be adversely affected putting them at a very high risk of contracting Covid-19.

7. The application is supported by the affidavit sworn by their counsel Mr. Chacha Mwita dated 24th July, 2020 and several documents. Of importance to this application is the facts regarding the incarceration of the Applicants since 19th June, 2012. The fact that the 1st Applicant developed colon cancer and the 2nd Applicant coronary artery disease. For their respective conditions, the 1st Applicant was operated at Aga Khan University Hospital (AKUH) in 2013 and the 2nd Applicant in the same Hospital in 2016.

8. In his oral submissions to court through TEAMS, learned counsel for the Applicants Mr. Chacha Mwita, urged that the Applicants were taken to KNH from Kamiti Prison for treatment but were from there referred to AKUH after they were diagnosed with Colon cancer and Coronary Artery complications respectively.

9. The documents in support of 1st App condition are attached as a medical report from AKUH dated 26th October, 2018. Mr. Chacha Mwita urged that the 2nd App was fitted with a *pacer* as confirmed by the annexure marked JOM 1(a) dated 14th September, 2020 in the Respondents affidavit.

10. Mr. Chacha Mwita urged that the Kamiti Clinic could not handle their cases and so referred them to Kenyatta National Hospital (KNH). That KNH referred them to AKUH where both underwent surgery. He urged that the Apps have been attending reviews at AKUH until early this year when that was interrupted without any justification. He submitted that the 2nd App was at the time admitted at AKUH when he was informed that orders from above had directed that he be returned to Kamiti Prison. Counsel relies on letters written to the officer- in- charge, Kamiti Prison seeking for reasons for the interruption of medical intervention which he claims went unanswered.

11. Mr. Chacha Mwita urged that their view is that it was not a must for the Applicants to be treated at AKUH, however if KNH felt they should be treated there, that cannot be changed. In addition, counsel urged that the Apps have chronic conditions as a result of which they were prescribed special diet, which he laments has not been regularly availed. He submitted that the Applicants were in a position to supplement for their meals through their welfare account which has some deposit.

12. Mr. Chacha Mwita submitted that the Applicants were entitled to best medical care as their conditions were chronic and life threatening. Counsel urged that contrary to the averment at paragraph 11 of the Respondent's affidavit, the Applicants being attended to at AKUH was not special treatment. He urged that at no time was there breach of security manning the Apps at AKUH.

13. Mr. Chacha Mwita relied on **Article 51** of the **Constitution**, and urged that the right of persons held in custody includes right to the best medical care. He also relied on **section 7** of the **Kenya Prisons Standing Order** and urged that the section was complied with when the Prison Commander authorized the Apps to be attended to at AKUH, as was **section 10** of the **Prison Act**. **Section 10** has no relevance to this case. Counsel urged that the Apps are seeking to have medics at Kamiti be allowed to do their bit without interference from other players.

14. The learned counsel for the Prosecution, Ms. Guyo opposed the application and stated that the application lacked merit and should not be granted. Counsel urged that the decision to take the Apps to Aga Khan hospital was an error by the Prison administration because the Rules are that persons in prison should only be taken to a public facility.

15. Ms. Guyo urged secondly that there was need for uniformity. Counsel urged that if the Applicants were allowed to go to AKUH it will open a flood gate where prisoners where prisoners will want to be taken to various private institutions.

16. The State filed a replying affidavit, sworn by SP Japheth Muhadia dated 16th September, 2020. The deponent is an Officer in the Office of the in-charge Kamiti Maximum Security Prison. In his affidavit he deposes that the Applicants are each serving 15 years imprisonment. He deposes that the Applicants have medical conditions for which they have been receiving medical care at KNH; and that the last person to attend the facility was the 1st Applicant on the 11th August, 2020. He deposed that Kamiti Security Prison where the Applicants are held is equipped with a fully functional medical center where all inmates are entitled to medical care; and that where an inmate requires further attention, such an inmate is referred to KNH. SP Muhadia deposed that the Prison holds thousands of inmates and that for uniformity purposes, all complex cases are referred to KNH, which is the Country's main referral hospital capable of addressing complex medical issues among inmates.

17. SP Muhadia has annexed medical reports for both Applicants together with the clinical notes for the various clinics that the Applicants have attended at KNH. The report on the 1st Applicant shows that he had surgery, Colectomy, in 2016 and that subsequently he has attended various clinic all for which he has kept appointment schedules. In respect of the 2nd Applicant KNH notes shows that he underwent three surgeries, one a prostatectomy, in 2017; knee surgery in 2016 and shoulder surgery in 2017. It shows he also has a pacemaker in situ on treatment. It states that he has been receiving regular nutritional support for his condition.

18. It is expedient to give a little background to demonstrate how the Apps found themselves at Kamiti Maximum Prison, as this is relevant. The Applicants were the accused in **Nairobi CM's Cr. Case No. 881 of 2012,** where they were charged with three charges of **Committing an act intended to cause grievous harm** contrary to **Section 231 (f)** of the **Penal Code; Preparation to commit a felony** contrary to **Section 308 (1)** of the **Penal Code** and **Being in possession of explosives** contrary to **Section 29** of the **Explosives Act**. At the end of the trial, the trial court found both Applicants guilty as charged on all the three counts. In respect of the first count, both Applicants were sentenced to serve **life imprisonment each**. In respect of the second count, both Applicants were sentenced to serve **ten (10) years imprisonment each** and in respect of the third count, both accused persons were sentenced to serve **fifteen years (15) imprisonment each**. All sentences were ordered to run concurrently. The 1st and 2nd Appellants were aggrieved by their convictions and sentences and filed their respective appeals to the High Court in Criminal Appeal Nos. 106 and 107 of 2013. The appeals against conviction was dismissed.

19. Regarding sentence, the court was of the view that taking into consideration the entire circumstance of the case, the sentence of life imprisonment imposed on the Applicants was not justified. Their sentences by the lower court were therefore set aside and **substituted by a consolidated sentence of fifteen (15) years imprisonment each**. The court took into consideration the period that the Applicants were in remand custody before they were convicted and ordered that the sentence shall take effect from the date that the Applicants were convicted by the trial court.

20. The Applicants are now serving their sentence at Kamiti Maximum Security Prison. It is not in dispute that both Applicants suffer from different chronic illnesses. It is also shown by the annexed KNH notes that they have been receiving medical care at the Kenyatta National Hospital. However, the Applicants counsel contended that no treatment was received by the Applicants at KNH, that all they did was to attend at the hospital. It was Mr. Mwita's submission that when the doctor at Kamiti referred them to KNH, the hospital indicated that it

could not deal with the two medical cases and a referral was made for the both Applicants to AKUH.

21. The **Evidence Act**, **section 109** provides "

> **Proof of particular fact**
>
> **The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

22. The Apps have not provided any documentation to show that KNH has not treated them. What we have is documentation to show that they have been attending clinics at Kenyatta National Hospital and a report on their illnesses and treatment given. I must mention that I noted that in the report AKUH was silent as to which treatment they had offered to the Applicants. Secondly, the Apps have not produced any documentation to show that KNH gave a referral regarding their case to AKUH. There are documents annexed which show that the Apps were seen at AKUH. The Respondent does not deny that the Apps were ever seen at AKUH. What they say is that the same was done illegally.

23. Regarding **Article 51** of the **Constitution** Mr. Mwita urged that prisoners are entitled to the best medical care available. While Ms. Guyo urged that the right has a condition that so long as the same is not incompatible with the fact that the person is detained. Counsel admitted that the Applicants have complex medical conditions. However, counsel relied on documents from Prison's Medical Officer and KNH marked JOM 1(a) and (b)and 2 (a) and (b) and urged that the Applicants have been attending KNH as late as August 2020.

24. Counsel relied on **Prisons Standing Order** which is titled Medical Treatment: Persons in Custody and urged the court to take Judicial Notice of the fact KNH is the country's main referral hospital, and that the court should be assured it is the best medical facility. She further stated that the letter referring the Applicants to AKUH was not attached. She urged that their position is that taking the Applicants to AKUH was an illegality. Counsel urged the court to allow KNH to attend to the Applicants.

25. In response, Mr. Mwita stated it was his first time to hear that it was an error for the Applicants to be referred to AKUH. He stated that they had documents to show that the Applicants had been attending AKUH between 2013 and 2018 and that it cannot be an error or illegality. He also stated that the Respondent's fear that allowing the application may open flood gate and create unrest is unfounded since there has been no unrest so far since 2013. Mr. Mwita urged the court to ensure that the Officer-in- Charge of Prison and the Medical Officer are allowed to exercise their discretion to recommend a prisoner be treated in another facility and provide security measures as provided for under **Prison Act** and the **Standing orders**.

26. I have carefully read and considered this application and the supporting affidavits and the oral submissions made in court by Mr. Chacha Mwita and Ms. Guyo learned counsels for the parties. I have also considered the affidavits and the documents filled by both sides. Unfortunately, none of the counsels cited any authorities in this case.

27. Human rights and fundamental freedoms are for enjoyment and to the greatest extent possible but not for curtailment. This was the edict by the Court of Appeal in ***Attorney General v Kituo Cha Sheria & 7 others*** **[2017] eKLR** that;

> **"…rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largely because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey".**
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> **"Article 20 is couched in wide and all-pervasive terms, declaring the Bill of Rights to apply to all law and to bind all state organs and all persons. None is exempt from the dictates and commands of the Bill of Rights and it is not open for anyone to exclude them when dealing with all matters legal. It is the ubiquitous theme unspoken that inspires, colours and weighs all law and action for validity. It is provided for in expansive terms declaring that its rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible. The theme is maximization and not minimization; expansion, not constriction; when it comes to enjoyment and, concomitantly facilitation and interpretation. What is more, courts, all courts, are required to apply the provisions of the Bill of Rights in a bold and robust manner that speaks to the organic essence of them ever-speaking, ever-growing, invasive, throbbing, thrilling, thriving and disruptive to the end that no aspect of social, economic or political life should be an enclave insulated from the bold sweep of the Bill of Rights. Thus Courts are commanded to be creative and proactive so that the Bill of Rights may have the broadest sweep, the deepest reach and the highest claims they are enjoined in their interpretive role to adopt a pro-rights realization and enforcement attitude and mind-set calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms…they must aim at promoting through their interpretation of the Bill of Rights the ethos and credo, the values and principles that underlie and therefore mark us out as an open and democratic society whose foundation and basis is humanity, equality, equity and freedom."**

28. The United Nations Basic Principles for the Treatment of Prisoners, 1990 stipulates:

> 5. Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.
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> 9. Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.

29. The United Nations Conventions for general application provides that prisoners and persons deprived of liberty retain all fundamental rights to which they are entitled as human persons, including the right to enjoy the highest attainable standards of physical and mental health. This is in line with **AG vs. Kituo Cha Sheria**, supra. Specific international instruments set out more clearly what this implies in terms of the healthcare provisions to be domesticated by prison administration of member countries. They include:

> **Basic Principles for the Treatment of Prisoners, Principle 9:** Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.
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> **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 24:** A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.
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> **Standard Minimum Rules for the Treatment of Prisoners, Rule 10:** All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climactic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.
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> **Standard Minimum Rules for the Treatment of Prisoners, Rule 22:** (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality. (2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers. (3) The services of a qualified dental officer shall be available to every prisoner.
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> **Standard Minimum Rules for the Treatment of Prisoners, Rule 25:** (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is especially drawn.
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> **Standard Minimum Rules for the Treatment of Prisoners, Rule 62:** The medical services of the institution shall seek to detect and shall treat any physical or mental illnesses or defects which may hamper a prisoner's rehabilitation. All necessary medical, surgical and psychiatric services shall be provided to that end.
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> **UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Principle 1:** *Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standards as is afforded to those who are not imprisoned or detained.*

30. This application is premised upon **Article 51(1) Constitution** which provides:

> **Rights of persons detained, held in custody or imprisoned**
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> **51. (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.**
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> **(2) A person who is detained or held in custody is entitled to petition for an order of *habeas corpus*.**
>
> **(3) Parliament shall enact legislation that—**
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> **(a) provides for the humane treatment of persons detained, held in custody or imprisoned; and**
>
> **(b) takes into account the relevant international human rights instruments" (emphasis mine)**

31. Related to **Article 51** is **Art. 24** of the **Constitution** makes provision for limitation of rights and fundamental freedoms as follows:

> **"Limitation of rights and fundamental freedoms**
>
> **24 (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—**
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> **(a) the nature of the right or fundamental freedom;**
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> **(b) the importance of the purpose of the limitation;**

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

32. The Constitution under **Art. 51** gave responsibility to Parliament to enact legislation that provides for the humane treatment of persons detained, held in custody or imprisoned, with a note that Parliament takes into account the relevant international human rights instruments. Parliament did enact the **Persons Deprived of Liberty Act**, **2014** to give effect to **Articles 29(f)** and **51** of the **Constitution** in response to that mandate. While considering this application, the court will ask itself whether Kenya has met the Standard Minimum of the International human rights instruments, some of which are mentioned herein above.

33. Under **section 15** of **Persons Deprived of Liberty Act**, it is provided as follows:

"A person detained, held in custody or imprisoned is, on the recommendation of a medical officer of health, entitled to medical examination, treatment and healthcare, including preventive healthcare".

34. Section 13(1) to **(6)** of the same **Act** provides that:

(1) A person deprived of liberty shall be entitled to a nutritional diet approved by competent authorities.

(2) A diet under subsection (1) shall take into account the nutritional requirements of children, pregnant women, lactating mothers and any other category of persons whose physical conditions require a prescribed diet.

(3) For the purposes of this subsection (1), "competent authority" means a qualified medical practitioner or qualified nutritionist.

(4) A medical officer of health may prescribe a particular diet for a particular person deprived of liberty, depending on the medical condition of the patient.

(5) As far as possible in the circumstances of any case, in providing food and water to persons deprived of liberty, consideration shall be made for their various religious needs.

34. It is useful to note that the **Persons Deprived of Liberty Act** makes general provisions touching on the humane treatment of prisoners among others, covering a wide range of issues. I can call them basic minimum rights which such persons are entitled to once denied of liberty. Worthy of note is the provisions regarding right to medical examination, treatment and health care upon recommendation of a medical officer of health. (MOH) It also provides that a detained person will be entitled to nutritional diet approved by a competent authority.

35. The **Prison Act**, has more elaborate provisions. Under **section 39** it provides that:

Removal of sick prisoners to hospital

1. In the case of the illness of a prisoner detained in a prison in which there is not suitable accommodation for such prisoner, the officer in charge, on the advice of the medical officer, may order his removal to a hospital, and in case of emergency such removal may be ordered by the officer in charge without the advice of the medical officer.

2. Any prisoner who shall have been removed to a hospital under the provisions of this section shall be deemed to be under detention in the prison from which he was so removed.

3. Whenever the medical officer in charge of a hospital considers that the health of a prisoner removed to that hospital under this section no longer requires his detention therein, he shall notify the officer in charge of the prison from which the prisoner was removed and the officer in charge of that prison shall thereupon cause such prisoner to be returned to the prison if he is still liable to be confined therein.

4. Every reasonable precaution shall be taken by the medical officer in charge of a hospital and the persons employed therein to prevent the escape of any prisoner who may at any time be under treatment therein, and it shall be lawful for such officer and person to take such measures for the preventing of the escape of any such prisoner as may be necessary:

Provided that nothing shall be done under the authority of this section which, in the opinion of the medical officer in charge of such hospital, is likely to be prejudicial to the health of such prisoner.

37. The **Prisons Act** gives the sole discretion to the MOH, first of the Prison to decide whether a prisoner requires to be removed from hospital for treatment in a hospital. It also gives the MOH of the hospital where the prisoner is taken for treatment to determine when such prisoner no longer needs hospital admission. Further the security of such prisoner is the responsibility of the MOH. There is only one exception, where the MOH is not available, the officer in charge of prison can authorize the removal of a prisoner to a hospital for treatment.

38. Mr. Mwita for the Apps contended that the law provided that prisoners are entitled to the best medical care, that such care in the case of his clients is only available at AKUH. Ms. Guyo on the other hand contends that the law provides for treatment in a public hospital if the prison hospital facility is unable to treat the condition a prisoner is suffering from. She urged the demand to be taken to a private hospital was incompatible with their status as prisoners, and had nothing to do with them being able to afford the treatment in the private facility.

39. Article 51 provides that *a prisoner is entitled to all the rights and fundamental freedoms in the Bill of Rights except to the extent that any particular right or fundamental freedom is clearly incompatible with the fact that the person is detained.* This is one of the factors that the MOH must bear in mind when exercising his discretion. The issue is what is that which will disentitle the prisoner to a right as to find it is incompatible to him by virtue of him being a prisoner?

40. The law does not have the words '*private'* or *'public'* under **section 39** of the **Prison Act**. It states that the prisoner may be removed to *'a hospital'*. The **Persons Deprived of Liberty Act** does not even mention a hospital. Neither does the Constitution mention "best medical care available".

41. The European Convention on Human Rights (prisoner`s rights). **Article 3** provides **"PROHIBITION OF TORTURE: No one shall be subjected to torture or to inhuman or degrading treatment or punishment."** This Convention has been the subject of several cases before the European Court of Human Rights, and several bold pronouncements have come from that court on the issue of medical care to persons who are imprisoned. Even though the decisions arise from civil claims, the court has made mention of the nature of medical care that should be availed to prisoners and has found that medical care that is not adequate subjects the prisoner to torture.

42. In **FARBATUHS vs LATIVIA European Court of Human Rights Application No. 4672/02,** stated as follows:

> **"On the 27 September 199 the Riga Regional Court found him guilty of crimes against humanity and genocide for his role in the deportation and deaths of tens of Latvian citizens during the period of Stalinist repression in 1940 and 1941. The court noted at the outset that the applicant had spent one year, nine months and 13 days in prison. The file showed that his condition was a cause for grave concern. He was 84 years old when he was sent to prison, paraplegic and disabled to a point of being able to attend most daily tasks unaided. In particular, he was unable to get up, sit down, move, get dressed or washed without assistance. Moreover, when taken into custody he was already suffering from a number of serious illnesses, the majority of which were chronic and incurable.**
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> **The court considered that when national authorities decided to imprison such a person, they had to be particularly careful to ensure that the conditions of detention were consistent with the specific needs arising out of the prisoner's infirmity."**

43. From a reading of **Farbtuhs case** the European Court held that when national authorities decide to imprison gravely ill persons they had to be particularly careful to ensure that the conditions of detention were consistent with the specific needs arising out of the prisoner's infirmity. The court observed that in the instant case, the authorities had sought expert medical advice to determine whether the prisoner was fit to serve sentence before sentencing him to imprisonment, which they landed.

44. In the case of **PATRANIN vs RUSSIA** ECHR Application No. 12983/14, the court made the following observations:

> **"Since 1999 the applicant has been suffering from progressive multiple sclerosis. He was designated with category 1 disability as the result of his condition. On 22 February 2012 the Applicant was arrested on suspicion of active membership of an organized crime group between 1995 and 2005 and the murder and the attempted murder or the attempted murder of several people in 1999. The Applicant`s health deteriorated significantly and rapidly in the detention facility, where his health complaints were not addressed in any way as the facility did not have any medical specialists. In August 2012 the prison authorities recorded that the Applicant`s movement was impaired and that he was unable to walk without a cane…**
>
> **The court thus finds that the Applicant was left without the medical assistance vital for his illnesses, primarily for his multiple sclerosis, a very serious condition threatening his life. It is aware that with multiple sclerosis being an incurable condition, treatment of such patients typically focuses on speeding recovery from attacks, slowing the progression of the disease and managing symptoms to alleviate the patient's sufferings. In the Applicant's case, the treatment he received was incomplete and the medical supervision afforded to him was insufficient to maintain his health.**
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> **The court believes that, as a result of the lack of comprehensive and adequate medical treatment, the Applicant was exposed to prolonged mental and physical suffering that diminished his human dignity. The authorities' failure to provide the applicant with the medical care he needed amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention.**

45. Even though our law is very general in terms of qualifying the nature and standard of medical care that persons held in prison are entitled to, it is only reasonable that such care should be adequate to meet the specific needs of the person concerned. The treatment itself should be complete and the medical supervision afforded him should be sufficient to maintain health. The actual ailment of the prisoner does not matter whether it is terminal, debilitating, serious, life threatening or just the usual seasonal conditions. They should not be ignored, or the medical intervention delayed unreasonably. This is because, as observed in many including the court of appeal, '*rights attach to persons, by virtue of their being human, and respecting rights is not a favour done by the State…'*

46. Since the responsibility to provide the medical care falls on the government, the government can only provide services from facilities they own. Unless they receive volunteers to give specialized treatment, as happens with humanitarian groups, such volunteer help should be provided at a government facility, whether in prison or outside prison.

47. In regard to the decision whether to remove a prisoner from Prison to a hospital, that decision should be left to the discretion of the MOH,

and in his absence, the o/c Prison and in the latter case, only where an emergency is involved.

48. Issues of the security of prisoners while in hospital, whether in or out of prison is a critical one. It is prescribed under **section 39** of the **Prison Act**. It is the responsibility of the state to ensure the security for the prisoners when they are in hospital. The prison officers are bound to guard such prisoner 24/7. It is okay for prison officers in uniform to be seen in a State hospital. It is however an eye sore for them to be seen in private hospitals. That in itself can cause anxiety to other patients, and pose danger to the hospital itself.

49. The **Persons Deprived of Liberty Act** also provides for the guarding of prisoners while under the care of a hospital. The law is clear that such prisoners should not escape from the facility as it poses a danger to the prisoner, the facility and the public. In that regard the nature of the offence the prisoner was imprisoned for is a relevant consideration. That is because it will inform the level of security the State should avail in case they are moved to a hospital.

50. In the instant case, the Apps are in with very serious offences related to transnational crime and terrorism, having been found with material which can be used to make explosives. They are also foreigners. I think that if prisoners are categorized from the less risky being low risk and the ones in for serious crimes being high risk, the Apps qualify to be classified as high risk. More so for the additional reason that given their status due to the offence that they were convicted of, and the fact they are foreigners raises the stakes higher. For such a prisoner it would be a serious flaw to let them wander into a private hospital.

51. I must mention something that was definitely out of line. If indeed the Apps or any of them were hurriedly removed from a hospital back to prison, interrupting the treatment he or they were receiving, that was clearly out of line. That was not a fair administrative action. It flies in the face of the **Constitution**, **Article 47**. In the very least, they should have moved them to a state facility to show fair play and good will. And the worst of all is that the Respondent has avoided to mention the incident, or explain it.

52. The other very serious flaw is that the MOH, Prison and the Officer in charge Prison snubbed the matter by giving no reports in their hand. Yet the removal of the Apps from the prison was their personal responsibility. It was essential that they said something about the matter. The other fact I noted was that no records of Apps conditions were provided by the MOH of prison. Such records are required to be kept under **Rule 30** of the **Prison Rules**.

53. I want to quote my learned brother Mwita J. in **Aloise Onyango Odhiambo & others vs. AG & Others [2019] e KLR**.

> **"The Prisons Act has a mechanism for treatment of inmates. Furthermore, Persons Deprived of Liberty Act, 2014 which was enacted to give effect to Articles 29(f) and 51 of the Constitution, provides other ways of dealing with complaints by persons deprived of liberty like prisoners.**
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> **Section 3(1) of the Act underscores the fact that every person deprived of liberty is entitled to the protection of all fundamental rights and freedoms subject to such limitations as may be permitted under the Constitution and that nothing in that Act may be construed as limiting the rights and freedoms of persons deprived of liberty otherwise than in accordance with Articles 29(f) and 5l of the Constitution.**
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> **The petitioners' complaints including one that they do not get proper medical care was not supported by any evidence. This is so because section 15 of the same Act is clear that a person detained, held in custody or imprisoned is, on the recommendation of a medical officer of health, entitled to medical examination, treatment and healthcare, including preventive healthcare. If any prisoners have any issues they should lodge complaints for investigations and appropriate action by relevant authorities.**
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> **It is in this regard that section 27 of the Act provides for the manner of dealing with complaints by persons deprived of liberty. It states:**
>
> > **(l) Any person deprived of liberty who considers that his or her right under this Act has been denied or violated may lodge a complaint either orally or in writing to the administrative officer in charge of the facility in which the person is detained.**
> >
> > **(2) In addition to the provisions of subsection (1), complaints may be instituted by a person acting on behalf of a person deprived of liberty who cannot act in their own name.**
> >
> > **(3) Where the complaint is made orally, the officer in charge shall cause it to be recorded in writing.**
> >
> > **(4). upon receipt of the complaint, the officer in charge shall investigate and take reasonable measures to address the complaint and report the complaint and furnish the complainant with-**
> >
> > > **(a) a written statement of the measures taken to address the complaint;**
> > >
> > > **(b) the recommendations made in settlement of the complaint."**
>
> **It is therefore clear that if any of the petitioners had a complaint, the mechanism for addressing such a complaint is well spelt in the law and there would be no reason to allege in this petition without proof that their rights are violated. It is also worth of note that section 5(1) of the Act provides that a Person Deprived of Liberty shall at all times be treated in a humane manner and with respect for their inherent human dignity; while section 5(2) states that any person who subjects a person**

deprived of liberty to cruel, inhuman or degrading treatment commits an offence and shall be liable upon conviction to a fine or imprisonment or both."

54. In addition to processes quoted in the cited case **Rule 65 of the Prisons Rules** provides for receipt of Petitions and Complaints from prisoners under Part III. It provides that such complaints shall be received by the Governor-General through the Commissioner, a visiting justice, the Commissioner, the officer in charge among others who may be designated. The Apps have a ready remedy to address any complainants they may have, or which may arise through the mechanism either under the Persons Deprived of liberty Act or the Prisons Act.

55. On the application for the Apps to be taken to AKUH for checkup and follow up, I find that taking into account the kind of cases that led to the Apps imprisonment, that the Apps are a category of prisoners who are a high risk, and the prison authorities must carefully consider their movements. Taking into account it is the government which has the responsibility to provide medical care to their prisoners, taking them to a private hospital is, in view of this, incompatible with the fact that they are imprisoned.

56. All in all, I find that when a state deprives a person of their liberty it takes on a responsibility to provide adequate health care in accordance to their specific conditions. The responsibility to decide who needs care outside of the prison hospital lies with the prison MOH and in their absence the O/C Prison only if it is in a case of emergency. That discretion should be exercised in a fair and reasonable manner. If the prisoner feels that his right to medical care has been violated, he can make a complaint in the manner provided under the **Prison Act** and **Rules** thereunder.

57. In conclusion,

Prayer I is allowed in part. It is ordered that a comprehensive medical checkup be done within 15 days of today on the Applicants either at Kamiti Prison Hospital or, if it has no capacity to do so, at Kenyatta National Hospital. The report should detail the status of the Applicants' health, the required follow-up or course of treatment, complete with a schedule of such follow-up or treatment.

Prayer 2 is allowed with variation. A copy of the comprehensive report be kept by the MOH, Kamiti Prison Hospital for compliance with the schedule of treatment and follow-up, giving a copy of the report relevant to each Applicant.

Prayer 3 does not arise.

Prayer 4 is allowed, each party to bear their own costs.

DELIVERED THROUGH TEAMS THIS 1ST DAY OF OCTOBER, 2020.

LESIIT, J.

JUDGE