

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CORAM: R. MWONGO, J.

CONSTITUTIONAL PETITION CRIMINAL NO. E001 OF 2025

**IN THE MATTER OF ARTICLES 2(1), 3(1), 10(2), 19, 22(1), 25(a), 27(1,2,4), 28, 29
(a,f), 50, 159(2)(a), 165(3)(b,d) OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF SECTION 5 AND 46 OF THE PRISON ACT

AND

IN THE MATTER OF THE JUDICIARY SENTENCING POLICY GUIDELINES

AND

**IN THE MATTER OF SIAKAGO MCCR NUMBERS 596 OF 2019, 261 OF 2018 AND
EMBU MCCR E060 OF 2021**

BETWEEN

JOSEPH MUTURI..... PETITIONER

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Petition

1. The petitioner filed a petition dated 17th February 2025 seeking the following orders:
 - a. A declaration that the officer in charge, the Prison Commissioner or any employee/officer of the Kenya Prison Service has no jurisdiction/power to interfere with the term of a sentence imposed on a prisoner by a competent court.
 - b. An order that the sentence imposed on the petitioner in Siakago Criminal Case No.261 of 2018, Siakago Criminal Case No.596 of 2019 and Embu Criminal Case No.E60 of 2021 be computed in accordance with the law.
 - c. That an order that the sentence in Siakago Criminal Case No.261 of 2018, Siakago Criminal Case No.596 of 2019 and Embu Criminal Case No.E060 of 2021 do start from the time of the arrest.

- d. An order that the Petitioner is entitled to remission.
 - e. This Honourable Court be pleased to issue an order that each party should bear their own costs on the grounds that this Petition is in the public interest.
 - f. This Honourable Court be pleased to issue such further or other orders as it may deem just and expedient for the ends of justice.
2. The petitioner stated that he was convicted and sentenced as follows:
- 1) In Siakago MCCR 596 of 2019, he was convicted of 8 counts of stealing and he was sentenced to 1-year imprisonment on each count; the sentences running consecutively. An appeal against this finding was dismissed.
 - 2) In Siakago MCCR 261 of 2018, he was convicted of the offence of obtaining good by false pretenses and was sentenced to 3 years imprisonment from the date of the judgment. He appealed against this finding and it was also dismissed.
 - 3) In Embu MCCR E060 of 2021 he was convicted of 2 counts of issuing a bad cheque and he was sentenced to 1-year imprisonment on the 1st count and 3 years imprisonment on the 2nd count; the sentences running consecutively.
3. He stated that the officer in charge of the prison interpreted the sentences to mean a total of 11 years imprisonment and according to him, this is not accurate. Moreover, that the said officer in charge does not have jurisdiction to interpret and interfere with the sentences imposed by the courts. That these actions by the officer in charge of the prison have resulted in violation of his rights and fundamental freedoms under the constitution as stated herein before.

Grounds of Opposition

4. The 1st respondent filed grounds of opposition stating that the sentences imposed on the petitioner were passed by different courts sitting independently of each other. That the petitioner was placed in the custody of the Officer in charge of Embu Main Prison following sentencing. It urged the court to dismiss the petition since it contravenes section 30 of the Prisons Act.
5. The 2nd respondent also filed grounds of opposition stating that the sentences were passed by different courts sitting separately and that the files are unrelated. It relied on section 14 of the Criminal Procedure Code and stated that the trial courts

each had the discretion to order that sentences meted could run consecutively or concurrently.

6. That the absence of the Commissioner of Prisons as a party to the petition causes the petition to be fatally defective and it ought to be dismissed. It was its case that the issues raised in the petition are misconstrued and aimed at unjustly benefitting the petitioner through a sentence more lenient than had been intended by the trial courts. That there is no error in law that should justify interference with the sentences imposed.

Written Submissions

7. The parties herein filed their written submissions.
8. The petitioner submitted that the sentences imposed by the trial courts were not subjected to section 333(2) of the Criminal Procedure Code since the courts failed to include time spent in custody pending the trials. He relied on the Judiciary Sentencing Guidelines and the cases of **Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR)** and **Bethwel Wison Kibor v R (2009) eKLR**. Further reliance was placed on Article 165(6) of the Constitution and he argued that the courts should have referred to previous records of the accused person as mitigating factors. He stated that following conviction in different files, he was entitled to concurrent sentences and he relied on the cases of **BMN v Republic [2014] KECA 198 (KLR)** and **Nathani v Republic [1965] EA 777**.
9. The 1st respondent, in its submissions, relied on Articles 23(1) and 165(a)(b) of the Constitution and the case of **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR)**. It conceded that the court has jurisdiction to determine the petition. It also placed reliance on section 30 of the Prison Act and stated that the Officer in charge of the prison was in charge of the prisoners within the prison where they are detained by the Commissioner of Prisons. That the prison officers only ensure compliance with the order of a court on sentencing. In this case, it was not possible for the officer in charge to consolidate the sentences or interpret or interfere with them because the 3 different courts had made clear orders as to the sentences.

Issue for Determination

10. The issue for determination is whether the petition has merit

Analysis and Determination

11. From a general overview of the issues raised by the petitioner in the petition and his written submissions, it is abundantly clear to the court that he is seeking an interpretation of the sentences imposed by the trial courts in Siakago MCCR 596 of 2019, Siakago MCCR 261 of 2018 and Embu MCCR E060 of 2021. The issue includes the question of whether the trial courts considered section 333(2) of the Criminal Procedure Code and included time spent in custody pending trial. The other question the petitioner has sought an answer to how the consecutive sentences by the various courts should be executed while he is serving them; namely, what does consecutive or concurrent mean when he was heard by different courts in the 3 cases?

12. These issues have been couched within a constitutional petition which is a vehicle by which parties who feel that their rights in the bill of rights have been infringed, may move to court for remedies. Article 23 of the Constitution provides:

“23. Authority of courts to uphold and enforce the Bill of Rights

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
(e) an order for compensation; and
(f) an order of judicial review.”

13. A constitutional petition must clearly state the constitutional rights alleged to have been infringed and how they have been infringed. It must be clear to the constitutional court what the petitioner is claiming to be a violation of his rights and how it was committed. The requirement for clarity and precision of a constitutional petition as to describing constitutional violations was stated in the case of **Anarita Karimi Njeru v Republic [1979] KEHC 30 (KLR)** thus:

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

14. The **Anarita Karimi case** was referred to in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR)** where it was held:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.” (Emphasis added)

15. Whilst, a party may bring a matter before the court in the form of a constitutional petition, it may become evident that the orders sought can be granted through another form besides a constitutional petition. In such cases, the constitutional court should exercise constitutional avoidance and avoid the matter whose redress may be found outside a constitutional petition. In the case of **Sports and Recreation Commission v. Sagittarius Wrestling Club and Anor, 2001 (2) ZLR 501 (S)**, the South African Court held thus:

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.”

16. There is no doubt that the issues herein may be collapsed into sentence interpretation and consideration of section 333(2) of the Criminal Procedure Code. For a response to these issues, the petitioner may choose to invoke the High Court’s revisionary power or any other form available in law. The High Court when moved appropriately, is able to give directions on enforcement of the sentences, some of which it upheld.

17. The Petitioner’s claim is that the officer in charge of the prison has infringed his rights by interpreting the sentences wrongly. Section 30(2) of the Prisons Act provides:

“Every officer in charge shall keep and detain all persons duly committed to his custody by any court or other competent authority according to the terms of the warrant or order by which such person has been committed, or until such person is discharged by due course of law.” [Emphasis added]

Conclusion and Disposition

18. From the above provision, the role of a Prisons officer is merely to keep prisoners in custody in accordance to the terms of the warrant or order under which such person has been committed to prison. He has no role in interpreting the sentence imposed, but must act in accordance with the committal warrant issued by the

Court. If the warrant is unclear or cannot be understood, the Prisons officer's role is to bring it to the Court for interpretation or clarification.

19. The officer in charge of Embu Main prison is a public servant. He may be subjected to legal proceedings of a specific kind, for instance under Judicial Review, if the petitioner feels that his actions exceeded his mandate in exercise of his duties. Therefore, the declaration sought against such an officer cannot be made through this constitutional petition as the court may safely avoid the issue, through the principles of constitutional avoidance.

20. Accordingly, I hold that this constitutional petition must be dismissed on the basis of the doctrine of constitutional avoidance. It is hereby so dismissed.

21. Orders accordingly.

Delivered, dated and signed at Embu High Court this 12th day of November, 2025.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Kiongo for 2nd & 3rd Respondent
2. Nyika for 1st Respondent
3. Muchangi online but not responding
4. Francis Munyao