

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI.

CONSTITUTIONAL PETITION NUMBER E. 014 OF 2023

**In the matter of article 22(1) 23(1), 3(d), 24(10)(d), 2(a)
(b) (c) 25(a) 20(1) (2)(3(a)., 47,48, 51(1) 52, 165(3(d)
258(1), 259(1) of the Constitution of Kenya 2010**

And

**In the matter of section 3&4(b) of the Probation of
Offenders Act Cap 64 Laws of Kenya**

**And in the matter of Case no 440/2020 at Makindu Law
Courts**

Between

MAXWELL NDAMBUKI MULIPETITIONER

VERSUS

ODPP MAKUENI.....1ST RESPONDENT

**PROBATONA AND AFTER CARE SERVICE.....2ND
RESPONDENT**

JUDGMENT.

What is before me is the undated Petition arising from the outcome in Makindu MCCRC 440 of 2020. The Petitioner avers that his application is brought inter alia pursuant to article 22 (1) of the Constitution of Kenya and the Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules, 2013

He avers that the the petition is about the Probation of Offenders Act, section 3 and 4(b) thereof which he avers , allows him to seek orders of this court directing that he serves the remainder of his sentence as a non custodial sentence.

He has sworn an affidavit in support of the Petition, stating simply that he was charged , tried , convicted and sentenced to 7 years imprisonment on 22nd September 2021, for the offence of dealing with an endangered species c/s 92(2) of the Wildlife Conservation & Management Act , 2013.

The Petitioner had not disclosed that he filed an appeal that was consolidated in HCCRA 116, 93 and 95 of 2021 which were heard and dismissed vide the Judgment of Dulu J on 29th

November 2022 where he upheld both the conviction and sentence.

This Petition is founded on the fact that the Petitioner has served most of his sentence and now seeks review to a non-custodial sentence.

The Prosecution did not file a response and there were no submissions.

The issue is whether the Petition is merited.

To determine this Petition I found it necessary to delve into the purpose of the Community Service

Orders Act so as to demonstrate why those orders are not available to the Petitioner.

In addition the issue as to whether a person who has appealed against their conviction and sentence

at the High Court, the appeal dismissed and the sentence upheld can come back to the same court

for "revision of sentence"

Article 22(1) of the Constitution provides for the Enforcement of Bill of Rights. It states:

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened

The petitioner has not alleged that any of his rights or fundamental freedoms has been denied, violated or infringed, or is threatened. He has not provided any evidence to bring this petition within the ambit of Article 22(1).

He has also not provided the court with evidence that any of the Articles of the Constitution cited herein above have been violated with regard to their rights and fundamental freedoms. Nothing has been placed before me to demonstrate the reason why ODPP and PACs are the respondents.

That notwithstanding I have looked into the averment that the Probation of Offenders Act allows him to bring this application. I did not find a section 3 in the Probation of Offenders Act. Section 4 gives the court the **power to permit conditional release of offenders** in the following terms

s.4(2) states:

Where **any person is convicted of an offence by the High Court** and the court is of the opinion that, having regard to the age, character, antecedents, home surroundings health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may, **in lieu of sentencing him to any punishment, make a probation order**, and may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.

The law is saying that at the point of trial the court is empowered to mete out a non-custodial sentence within the parameters set out by the law. It is not this court that initially convicted the petitioner.

True, on appeal , the court is empowered inter alia under s. 354 as follows

(3) *The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may*

—

(a) in an appeal from a conviction—

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence or

(iii); with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

In this case the Petitioner has already been heard in the appeal and this Court (Dulu J) upheld the conviction and the sentence and clearly that door closed for him.

Therefore s.4(2) of Probation of Offenders Act is not applicable to the Petitioner.

There is however the Power of Mercy Act [Cap. 94](#) of the Laws of Kenya which provides for situations such as the one presented by the Petitioner. At s. 20 it states

20. Commencing a petition

(1) An application for the exercise of the power of mercy shall be by a petition in the prescribed form.

*(2) The petition referred to in subsection (1) shall comply with the requirements set out in the **Third Schedule**.*

(3) For the avoidance of doubt, a petition that provides the requisite information shall not be incompetent only for the reason that—

(a) it does not accord strictly with the prescribed format; or

(b) it has been commenced in person or through a representative other than an advocate.

(4) A petition under this section may be lodged by electronic means.

(5) The Cabinet Secretary and Committee shall ensure that the relevant forms and information are supplied to all the correctional facilities

The Third Schedule provides the GUIDELINES ON THE CONTENTS OF THE FORMS. The Petitioner is required to provide the following particulars:

1. *Particulars of the petitioner.*
2. *Particulars of the convicted criminal offender, the subject of the petition, if different from the petitioner.*
3. *The nature and particulars of the offence committed.*
4. *Relief sought or nature of the petition.*
5. *Grounds for the petition.*
6. *The age of the offender at the time of the commission of the offence and at the time of making the petition.*
7. *The circumstances surrounding the commission of the offence.*
8. *Whether the person, for whose benefit the petition is made, is a first offender.*
9. *The length of period so far served by the convicted criminal prisoner.*

10. The length of period served by the convicted criminal prisoner in remand.

11. The personal circumstances of the offender at the time of making the petition, including mental and physical health, disabilities.

12. The post-conviction conduct, character and reputation of the convicted criminal prisoner.

13. Any other relevant information as may be prescribed by the Cabinet Secretary on the advice of the Committee

Further at s. 21 **provides for the Consideration of petitions, notification of victims, etc.**

(1) Upon receipt of a petition for the exercise of the power of mercy, the Committee shall—

(a) determine the admissibility of the petition;

(b) have all the necessary powers to determine the petition under this section, including—

(i) calling for evidence;

(ii) where appropriate conducting interviews;

(iii) conducting investigations;

(iv) receiving and reviewing the necessary reports from appropriate government agencies or officials; and

(c) make appropriate recommendations to the President in accordance with the Constitution.

(2) In determining the admissibility of the petition under subsection (1)(a), the Committee may consider

—

*(a) whether the **convicted criminal prisoner has served at least one-third of the sentence pronounced by a court;***

(b)....

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

133. Power of mercy

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

*(a) granting a **free or conditional pardon to a person convicted of an offence;***

*(b) **postponing the carrying out of a punishment,** either for a specified or indefinite period;*

*(c) **substituting a less severe form of punishment;** or*

*(d) **remitting all or part of a punishment.***

Section 22 of Cap 94 provides the applicable criteria:

(1) The Committee shall, in making a recommendation under Article 133 of the Constitution and [section 21\(1\)\(c\)](#) consider—

(a) the age of the convicted criminal prisoner at the time of the commission of the offence;

(b)the circumstances surrounding the commission of the offence;

(c)whether the person, for whose benefit the petition is made, is a first offender;

(d)the nature and seriousness of the offence;

(e)the length of period so far served by the convicted criminal prisoner;

(f)the length of period served by the convicted criminal prisoner in remand;

(g)the personal circumstances of the offender at the time of making the petition, including mental and physical health and any disabilities;

(h)the interest of the State and community;

(i)the post-conviction conduct, character and reputation of the convicted criminal prisoner;

(j)the official recommendations and reports from the State organ or department responsible for correctional services;

(k) where the petitioner has opted to pursue other available remedies, the outcome of such avenue; and

(l) the representation of the victim where applicable.

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

From the foregoing there is an elaborate, simple procedure that persons like the petitioner herein are entitled to follow in pursuit of his rights as a convict.

Applications such as these arise out of the fact that the Judiciary began to do what has come to be known as DECONGESTION ostensibly under the Community Service Act [Cap. 93](#).

Section 3. of the Act provides for when Community service orders may issue:

*(1) Where any person **is convicted of an offence punishable with—***

(a) imprisonment for a term not exceeding three years, with or without the option of a fine; or

(b)imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service.

My reading of this section is that it gives the trial court the opportunity to apply community service in any matter where the court is considering a sentence of three years or below.

CSO replaced what was known as EMPE (Extra Mural Penal Employment) under Cap 92.

The ***raison d'être*** for CSO was to decongest the Prisons by not sending them into the Prison in the first place. The trial court was encouraged to apply this non-custodial option among others so as to reduce the number of short term prisoners in prison due to the cost on the tax payer vis a vis the effectiveness of short custodial sentences. There are Guidelines that were developed that need to be pulled out and dusted for use. CSO was never intended to decongest post-imprisonment. It was intended to ensure that any person upon whom a sentence of three years imprisonment and below did not enter

the gates of prison unless it was necessary. That person would perform unpaid community work within his community for the benefit of that community.

The order could not be made without a workplace that had sufficient work for the period the court was to place the offender.

My view is that now CSO is watered down to a decongester (sic) yet the Constitution provided a procedure for that purpose through the Power of Mercy Committee.

Despite Section 8 (2) of the Act which states

*Without prejudice to subsection (1), the National Committee may, through the chairman, advise the Chief Justice on any need for enhanced application of the provisions relating to revision under the Criminal Procedure Code (Cap. 75) **so that the courts may make better use of community service orders in the appropriate cases;***

It is my view that going back to Prison and purporting to decongest through the CSO Orders is not supported by the Act;
Making better use of community service orders in the

appropriate cases cannot mean merely releasing persons from prison custody. That is usually the outcome of decongestion where the Prison Authorities prepare a list for the Judiciary for decongestion. CSO Reports are drawn hurriedly. Workplaces are identified over the phone. There is no time for home visits. There are no workplaces set out by the committees, and no one is really bothered about the required supervision. There is no supervision by the Judiciary (through the chairs of the Community Service Orders Committees) Yet there are the provisions of s. 3(2) of the Act

(a)Community service shall comprise unpaid public work within a community, for the benefit of that community, for a period not exceeding the term of imprisonment for which the court would have sentenced the offender.

(b)For the purposes of this Act, public work shall include but not be limited to—

(i)construction or maintenance of public roads or roads of access;

(ii)afforestation works;

(iii) environmental conservation and enhancement works;

(iv) projects for water conservation, management or distribution and supply;

(v) maintenance work in public schools, hospitals and other public social service amenities;

(vi) work of any nature in a foster home or orphanage;

(vii) rendering specialist or professional services in the community and for the benefit of the community,

and the nature or type of public work shall, in any particular case, be determined by the court after

*consultation with the **community service orders committee.***

The **Community Service Orders Committees** have to do their part to ensure workplaces and effective supervision. They cannot do so without the support of the **National Community Service Orders Committee.**

The High Court does not need direction to exercise its supervisory power as provided for in the Criminal Procedure Code at 362. *Power of High Court to call for records: The High*

Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

At Article Constitution Article 165(6) and (7) each Judge of the High Court has the power to call for records of the subordinate court and to carry out the necessary revision.

*(6) The High Court has **supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function**, but not over a superior court.*

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to **ensure the fair administration of justice**.*

The power of revision is vested in the court to exercise to ensure the fair administration of justice.

However due to the mis- apprehension of what CSO Orders is for; parties such as the Petitioner who has even **appealed against his conviction & sentence and the same has been upheld by the High Court** , believes there is a chance of being **decongested** out of Prison through CSO Orders for the reason that he has served most of his sentence. However, the law as set out above does not support the Petitioner , as his case is not covered under Article 165(6) and (7) of the Constitution of s. 362 of the CPC. He has a forum before the Power of Mercy Committee.

From the foregoing it is clearly evident to me that the Petitioner is not without recourse and is encouraged to seek relief from the Power of Mercy Committee, taking into consideration the fact that he filed an appeal, which was heard and determined by this court.

Otherwise any other relief from the courts would have to be sought from the Court of Appeal.

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

Dated, signed and delivered this 2nd day of October 2025

Mumbua T Matheka

Judge

Applicant

CA Chrispol