



REPUBLIC OF KENYA



KENYA LAW
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**Muthoni & another v Commissioner General of Prisons & 2 others
(Constitutional Petition 20 of 2021) [2025] KEHC 12163 (KLR)
(Constitutional and Human Rights) (14 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 20 OF 2021**

AB MWAMUYE, J

AUGUST 14, 2025

**IN THE MATTER OF ARTICLES 22(1), (2), 23(1), 25, 20(1), (2), (3), 27(4), 29(D), 47, 48,
50(2), (7), 159, 165(3), (6), (7), 258(1), 259(1) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTION 203 AS READ WITH
204 OF PENAL CODE CAP 63 LAWS OF KENYA**

AND

IN THE MATTER OF SECTION 46 OF PRISON ACT CAP 90 LAWS OF KENYA

AND

IN THE MATTER OF CR. CASE NO. 111 OF 2006 AT MILIMANI LAW COURT

AND

**IN THE MATTER OF COURT OF DECISION IN H.CR.
MISC. APPLICATION NO 514 OF 2018 AT NAIROBI**

BETWEEN

ANN WAMBUI MUTHONI 1ST PETITIONER

SIMION GITHU MBUGUA 2ND PETITIONER

AND

COMMISSIONER GENERAL OF PRISONS 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT



JUDGMENT

1. The Petitioners approached this Court vide an undated Petition seeking the following orders: -
 - a. A declaration that the 1st Petitioner has a right to remission like any other prisoner and the court has no powers to deny the 1st Petitioner remission as provided by Section 46 of the Prison Act Cap 90 Laws of Kenya.
 - b. An order directing the 1st Respondent to grant remission to the 1st Petitioner as provided by Section 46 of the Prison Act Cap 90 Laws of Kenya.
 - c. This Honourable Court gives an Interpretation of Article 20, 27(1) and (4) of the Constitution and the provision of Section 46 of the Prison Act Cap 90 Laws of Kenya.
 - d. Any other order that the Court may deem appropriate in the circumstances.
2. The Petition was accompanied by an undated Supporting affidavit sworn by Ann Wambui Muthoni, the 1st Petitioner herein. She avers that she was charged with the offence of murder contrary to Section 203 as read with 204 of the Penal code and sentenced to suffer death however, the death sentence was commuted to life imprisonment on 26th October, 2016.
3. The 2nd Petitioner is a paralegal who assisted the 1st Petitioner in bringing her grievances before the Court by assisting her in drafting and filing documents.
4. The 1st Petitioner further avers that the life sentence was thereafter reduced to 20 years' imprisonment which she is currently serving at the Langata Women Prison. She contends that the sentence awarded and the manner in which it was carried out by the Courts violate her constitutional rights by failing to conform with the Bill of Rights under the Constitution of Kenya, 2010.
5. She asserts that she has a right to fair trial/remission as required by the Law and that all state organs have a fundamental duty to respect, protect, promote and fulfill the Petitioner's rights and fundamental freedoms in the Bill of Rights including the right to equality and non-discrimination. She prayed that this Honourable court issues an order to the 1st and 2nd Respondents to enforce Section 46 of the Prison Act Cap 90 Laws of Kenya and ensure all prisoners in the same situation benefit from the orders prayed in the Petition.
6. In response and in opposition to the Petition, the Respondents filed Grounds of Opposition dated 19th November 2021 based on the grounds that the Petition does not meet the qualifications of the prayers sought since the Petitioner has been heard and the issue of remission dealt with exhaustively. Further, that the Petitioner has failed to appreciate the reasoning of Justice Lessit's ruling delivered on 21st May, 2019 making the Petition scandalous, frivolous, vexatious and an abuse of the Court process and should therefore be struck out.
7. The petition was canvassed by way of written submissions, and in compliance, all parties filed and served their submissions.

Petitioners' Submissions

8. The Petitioners filed undated submissions and submitted that there is no express provision excluding murder convicts from their right of remission thus denial of such a right by the Respondents is a blatant violation of Article 27 of the Constitution of Kenya and Section 46 of the Prisons Act Cap 90



Laws of Kenya. They relied on the case of Peter K. Waweru v Republic [2006] eKLR, Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015, Sammy Musembi Mbugua & 4 others v Attorney General & Another [2019] eKLR and Brown Tunje Ndago v Commissioner General of Prisons.

Respondents' Submissions

9. The Respondents filed submissions dated 19th November 2021 where they submitted that the mitigating factors that were encouraged to be considered before sentencing in the Muruatetu case have been considered and effected by Hon. Lady Justice Lessit.
10. They aver that since Justice Lessit considered that the Petitioner should serve 20 years imprisonment from the date of arraignment, that is 6.12.2006, the Petitioner has effectively served 14 years and 9 months and is left with 5 years to serve the full sentence. They further argue that the Petitioner has spent a considerable amount of time seeking all manner of redress in various fora and if the orders are granted, forum-shopping will have succeeded.
11. They contend that Section 46(11) of the Prison Act that invalidates remission for murder cases and cases of robbery with violence has been declared unconstitutional in Criminal Petition No. 68 of 2018 Kenneth Otieno Odhiambo & 4 others vs Republic (2019) eKLR. Accordingly, the final disposition of the case is that one is entitled to remission as per *the Constitution* unless lawfully excluded by operation of Section 46 (3) and (4) of the Prison Act. The Respondents submit that a clear read of Section 46(4)(a) gives the Commissioner General discretion to consider if the reformation and rehabilitation has been met thus the Petitioner should use the time left in her sentence to deeply analyze and self-introspect in order to appreciate the magnitude of what she did vis a vis the value of life.

Analysis And Determination

12. I have considered the issues placed before me in this matter. It is important to set the record straight. It is not the duty of this court to grant remission. That is the duty of the Commissioner of Prisons in the exercise of his discretion under Section 46 of the *Prisons Act*. Section 46 (3A) states as follows: -

- “(3A) A prisoner may be deprived of remission-
- a. where the Commissioner considers that it is in the interest of the reformation and rehabilitation of the prisoner,
 - b. ...”

13. The position that it is the duty of the Commissioner in the exercise of his discretion to grant remission was clearly set out in Petition No. 16 of 2019 between Sammy Musembi Mbugua & Others vs Attorney General & others where it was held that:

“the power to grant remission should not be confused with the right to remission. While there is a right to remission, the power to exercise it and the circumstances to which it should be exercised must remain as provided for under Section 46 of the *Prisons Act*. Just like my learned brother in the above case, 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.”



14. In Petition No. 16 of 2019, this Court considered Section 46 of the *Prisons Act* and in its understanding:

“the said provision is that all criminal prisoners are, upon their admission entitled to be credited with the full amount for remission to which they would be entitled at the end of their sentence if they lost no remission of sentence...

However, just like a bank gives a borrower a loan and credits his account with the sum advanced and as the borrower continues servicing the loan, the account is debited with the sum paid, a prisoner whose “account” has been credited with the period of remission may have that credit debited with the period spent in a hospital through his own fault or for the period the prisoner is undergoing confinement as a punishment in a separate cell. This is understandable because remission is a reward for industry and good conduct and a person who is in hospital through own fault cannot be termed as being industrious while a person undergoing confinement as a punishment is definitely not of good conduct. Based on the same reasoning, a prisoner may lose remission as a result of its forfeiture for an offence against prison discipline. There is however a power given to the Commissioner- General of Prisons to deprive a prisoner of the credited remission where he considers that it is in the interest of the reformation and rehabilitation of the prisoner that the said deprivation be undertaken. In other words, remission must only inure to those prisoners who have by industry and conduct manifested that they have reformed and have been rehabilitated to be sufficiently released back to the society. Apart from the powers given to the commissioner, the Cabinet Secretary for the time being responsible for Internal security may also exercise the power to deprive a prisoner of remission where he considers that it is in the interests of public security or public order that the prisoner be so deprived.”

15. What that Section as interpreted by the Court means, is that once convicted, the prisoner’s remission is granted. However, that grant of the remission depends on the prisoner’s conduct. If she misconducts herself, she will in effect be chipping away the remission period. This is an incentive for a prisoner to ensure that during the term of imprisonment she does not misconduct herself since the primary objective of imprisonment is reformation of the prisoner. While all prisoners are entitled to remission, depending on the decision of the Commissioner General as guided by the law and the prisoner’s conduct, the actualization of the remission remains and must remain with the Commissioner General of Prisons.
16. Remission as provided under Section 46 of the *Prisons Act* is not an absolute right and can be waived by the Commissioner General upon whom the power to grant remission is vested. The power of remission therefore lies with the prison authorities and this court should not usurp such power.
17. In the Court of Appeal decision in Francis Opondo v Republic [2017] eKLR clearly shows that this court has supervisory jurisdiction over the exercise of the power of remission by the Commissioner General. Indeed, the power to grant remission lies with the Commissioner, and it is only the manner in which that Office exercises that power that becomes the concern of this Court.
18. The 1st Petitioner has not demonstrated that she challenges the exercise of the power of remission by the Commissioner. She has equally not demonstrated any misconduct by the Commissioner General in refusing to grant her remission that she is entitled to. She has equally not shown this Court that she made an application to the Commissioner General for remission which was denied to enable this Court to exercise its supervisory powers over the said decision.



19. The issue in the instant Petition does not fall on the jurisdiction of this Court but on the Commissioner General. I also cannot presume that a court of coordinate jurisdiction failed to take into consideration the relevant sentence principles before imposing sentence on the Petitioner. For the above reasons I cannot deduct any time from the 1st Petitioner's sentence.
20. Accordingly, the Petition is found to be devoid of merit. The orders sought in the Petition being declarations are declined and dismissed.
21. Each party to bear its own costs.
Orders Accordingly. File Closed Accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF AUGUST 2025.

BAHATI MWAMUYE

JUDGE

In the presence of: -

The Petitioner – Ms Ann Wambui at Lang'ata Women's prison

Counsel for the 1st & 2nd Respondents – Mr wechec

Counsel for the 3rd Respondents – No appearance

Court Assistant - Ms. Neema

