



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL PETITION NO. 101 OF 2015**

**ALOISE ONYANGO ODHIAMBO.....1<sup>ST</sup> PETITIONER**

**NICHOLAS OUMA OBONYO.....2<sup>ND</sup> PETITIONER**

**SAMUEL K NGÓNDO.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**COMMISSIONER GENERAL OF PRISONS.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. **Aloyce Onyango Odhiambo, Nicholas Ouma Obonyo and Samuel K. Ngendu**, the Petitioners, were at the time of filing this petition, prisoners serving life sentences for robbery with violence. They had been sentenced to death but their sentences were commuted to life imprisonment by the President in exercise of prerogative power of mercy.

2. The petitioners filed a Petition dated and filed on 15<sup>th</sup> January 2015, against the Attorney General and the Commissioner General of Prisons contending that the Power of Mercy Committee was not functional; that they applied to the power of mercy Committee while it was visiting various parts of the country but the Committee had not presented its report to the President for action. They also stated that as convicts, they should benefit from “earing Scheme” under the Prisons Act, thus be free from slavery and or servitude which is prohibited by the Constitution.

3. The petitioners further averred that they are entitled to basic necessities including toiletries namely; soap, tooth brush and tooth paste, toilet papers among others which prison authorities do not provide. They contended that pardon and immunity should be beneficial to prisoners and should be granted freely or conditionally by the President while exercising his prerogative power of mercy.

4. In their supporting affidavit, the petitioners deposed that although they were sentenced to death, their sentences were committed to life imprisonment and some convicts had benefited from the prerogative power of mercy but in their case, they had not.

5. The Respondents filed grounds of opposition dated 23<sup>rd</sup> December 2018 in opposition to the petition. They contended that the petition does not disclose any constitutional violations or breaches; that exercise of prerogative power of mercy is discretionary; that the petitioners have not demonstrated that they have been subjected to slavery, servitude or forced labour; that engagement in productive labour by convicted persons is a legal requirement under section 43 of the Prisons Act; that prison labour is an integral component of sentence as its objective is to equip convicts with relevant knowledge and skills through training to enable them reintegrate well into society on release and that the Prisoners Serving Scheme and rate of earning are provided for by law.

**Evidence**

6. The Petitioners gave oral evidence and called 5 witnesses to prove that their rights have been violated. The 1<sup>st</sup> Petitioner told the court that the petition was filed pursuant to Articles 22(1) and 165(3) (a) and (b) of the Constitution raising issues of breach of constitutional rights. He told the court that the Committee on the Power of Mercy is not functioning although it had been constituted.

7. According to 1<sup>st</sup> Petitioner, the Committee ‘s annual report for 2011-2014 contained the number of prisoners it had recommended for release namely 18,956 made up as follows:

- (i) Death vin convicts 1167;
- (ii) Life sentence 3376'
- (iii) Long term convicts 5331
- (iv) Presidential pleasure 556
- (v) Star claims offenders 2553
- (vi) Ordinary claims offenders 953
- (vii) Serious medical claims 12
- (viii) Petty offenders 2469
- (ix) Short term convicts 10,971

8. He stated that despite the recommendations, the convicts were not released. He further stated that although all those reviewed were to be released; only 18,956 were ready to be released for the year 2013-2014. He told the court that to date only 7000 convicts had been released yet the committee has been misusing public funds on the exercise. He invited the court to issue orders compelling the respondents to help the convicts and release of the documents they had sought; an order to stop slavery and servitude, and review of the contract scheme of 30 cents under the Prisons Act.

9. The 1<sup>st</sup> petitioner further told the court that although the 2<sup>nd</sup> respondent receives the money for work done by the convicts, he does not give it to them. According to him, clause 19 of the Prisons Rules provides for the earning scheme and section 43 of the Act provides for payment if convicts make furniture for institutions such as Parliament. He also stated that section 46 of the Act provides for the manner earnings are to be paid to the Prisoners; that the rules provide how the Minister fixes earnings of prisoners and that rule 22 allows a prisoner to use two thirds of his earnings per month and the balance is to be placed on his credit and to be paid on his release.

10. The 1<sup>st</sup> petitioner continued to state that the 2<sup>nd</sup> respondent had not shown how Procurement is done and where the money goes and that pardon through the power of mercy under the section 77(b) of the repeated constitution had been misused. Giving an example of how the prerogative of mercy had been misused by the Advisory Committee, the 1<sup>st</sup> petitioner cited the case of a Sudanese national who never appeared before the Committee of Mercy but was released on 4<sup>th</sup> July 2014 after serving only 7 years

11. He stated that prisoners face violation of rights and fundamental freedoms through beatings whenever they seek to enforce their rights; that they lack basic needs such as toilet papers, soap, tooth paste and tooth brush and clothing which violate their basic rights. He urged that all prisoners be compensated. The 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners supported 1<sup>st</sup> Petitioner and urged the court to grant their prayers in the Petition.

12. **PW1, Charles Arunga**, who testified in support of the Petition, told the court that he was convicted for the offence of robbery with violence and sentenced to death but the death sentence was commuted to life imprisonment; that prisoners have no rights; that they are not paid for services rendered; that he has not been paid despite plea to be paid and that he was told that his money disappeared during the purchase of mattress.

13. The witness told the court that he has served sentence at various prisons, including; Shimo la Tewa, Naivasha, Nakuru, Nyahururu, among others and that in all those prisons, prisoners' rights are not observed such as clothing, tissue papers, soap; tooth paste and medication. According to the witness, prisoners do not also have legal aid or assistance and are punished whenever they question prison authorities. With regard to money, the witness gave an example of a convict, (Masara), who was released from Athi River GK Prison but was given Kshs. 50/= only after serving sentence for 32 years. In cross-examination, he told the court that they are not given records of their earning and that they are not paid for work done; that he was not aware that the Commissioner of Prisons is the one who pays the money and that they are only given one pair of uniform.

14. **PW2: James Mwangi Njoroge** told the court that he was also sentenced to death for robbery with violence in 2002 which was however commuted to life imprisonment. He testified that prisoners' rights are violated; that prisoners' families shoulder the burden of the convicts including the cost of treatment; that they are denied basic need such as soap, tooth paste and toilet papers and that they are mistreated in prison and are denied medication or not given relevant medication.

15. **PW3: Abduba Debano Boye** also a robbery with violence convict who was sentenced to death but whose sentence was commuted to life imprisonment, told the court that he holds grade I in carpentry but he has never been paid and that this applies to his co-convicts.

16. **PW4: Stephen Njau Mbugua** was also convicted for robbery with violence and sentenced to death in 2008 which was however commuted to life imprisonment. He told the court that there is congestion in prisons and that space in the cells is not commensurate with human rights. He testified that when one is injured at work, the treatment he gets is sub-standard; that there is no access to justice since there is no independent body to oversee how Prison officers treat prisoners and that there is no observance of prison laws including the right of access to information.

17. **PW5: Charles Mbai Mutuku** who was sentenced to life imprisonment in 2006, told the court that on 1<sup>st</sup> August 2011 he was picked from his cell by Flying Squad officer and taken for interrogation. He was asked to surrender Kshs. 45,000/= he allegedly had; that he told the

officers that he did not have any money but he was subjected to severe beatings and sustained serious injuries as a result. He testified that he was later taken to hospital where he was diagnosed to have sustained serious injuries that required surgery but he never underwent surgery because he could not afford the cost.

### **Petitioners' Submissions**

18. The 1<sup>st</sup> Petitioner submitted, highlighting their written submissions filed on 16<sup>th</sup> April 2018 on his own behalf and that of his co-petitioners. He told the court that they had abandoned the prayer challenging the Committee of Power of Mercy and that they would only pursue the issue of basic needs and the earning scheme of prisoners.

19. Submitting on the issue of basic needs, he argued that they are not provided with the basic needs such as tooth paste, tooth brushes, toilet papers and soap which he contended is a violation of their rights. He submitted that given that prisoners are transferred from one prison in one part of the country to another, their relatives do not have the means to reach them wherever they are transferred to in order to take to them supplies of the necessities. He contended, therefore, that prisoners who are not able to have relatives' visits would not have such items although they are basic needs to any human being. He argued that Article 50 of the Constitution grants all persons the right to basic needs including those convicted and serving sentence.

20. On the service scheme, the 1<sup>st</sup> Petitioner submitted that section 43 of the Prisons Act provides for labour while article 37 of the Convention on Civil and Political Rights is clear that any person serving sentence should not do any work that benefits any other person. He argued that the work prisoners do is profitable and the items and goods they make are sold at high prices and thus benefit authorities violating the prisoners' rights.

21. It is the petitioners' submission that by engaging prisoners in profitable work under section 43, it violates their constitutional rights and the violations extend to Articles 27, 28 and 29 of the Constitution. He urged the court to issue a declaration that prisoners' rights are violated by denying them basic rights. He also contended that rules 19 and 20 of the Prisons rules show how the scheme should operate and used but the rules are not followed.

### **Respondents' submissions**

22. Miss Wawira, learned counsel for the respondents submitted highlighting their written submissions dated 8<sup>th</sup> October 2018. (submissions were not however traced in the file). Counsel submitted with regard to Article 30 of the Constitution that under section 43 of the Prisons Act, every prisoner serving a sentence is to be involved in labour approved by the Commissioner which gives skills to prisoners to assist them upon release. In counsel's view, this does not fall within the confines of Article 30 as it does not amount to slavery and servitude.

23. Regarding the earning scheme, learned counsel submitted relying on section 74 of the Act, that the Minister has powers to make rules for payment of prisoners for work done while in prison and that rule 19 of the **Prisons Rules**, provides for upgrading system to determine the amount to be paid. According to counsel, prisoners are paid at the end of their sentence and upon release. Miss Wawira argued that this is a legal requirement and the 2<sup>nd</sup> respondent does not have mandate to revise them.

24. With regard to provisions of basic needs, counsel submitted that this is subject to budgetary allocation by the Parliament; that prisoners have a canteen from which they can pick provisions for their basic needs and that the prisoners have a kitty where their money is kept and they are allowed to access the money for basic needs. She prayed that the petition be dismissed.

### **Determination**

25. I have considered the petition, the response and submissions by parties. The petitioners abandoned the issue of non-functioning of the Committee of the Power of Mercy leaving only two issues for determination, namely: whether failure to provide prisoners with basic needs is a violation of their right to dignity guaranteed under Article 29 of the Constitution and whether prisoners' scheme of service including failure to pay them money earned for work done while in prison amounts to forced labour and servitude.

26. The 3 petitioners were all convicted of robbery with violence and were each sentenced to death, the only sentence then provided for in law. Their death sentences were however commuted to life imprisonment which they are now serving. They have argued that they are denied the basic items such as soap, tooth paste and brush, clothes and medical treatment. They further argued that these are basic needs for any human being and that the cost of maintaining them in prison is passed on their relatives which some of their relatives can barely afford.

27. It is the petitioners' case that they are routinely transferred from one prison to others across the country which makes it difficult for their relatives to visit them and, for that reason; they do not get supplies once transferred to where their relatives are unable to visit them. This they argued, subjects them to inhuman treatment a violation of their fundamental rights.

28. The petitioners have also argued that under the Prisons Act, they have a scheme of service and that under that scheme, they are supposed to be paid some money per month when they have worked but they are not paid the 30 cents they are entitled to under the law. All the 3 petitioners were clear that since they started serving sentences they have never been paid as required. They gave an example of an instance where prisoner had been released after serving up to 32 years only to be paid Kshs. 50/=. In their view, this is subjecting them to slavery and servitude contrary to Article 30 of the Constitution. They contended that their rights under Article 27, 28 and 29 are violated.

29. The Respondents opposed the Petitioners' claims arguing, first; that prisoners' basic needs depend on budgetary constraints as the money is voted for by the National assembly; that there is a canteen at the prisons where the prisoners buy items they need and that their relatives are allowed to visit and to take to them the items needed. The Respondents further argued that the petitioners are provided with uniforms and receive medical attention.

30. Regarding the scheme of service, the respondents argued that the scheme of service is provided for in law and that the money earned is kept for prisoners and is paid out on release. They argued since the scheme is provided for by law and only Parliament and not the 2<sup>nd</sup> respondent can change it.

***Who should provide basic needs such as toiletries?***

31. This petition raised issue of basic necessities of prisoners. The question is; who should provide the prisoners with basic needs such as soap, tooth paste, brush and toilet papers. Prisoners are human beings. They are entitled to their basic rights except the fact that their rights are limited by virtue of being prisoners as persons of restricted liberty. What is limited are those rights that they cannot exercise or enjoy as human beings because their liberty is restricted. They are however entitled to all other human rights and fundamental freedoms.

32. The petitioners though prisoners serving sentences are entitled to such basic needs as soap, tooth paste, brush and tissues to enable them lead prison life with dignity. This is because the Constitution grants every person the right to live in dignity, a critical human right. Where one is denied this right, he/she is subjected to lead a life that is short of dignity because the right to dignity is a critical human right that cannot be curtailed. However, the fundamental question is; who should provide these items. The petitioners argue that the state should take care of these items while the respondents contend that budgetary allocations cannot allow this.

33. As correctly submitted by the respondents, provisions items such as soap tooth paste, and tooth brush depend on budgetary allocations. Only those items budgeted for can be provided by prison authorities. It would be difficult for the prison authorities to provide items not budgeted for and money not allocated by the National Assembly. Provision of these services if it were to be passed on to the prison authorities would depend on budgetary allocations and may require amendment of the law to state who is to benefit whether the convicts or even those in remand.

34. The court appreciates the petitioners' concerns. However, this is a matter that requires finances and the court may not direct that these items be provided for without financial allocation by the National Assembly and clarification in the law who should benefit which is a matter for Legislation but not for the court. I therefore find no fault on the part of the respondents on this issue,

***Prisoners' scheme of service***

35. The second issue regards the prisoners' service scheme. Section 43 of the Act provides for labour of prisoners. Section 43(2) provides that every person under sentence of imprisonment may be required to engage in such type of employment approved by the Commissioner as the officer in charge may direct. This means prisoners may be called upon to perform such labour as the officer in charge may deem fit and appropriate. The labour and employment is therefore a legal requirement under the Prisons Act.

36. Section 74 of the Act gives the Minister power to make rules for the better carrying into effect the provisions and the purposes of the Act. He may also make rules that provide for classification of prisons and prisoners into categories, duties and responsibilities of prison officers, disciplinary control of prisoners to safe custody, management, origination, hours, mode and kind of labour and employment, clothing, maintenance, instructions, discipline, treatment, restraint, correction and discharge of prisoners and the manner in which prison offences are to be tried.

37. To that extent, the Minister made the Prisons Rules. Rule 3(c) states that at all times the treatment of convicted prisoners shall be such as to encourage their self-respect and sense of personal responsibility, so as to rebuild their morale, to inculcate in them the habit of good citizenship and hard work, to encourage them to lead a good and useful life on discharge and to fit them to do so.

38. Some of the rules made by the Minister were on payment of prisoners for the work done while in prison. This means prisoners may be entitled to payment for work they do while serving their prison sentences. Rule 6 provides;

***(1) At every prison there shall be a Reception Board consisting of the officer in charge and such other persons as the Commissioner may determine, who shall interview every long sentence prisoner as soon as possible after his reception in prison and consider what arrangements are to be made for his training.***

***(2) The Reception Board shall, as soon as possible after reception, classify all prisoners sentenced to imprisonment, having regard to their age, character and previous history.***

39. The rules state that short sentence prisoners (first stage) may be allowed to participate in earning scheme depending on their industry and character. (r10) long sentence prisoners (6 months and above (second stage) may participate in the earning scheme if of good character and industry. Those in the third stage if of good conduct and industry may participate in the earning scheme. Similarly, those in the fourth stage may participate in the earning scheme under similar considerations. Those in the special category if of good conduct and industry may also participate in the earning scheme. What is clear, therefore, is that every prisoner has an opportunity to participate in the earning scheme but this is not mandatory and is pegged on certain conditions.

40. Rule 17 gives the Commissioner mandate to create privileges and prisoners to whom such privileges have been extended may lose them as a punishment. Rule 19 of the rules provides that prisoners eligible to participate in the earning scheme shall be classified into either Grade A; B or C. Category A consists of prisoners who in the opinion of the Commissioner are of exemplary conduct and are skilled in their trade, and all special stage prisoners; Category B consists of prisoners who in the opinion of the officer in charge are of good conduct and are semi-skilled in their trade and Category C which consists of all prisoners eligible to participate in the earnings scheme who are not Grade A or Grade B. It therefore means that all grade C Prisoners are eligible to participate in the earning scheme but not those in grade A or B. The operating word here is "**eligible**" and eligibility is based on the opinion of the Commissioner or the officer in charge. It does not mean that all prisoners must participate in the payment scheme except those who meet the set criteria.

41. Rule 19(2) stated that Promotions to Grade A are made by the Commissioner while promotions to Grade B are to be made by the officer in charge. Sub-rule 3 provides that prisoners engaged in collective work shall be graded in Grade C but may receive additional payment for work completed in excess of a fixed task. According to Rule 20, the Minister is to fix the rate of earning to each grade. The rules are clear that participation by a prisoner in the earning scheme is at the discretion of the Commissioner or the officer in charge.

42. Rule 21 (ii) which is critical to this issue, provides that:

***“A prisoner on the earnings scheme, other than a prisoner in the first or second stage, may spend up to two-thirds of the total of his monthly earnings upon the purchase of tobacco and such other goods as may be allowed by the officer in charge on the instruction of the Commissioner; and the balance of the earnings shall be placed to the credit of the prisoner and the total credit shall be paid to him on release.”***

***“(2) A Prisoner in the first or second stage may not spend any of his earnings, and the whole of his earnings shall be paid to him on release”***

43. According to the rules other than prisoners in the first and second categories all other prisoners are entitled to spend up to two-thirds of their monthly earnings to purchase items that are necessary and allowed by the officers in charge as the Commissioner may direct. In that regard, spending of earnings by prisoners in the promoted category is not in question. The petitioners told the court that they have never been given money from their earnings and that since the scheme is internally managed they do not know how much they have to their credit. They also gave an example of a prisoner who served for 32 years but was only paid Kshs. 50/= on release from prison.

44. I have carefully gone through the Act and the rules on the manner in which prisoners are to participate in the earning scheme. What is clear is that petitioners are legible to participate in the earning scheme subject to certain conditions. Although the petitioners testified in court, none of them showed that he was in the categories that are eligible to participate in the earning scheme and that in fact they were actually participating in the scheme and were therefore entitled to payment.

45. The question of participation in the payment scheme is one of fact and the petitioners could not state in general terms that they were not being paid money for the work done. This is so given that participation in the scheme is a privilege, and as a matter of discretion, it is one that could be withdrawn by the Commissioner if those participating were found to be on the wrong side of disciplinary procedures. The petitioners gave an example of a prisoner that had been released after 32 years in prison only to be paid Kshs 50. They did not table evidence that the alleged prisoner was participating in the payment scheme.

46. My reading of the rules is that whereas they make all prisoners legible to participate in the payment scheme that is not mandatory that everyone participates. For that reason, it is not all prisoners who can argue without proof that they were participating in the scheme and were therefore not being paid their money. Furthermore, the rules are clear that only in some categories are prisoners entitled to use a fraction of their earnings to buy certain items while the balance is kept for them to be paid on release. The other category is not entitled to use the money at all. The petitioners therefore failed to demonstrate that they were participating in the earning scheme and that they belong to the category that was allowed to use a fraction of their earnings and had not been allowed to do so.

47. The petitioners also argued that they are subjected to labour and servitude while in prison and that their rights are therefore violated. The respondents denied this and argued that the work prisoners do is not labour but is intended to equip prisoners with knowledge and skills that may be valuable to them once released. The respondents' argument is not farfetched. First, the law allows prisoners to work while serving sentences. That way, prisoners gain knowledge and skills and indeed find this valuable when they finally find themselves out of prison.

48. The spirit of the rules is captured in rule 3(c) to the effect that at all times the treatment of convicted prisoners should be to encourage their self-respect and sense of personal responsibility, so as to rebuild their morale, to inculcate in them the habit of good citizenship and hard work and encourage them to ***lead a good and useful life on discharge.***

49. It cannot therefore be said that working while serving sentence is unhelpful to prisoners or is forced labour and servitude. This is because the Constitution and the Prisons Act do not permit forced labour or servitude. The court is also alive to the provisions of Article 51(1) of the Constitution which provides that 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 freedom is clearly incompatible with the fact that the person detained, held in custody or imprisoned. I am therefore unable to find favour with the petitioners' argument that they are subjected to conduct that amounts to forced labour or servitude.

50. There is a further argument that prisoners are mistreated in prison in violation of their rights and fundamental freedoms. To demonstrate this, PW5 testifies on how he was picked by Flying Squad officers from his cell and taken for interrogation. He told the court that he was tortured and injured in the process. 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.

51. 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 51 of the Constitution.

52. 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.

53. 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:

*(1) 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.*

54. 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.

55. Flowing from all that, it is clear that the law has provided sufficient mechanism for dealing with complaints by persons deprived of liberty such as the petitioners. For that reason, these issues should have been addressed through that mechanism for resolution as appropriate.

56. The upshot is that I find no merit in this petition. It is declined and dismissed with no order as to costs.

**Dated, Signed and Delivered at Nairobi this 14<sup>th</sup> day of November 2019.**

**E C MWITA**

**JUDGE**