



RF v Director of Public Prosecutions & another (Constitutional Petition E002 of 2025) [2025] KEHC 1247 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CONSTITUTIONAL PETITION E002 OF 2025**

JN KAMAU, J

FEBRUARY 28, 2025

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 1, 23, 24, 25, 27, 28, 29, 31, 43(I), 47, 48, 51(3A), 57, 159 & 259 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

RF PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

COMMISSIONER GENERAL OF PRISONS 2ND RESPONDENT

Court orders the release of an elderly man convicted of defilement on humanitarian grounds due to failing health

This petition concerned a 67-year-old convict serving a 15-year sentence for defilement, whose health had deteriorated due to prostate cancer and inadequate medical care in prison. He argued that continued incarceration violated his constitutional rights to dignity, health, and reasonable care for elderly persons. Medical reports confirmed worsening illness and inability of prisons to provide adequate treatment. The court, guided by constitutional protections and sentencing policy guidelines, found continued detention inhuman and ordered his release on humanitarian grounds.

Reported by John Ribia

Constitutional Law - fundamental rights and freedoms - secondary and tertiary rights - right to dignity - right to the highest attainable standard of health - right to reasonable care and respect for elderly persons - where the health of a convict was deteriorating due to old age, sickness and the lack of proper health facilities in prison - whether continued incarceration of a prisoner whose health continued to deteriorate due to inadequate diet and limited medical facilities was compatible with the rights to dignity, the highest attainable standard of health, and



reasonable care and respect for elderly persons - Constitution of Kenya, 2010, articles 1, 23, 24, 25, 27, 28, 29, 31, 43, 47, 48, 51(3)(a), 57, 159 and 259.

Criminal Law - sentencing - defilement - 15 year imprisonment term - where the health of a convict was deteriorating due to old age, sickness and the lack of proper health facilities in prison - whether the High Court had the power to reduce a sentence of defilement of 15 years imprisonment to a non custodial sentence due to the old age and deteriorating health of the convicted person - Sexual Offences Act (cap 63A) section 8(1), and (4); Community Service Orders Act (cap 93) section 10.

Brief facts

The petitioner sought declarations that his continued detention violated his dignity as an older member of society, his right to health care, and his right to privacy, given the prison authorities' admission of their inability to provide adequate care. He was serving a fifteen-year sentence for defilement at Kakamega G.K. Prison. The petitioner, aged 67, had been diagnosed with prostate cancer in 2022 and was awaiting surgical intervention. He had been fitted with a catheter, forcing him to walk around with a urine bag, which he described as humiliating and degrading. Medical reports from Vihiga County Referral Hospital and Vihiga Prison confirmed deterioration of his condition, including scrotal swelling and complications requiring specialist treatment. The petitioner argued that, under articles 28, 43, and 57 of the Constitution, his continued incarceration without adequate medical care amounted to cruel, inhuman, and degrading treatment.

Issues

- i. Whether continued incarceration of a prisoner whose health continued to deteriorate due to inadequate diet and limited medical facilities was compatible with the rights to dignity, the highest attainable standard of health, and reasonable care and respect for elderly persons.
- ii. Whether the High Court had the power to reduce a sentence for the offence of defilement of 15 years imprisonment to a non-custodial sentence due to the old age and deteriorating health of the convicted person.

Held

1. The petitioner's health continued to deteriorate due to inadequate diet and limited medical facilities. The evidence demonstrated that the prison system was unable to provide sufficient care for the petitioner, thereby aggravating his medical condition.
2. The Constitution safeguarded the petitioner's rights to dignity, the highest attainable standard of health, and reasonable care and respect for elderly persons. Punishment through imprisonment should not amount to cruel, inhuman, or degrading treatment. In view of the petitioner's age, illness, and lack of adequate medical support within prison facilities, continued detention risked violating those constitutional protections.
3. The Sentencing Policy Guidelines 2023 recognised that sentencing of terminally ill, elderly, or chronically ill offenders required careful consideration to ensure that punishment did not amount to excessive or inhuman treatment. The Guidelines underscored that courts must assess whether imprisonment would expose such offenders to undue hardship or impose an unreasonable burden on prison authorities, while also affirming the constitutional right of older persons to live with dignity. Non-custodial or suspended sentences were encouraged unless the gravity of the offence demanded a custodial term.
4. The petitioner had been convicted of defilement, a grave offense, one that ordinarily attracted a deterrent custodial sentence. He was serving a fifteen-year imprisonment term. Sentencing objectives of reformation and deterrence had to be balanced against the realities of caring for elderly, sickly inmates at significant cost to the State and hardship to other prisoners. While a non-custodial sentence would ordinarily be considered, it was not feasible in the instant case due to statutory limitations under



the Community Service Order Act, which excluded offenders convicted under the Sexual Offences Act. Ultimately, the court was enjoined to ensure that the petitioner's continued imprisonment did not degenerate into cruel, inhuman, or degrading treatment contrary to the Constitution.

Petition allowed.

Orders

Petitioner to be released from custody unless he was being held for any other lawful cause.

Citations

Statutes

1. Community Service Orders Act (cap 93) section 10 - (Interpreted)
2. Constitution of Kenya — article 1, 23, 24, 25, 27, 28, 29, 31, 43, 47, 48, 51(3)(a), 57, 159, 259 - (Interpreted)
3. Sexual Offences Act (cap 63A) — section 8(1); 8(4) - (Interpreted)

Texts

1. National Council on Administration of Justice (2023), *Sentencing Policy Guidelines* Nairobi; National Council on Administration of Justice

Advocates

None mentioned

JUDGMENT

Introduction

1. In his petition dated January 13, 2025 and filed on January 14, 2025, the petitioner herein sought the following orders:-
 - a. A declaration that owing to the petitioner's sickness and condition, it is a violation of his dignity as an older member of the society, right to health care services and privacy owing to prison authorities' admission of their inability to take care of him while in confinement.
 - b. A declaration that continued detention of the petitioner in prison without proper diet and medical care is torturous, cruel, inhuman, degrading and hence unconstitutional.
 - c. A declaration that the petitioner be and is hereby released from prison on humanitarian grounds to enable him seek proper medical care under the care of his family members for quick recuperation.
 - d. Any other relief this honourable court deem fit to grant.
2. There was also an affidavit of service that was sworn by Damaris A Ndale on February 4, 2025 and filed on even date evidencing service upon the Prison Department. The 1st respondent filed a replying affidavit on February 15, 2025 in response to the said petitioner's petition. Despite having been given time to respond, the 2nd respondent did not file its response to the said petition.
3. In view of the condition of the applicant herein as was evidenced in the letter from Vihiga Prison dated November 15, 2024 addressed to this court that the petitioner's health had continued to deteriorate due to lack of proper diet and medical care and that the fact that this court was proceeding on leave, this court found it prudent to render itself on the petitioner's petition with the urgency that this matter deserved.



The Petitioner's Case

4. The petitioner swore an affidavit in support of his petition on January 13, 2025. He averred that he was charged and convicted of the offence of defilement at the Senior Principal Magistrate's Court at Vihiga and was currently being held at Kakamega GK Prison serving his sentence of fifteen (15) years imprisonment.
5. He further stated that he was diagnosed with prostate cancer sometime in the year 2022 and he had been on a follow up treatment at Vihiga County Referral Hospital awaiting to undergo prostatectomy and further management. He contended that a catheter had since been inserted in his penis to allow urine to flow out and was therefore forced to walk around with the plastic urine bag which he has to empty every now and then.
6. He contended that the Prison authorities had been unable to manage his condition and had left him on his own owing to the fact that they had limited resources and facilities to manage his condition. He pointed out that it was embarrassing for him to have to walk around with the catheter inserted in his penis with the plastic bag hanging by his side in public which condition made everybody including prison staff and fellow inmates uncomfortable.
7. He argued that at his age of sixty seven (67) years, he was an elder member of the society and the State should ensure that he lived in dignity and respect and free from abuse. He averred that he was entitled to receive care and assistance from family members who could not extend that help while he was in confinement. He added that he had developed a scrotal swelling which was painful and discomfoting which he had to keep on scratching but he lacked the privacy to do so as the prison was full of both young and old people and the authorities therein had no capacity to afford him that privacy.
8. He was categorical that articles 28 and 43 of the Constitution of Kenya, 2010, guaranteed him of human dignity and highest attainable standards of health care which could not be attained from prisons. He asserted that this court had the authority to defend his rights as enshrined in the Bill of rights and that it must ensure that its interpretation of the Constitution promotes its purposes, values, principles, advances the rule of law and the human rights and fundamental freedoms without undue regard to technicalities as slated under articles 159 and 259 of the Constitution of Kenya.
9. He was emphatic that his continued detention in prison without the required diet and medical care was torturous, cruel, inhuman, degrading especially where the prison authorities have admitted their inability to provide such essential care. He added that if his condition was left unchecked, he would soon be unable to pass stool as it had already happened to his urinal system, a condition that would guarantee his death.

The 1st Respondent's Case

10. In response to the petitioner's petition herein, Faith Koech, an Advocate of the High Court of Kenya and prosecution counsel, swore a replying affidavit on February 14, 2025 on behalf of the 1st respondent. The same was filed on February 15, 2025.
11. She averred that the 1st respondent had been improperly enjoined herein as it was functus officio having already discharged its mandate of prosecution and it was not holding the petitioner. The petition herein was therefore technically unopposed in the absence of the 2nd respondent herein.



Legal Analysis

12. This court had therefore been called upon to determine whether or not the petitioner's old age or illness would cause him to experience undue hardships while in custody, whether the conditions in custody would be termed inhuman bearing in mind the petitioner's state of health and whether his condition would cause undue burden on prisons officers taking care of him.
13. Notably, through a letter dated November 6, 2024, Dr Abonyo Carrey, Urologist, Vihiga County Referral Hospital indicated that the Petitioner was on a follow-up in their Urology Clinic and had been diagnosed with prostate enlargement and put on medical management. He also pointed out that he required surgical intervention and close follow up post his op (sic) until he fully recovered.
14. Through a letter dated December 16, 2024, Tonny Nyadimo, Clinical Officer In Charge, GK Prisons Dispensary- Kakamega confirmed that the Petitioner had recently developed scrotal swelling with associated tenderness and an ultrasound revealed bilateral inguinal lymphadenopathy, bilaterachronic hydrocele LR, Left epididymal head cyst and bilateral testicular microlithiasis. He recommended that the Petitioner would benefit highly from intervention of consultant urologist and care of close relatives.
15. In his letter dated November 15, 2024, Julius Kapsir (SSP), Officer In Charge, Vihiga Prison also indicated that the petitioner's health as stated above had continued to deteriorate due to lack of proper diet and medical care.
16. Article 28 of the Constitution of Kenya provides that:-

“Every person has inherent dignity and the right to have that dignity respected and protected.”
17. Article 43(1)(a) of the Constitution of Kenya provides for the right to the highest attainable standard of health which includes the right to health care services.
18. Further, article 57 of the Constitution of Kenya provides for the right of elderly persons to live dignity, respect and free from abuse with reasonable care from family and State.
19. It was apparent that the petitioner was not receiving adequate care considering that the Prison authorities were facing challenges in addressing his daily needs. His sentence ought not amount to excessive punishment in view of the extent of his illness and age despite the offence that he committed. Additionally, the sentence ought not amount to cruel, inhuman and degrading treatment in view of illness.
20. The Sentencing Policy Guidelines 2023, Gazette Notice No of September 1, 2023 in relevant parts provides as follows:-
 - 3.3 Terminally ill and elderly offenders and offenders with chronic illness
 - 3.3.1 As with the case of offenders with disability the consideration should be whether in view of the illness or age, the sentence rendered is excessive. There are two dimensions worth considering. Firstly, whether the illness or old age would cause the offender to experience undue and unjustifiable hardship in custody and whether the conditions in custody would be termed inhuman bearing in mind the offenders' state. Secondly, whether the offender's condition is one that would cause undue burden on other offenders and/or prison officers taking care of them.



- 3.3.2 Article 57 of the Constitution affirms the right of older members of society to live in dignity. The sentence imposed on them must therefore not undermine this right.
- 3.3.3 The Kenya Prisons Service has made a good attempt at addressing the needs of HIV/AIDS positive offenders. However, other offenders with terminal illnesses such as those in need of chemotherapy for cancer treatment; hypertension; diabetes or other chronic illnesses, are not adequately catered for and face undue hardship while in custody.
- 3.3.4 When imposing sentencing orders against terminally ill and elderly offenders, a court should ensure that the sentence imposed does not amount to an excessive punishment in view of the extent of illness and age, as well as in light of the offence committed. In particular, the court should ensure that the sentence imposed does not amount to cruel, inhuman or degrading treatment in view of the extent of illness or age of the offender.
- 3.3.5 Non-custodial sentences – or suspended sentences - should be considered unless, in light of the nature and seriousness of the offence committed and other factors, justice would demand the imposition of a custodial sentence.”
21. This court was live to the serious nature of the charge of defilement contrary to section 8(1) as read with 8(4) of the Sexual Offences Act that the petitioner was charged with and which called for a deterrent custodial sentence. He was currently serving a sentence of fifteen (15) years imprisonment.
22. However, in the circumstances of this case, the court found it prudent to consider his Petition against his right to seek for medical care and his right to dignity.
23. In the mind of this court, the objective of sentencing on reformation and rehabilitation had to be balanced against the need to properly care for the elderly and the cost of providing for such care, in custody. It was clear that the continued incarceration of the petitioner herein would amount to inhuman and degrading treatment, at an unreasonable cost on the facility of the Prison which came from tax payers and sap the goodwill and energy of other inmates who were already struggling with their own unique challenges.
24. It was the responsibility of the State to extend care to terminally sick inmates and where it had conceded that it could not ensure proper treatment, then the court was enjoined to ensure that the human rights and fundamental freedoms of inmate were not violated, contravened and infringed upon.
25. This court mulled about putting the petitioner on a non-custodial sentence but the same was not feasible as he would not be able to adhere to the conditions of a non-custodial sentence such as Probation. He could not be put on Community Service Order under the Community Service Order Act as section 10(b) provided that:-

“Subsection (1)(b) of this Act shall not apply to a person who is convicted under the following legislation (b)the Sexual Offences Act (cap 63A).”

Disposition

26. For the foregoing reasons, the upshot of this court’s decision was that the petitioner’s petition dated and filed on was merited and the same be and is hereby allowed in terms of prayers Nos (a),(b) and (c).
27. It is hereby directed that the petitioner be and is hereby released from custody forthwith unless he be held for any other lawful cause.



28. This court wishes to sincerely thank Mr Obwatinya Advocate for having taken up this matter on a pro bono basis to ensure that none of the provisions of the Constitution of Kenya, 2010 in relation to the petitioner herein were violated, contravened and/or infringed upon.

29. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF FEBRUARY 2025

J. KAMAU

JUDGE

