



**Ireri v Republic (Miscellaneous Criminal Application E020 of 2025)
[2025] KEHC 17715 (KLR) (26 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CRIMINAL APPLICATION E020 OF 2025**

RM MWONGO, J

NOVEMBER 26, 2025

**IN THE MATTER OF ARTICLES 2 (1) (6), 3 (1), 10 (2) (B), 19, 22 (1), 25 (A),
27 (1), (2), (4), 28, 29 (A), (D) AND (F), 50, 159 (2) (A), 165 (3) (B) (D) OF THE
CONSTITUTION**

AND

**IN THE MATTER OF SECTION 216 & 326 OF THE CRIMINAL PROCEDURE
CODE**

AND

IN THE MATTER OF SECTION 296 (2) OF THE PENAL CODE

BETWEEN

FRANCIS KINYUA IRERI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

The Petition/Application

1. Through a petition dated 23rd August 2024 and amended on 22nd July 2025, the petitioner is seeking orders as follows:
 1. This Honourable Court be pleased to issue a declaration that indeterminate sentence of life imprisonment is unconstitutional in so far as it violates the Articles 28 and 29(d) of *the Constitution* by failing to give regard to not only his dignity as [a] human [being] but also failing to prevent their subjection to inhuman and degrading treatment;



2. This this Court be pleased to issue a declaration that indeterminate sentences of life imprisonment are unconstitutional in so far as they violate the inherent right to a fair trial as envisaged under Article 50 of *the Constitution*;
 3. This Court be pleased to issue a declaration that indeterminate sentences of life imprisonment are unconstitutional in so far as they violate Article 2(5) and (6) of *the Constitution* through their noncompliance with international laws and Instruments which Kenya is a party to through its ratification;
 4. This Court be pleased to issue a declaration that indeterminate sentences of life imprisonment are unconstitutional in so far as they violate the objectives of sentencing as stipulated under the Judiciary Sentencing Guidelines;
 5. This Court be pleased to issue a declaration that indeterminate sentences of life imprisonment are unconstitutional in so far as they violate Article 27 of *the Constitution* owing to lack of legislation catering for remission and or Parole;
 6. This Court be pleased to issue a declaration that the Petitioner herein is entitled to have his case reviewed and the same be set aside and be commuted to time served;
 7. This court be pleased to make a probation order in the circumstance that the order (f) above is not met;
 8. The Honourable court declares that section 46 of the *Prisons Act* is unconstitutional to the extent that it excludes prisoners serving life sentences from remission, thereby violating Articles 27, 28 and 29 of *the Constitution*; and
 9. The Court be pleased to make further such other order(s) as it shall deem just.
2. The petitioner referred to his rights as provided for under Article 50 of *the Constitution* and as interpreted by the courts in the cases of Ouma v Republic [2021] KEHC 13707 (KLR), Vinter and Others v. the United Kingdom [GC] - 66069/09, 130/10 and 3896/10, László Magyar v. Hungary (Application no. 73593/10) and Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR) (Muruatetu 1). He argued that his rights under *the Constitution* have been violated and he specified the constitutional provisions he alluded to.
 3. He stated that the indeterminate nature of the life imprisonment sentence is discriminatory and offends *the Constitution* as it takes away the dignity of a person. That it perpetrates the unequal treatment of persons, yet Article 50(1)(2)(q) of *the Constitution* affords him the right to review of his sentence and to benefit from the least available punishment in law. That it is inhumane and even contravenes Article 10 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the United Nations Standard Minimum Rules for the treatment of Prisoners (Mandela Rules).
 4. The petitioner also sought to challenge the constitutionality of section 46 of the *Prisons Act* on grounds that it does not provide for remission for a prisoner serving a life imprisonment sentence yet allows so automatically for others on term sentences. It was his argument that the provision violates Article 28 of *the Constitution* on the right to dignity and Article 29(d) which provides for protection from cruel and inhumane treatment.
 5. The petitioner urged the court to review his sentence to time served and consider releasing him from incarceration.



Grounds of Opposition

6. The respondent filed grounds of opposition stating that the court does not have the discretion to review the life imprisonment sentence that the petitioner is serving. That only the legislature has the power to review a sentence since it is the law-making branch of government. It argued that the court lacked jurisdiction to entertain the petition.

Parties' Submissions

7. The application was canvassed by way of written submissions.
8. The petitioner submitted that he was convicted of the offence of robbery with violence and was sentenced to death. Through a presidential decree, the death sentence was commuted to life imprisonment. So far, he has been in prison for 18 years. He brought the petition to challenge the constitutionality of the life imprisonment sentence that he is currently serving. Under section 46 of the *Prisons Act*, he is not eligible for remission, and he now argues that the provision is both prejudicial and unconstitutional.
9. In his submissions, the petitioner relied on the Judiciary Sentencing Policy Guidelines, 2023, The NCAJ Guidelines 2023 and the cases of *Muruatetu 1*, *Manyeso v Republic* [2023] KECA 827 (KLR) and *Mbugua & 9 others v Attorney General & 3 others* [2025] KEHC 1248 (KLR). He argued that the mandatory life imprisonment or death sentences violate provisions of *the Constitution* on the right to life and non-discrimination. Further reliance was placed on the cases of *S v Dodo* (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC) and *S v Vries and Others* (CR 27/2024) [2024] NAHCMD 138 in which it was held that:

“Sentences that remove judicial discretion and preclude individualized justice; and bar the possibility of release respectively, are contrary to modern penological objectives and violate fair trial and dignity rights.”
10. He also relied on *Muruatetu 1* and argued that Section 46(1)(ii) of the *Prisons Act* is unfair and discriminatory. He relied on Article 7 of the ICCPR and the United Nations Standard Minimum Rules for the treatment of Prisoners (Mandela Rules). Finally, referred to the accolades he gathered while in prison and argued that he has since reformed and that the sentence should be reviewed to time served.
11. On its part, the respondent relied on Articles 23(1) and 165(3)(a,b) and submitted that the petitioner's rights were not violated. Further reliance was placed on the case of *Jackson Maina Wangui v Republic* [2012] KEHC 3013 (KLR) where the court held that the question of how long a life imprisonment sentence should be is a preserve of the legislature to determine. That according to the Court of Appeal in *Igiro v Republic* [2023] KECA 926 (KLR) life imprisonment sentence was not invalidated by the Supreme Court in *Muruatetu 1*.
12. In fact, it argued that the Supreme Court charged the Attorney General to present the issue to Parliament for legislation. Regarding the issue concerning the alleged unconstitutionality of section 46(2)(ii) of the *Prisons Act*, the respondent relied on the case of *Vincent Sila Jona & 87 others v Kenya Prison Service & 2 others* [2021] KEHC 13027 (KLR). There, it was held that not all prisoners are eligible for sentence reduction. That the right to remission is not an automatic constitutional entitlement. It urged the court to dismiss the petition.



Issues for Determination

13. The core issues for determination is whether the petition has merit

Analysis and Determination

14. The applicant was initially sentenced to death by the trial court. That sentence was however, commuted to life imprisonment through a Presidential decree. Essentially, the petitioner is in fact tangentially seeking resentencing from 2 angles: First, based on the argument that the indeterminate nature of the life imprisonment sentence is unconstitutional; and Secondly, on the argument that since his sentence cannot be remitted as provided under section 46(2)(ii) of the *Prisons Act*, that provision should be declared unconstitutional.
15. On the first argument that the indeterminate nature of the life imprisonment sentence is unconstitutional, the Court of Appeal widely discussed the issue in the cases of *Manyeso v Republic* [2023] KECA 827 (KLR), and *Ayako v Republic* [2023] KECA 1563 (KLR). In these 2 cases, the Court of Appeal found indeterminate sentences to be unconstitutional and reduced the life imprisonment sentence to a defined number of years. These 2 decisions were, however, overturned on appeal by the Supreme Court in *Republic v Ayako* [2025] KESC 20 (KLR) and *Republic v Manyeso* [2025] KESC 16 (KLR).
16. In its decisions in the *Ayako* and *Manyeso* cases, the Supreme Court stated that the role of the court is limited to interpretation of the law and it does not extend to altering sentences already imposed in law. The court stated that law review is a preserve of the legislature and that the sentences provided under statute should be applied as they are without alteration. To that extent, the respondent is correct to say that this court lacks authority to review the life imprisonment sentence.
17. The second limb of the petitioner's argument is that challenging the constitutionality of section 46(2) (ii) of the *Prisons Act* on the grounds that it excludes remission for prisoners serving life imprisonment sentences. The section provides:
 - “(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.
Provided that in no case shall —
 - (i) ...;
 - (ii) any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the Penal code or to be detained during the President's pleasure.”
18. The impugned provision has 3 limbs; the first refers to prisoners imprisoned for life; The second to prisoners for the offence under section 296(2) of the Penal Code; and the Third to prisoners detained at the President's pleasure. This particular question of the constitutionality of the second limb of that provision was raised before Odunga, J. (as he then was) in *Sammy Musembi Mbugua & 4 others v*



Attorney General & another [2019] KEHC 4698 (KLR) before the High Court in Machakos. The Judge held:

“While there is a right to remission, the power to exercise it and the circumstances under which it is to be exercised must remain as provided for under section 46 of the *Prisons Act*. I find that the only part of section 46(1) of the *Prisons Act* that is unconstitutional is that which denies remission to persons sentenced to imprisonment for an offence under section 296(2) of the Penal Code.”

19. Section 296 (2) of the Penal Code provides for the sentence of death for robbery whilst armed with a dangerous weapon, whilst in the company of one or more other people.

20. In Sammy Musembi Mbugua’s case the Judge went on to order that:

“1. A declaration that section 46(1)(ii) of the *Prisons Act*, to the extent that it denies remission to persons imprisoned for an offence contrary to Section 296(1) of the Penal Code is inconsistent with the provisions of Article 27(1)(4) of *the Constitution* on the right to equality before the law and the right to equal protection and equal benefit of the law and is therefore unconstitutional, null and void.

2. A declaration that the limitation on benefiting from remission of part of sentence for convicts serving determinate and definite sentences pursuant to section 296(2) of the Penal Code, under section 46(1)(ii) of the *Prisons Act* is similarly unconstitutional.

3. A declaration is issued that the Petitioners being prisoners serving a fixed or definite or determinate period of imprisonment are entitled to remission of their sentence in accordance with the provisions of Section 46 of the *Prisons Act*, Cap. 90;”

21. In his reasoning in the same case, Odunga, J. (as he then was) addressed the first limb of the impugned provision as such:

“24. The law however expressly denies those prisoners who are serving life imprisonment or for an offence under section 296(1) of the Penal Code or those detained during the President’s pleasure. While it is understandable that those serving life sentences and those detained at the President’s pleasure ought not to benefit from the remission, since their sentences being indeterminate, it is not possible to calculate the one third of their sentence...”

25. On the face of it, the exclusion of remission to those convicted of offences under section 296(2) of the Penal Code makes sense since the law provides for, a prima facie, mandatory death sentence to which one third remission cannot apply. To that extent I agree with Korir, J in *Brown Tunje Ndago v Commissioner - General of Prisons* [2019] KEHC 6512 (KLR) where he expressed himself as hereunder:

“The two decisions [Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR and William Okungu Kittiny vs. Republic [2018] eKLR] created a cadre of prisoners not envisaged by Section 46 of the *Prisons Act*. These are the death row convicts whose sentences, like that of the Petitioner,



have now been substituted with determinate prison sentences. Although Section 46(1) of the *Prisons Act* did not expressly bar remission for prisoners sentenced to death, it goes without saying that a prisoner sentenced to suffer death cannot benefit from remission. This also applies to a prisoner serving a life sentence. Not only is it difficult to calculate remission in these two instances but even if calculation is done the remission will serve no purpose for a prisoner who is to be hanged or expected to serve the remainder of his/her natural life behind bars...It should be noted that as drafted Section 46(1) of the *Prisons Act* only discriminates against those sentenced for an offence under Section 296(1) of the Penal Code. It cannot be said that it is discriminatory against those sentenced to imprisonment for life or those detained during the President's pleasure. For this category of prisoners their period of imprisonment is never fixed by the court. As of now imprisonment for life means imprisonment for the natural life term of a convict. Nobody knows how long each human being will live. For such a sentence the prison term cannot be fixed to enable the Commissioner credit remission to the convict. The same position applies to those detained at the President's pleasure. The custodial period is not known. I am aware that detention at the President's pleasure has been declared unconstitutional – see *A.O.O. & 6 others v A.G. & another* [2017] eKLR. In that regard, detention at the President's pleasure is no longer available as a punishment in this country. Also, once a person is sentenced to suffer death, such a convict will have no use for remission. Although Section 46 of the *Prisons Act* does not specifically state that a person given the death sentence is not entitled to remission, common sense dictates that such a convict cannot have his sentence remitted. There is nothing remittable in a death sentence.” [Emphasis added]

22. The sentiments of Korir, J. (as he then was) in *Brown Tunje Ndago v Commissioner-General of Prisons* [2019] KEHC 6512 (KLR) as relied upon by Odunga, J. (as he then was) resoundingly answer the petitioner's question as to the constitutionality of the first limb of the impugned provision for prisoners sentenced to imprisonment for life. A sentence of life imprisonment is for an indefinite term. Such term is incalculable for purposes of remission. Even if this indefinite term was to be remitted how much of it would be taken away? What would be the appropriate formula to remit a part of a life imprisonment sentence and what would such remittal be?

Conclusions and Disposition

23. It is not until Parliament defines what number of years constitutes life imprisonment that the impugned provision can come under attack successfully. That is to say, once a sentence becomes determinable, there is no reason why remission should not be applied to it in accordance to section 46 of the *Prisons Act*. Therefore, at this point in time, there is no legal basis to declare the first limb of section 46(2)(ii) of the *Prisons Act* as unconstitutional.
24. It would appear that the petitioner herein was seeking the overall outcome of sentence review. For now, his endeavour unfortunately remains unsuccessful, and he must pursue other ingenious means to achieve that outcome as the law evolves every day.
25. In the result, the petition lacks merit and it is hereby dismissed.
26. Orders accordingly.



DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 26TH DAY OF NOVEMBER, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Applicant Present in Court

Ola holding brief for Abubakar for Petitioner/Accused

Ms. Nyika for the Respondent

Francis Munyao - Court Assistant

