



**Otieno v Ministry of Interior & Co-ordination of National Government (State  
Department for Correctional Services) & 2 others (Petition E542 of 2022)  
[2024] KEHC 1639 (KLR) (Constitutional and Human Rights) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1639 (KLR)

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

**PETITION E542 OF 2022**

**LN MUGAMBI, J**

**FEBRUARY 23, 2024**

**BETWEEN**

**MOSES DOLA OTIENO ..... PETITIONER**

**AND**

**MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL  
GOVERNMENT (STATE DEPARTMENT FOR CORRECTIONAL  
SERVICES) ..... 1<sup>ST</sup> RESPONDENT**

**KENYA PRISON SERVICE ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**Prisoners and detainees have a right to be permitted, whenever possible, to attend burials of their close family members.**

Reported by John Ribia

***Constitutional Law** – fundamental rights and freedoms – right to human dignity – temporary release of prisoners - right of prisoners and detained persons to attend burials of their close family - whether the omission of the Ministry of Interior and Co-ordination of National Government (State Department for Correctional Services) to make rules providing for mechanisms and structures for temporary releases for persons detained or imprisoned under section 30(2)(h) of the Persons Deprived of Liberty Act curtailed the rights of imprisoned and detained Persons to be treated humanely and to have their dignity respected and protected – whether prisoners and persons detained had a right to be permitted to attend the burial of their close family members - whether the right of prisoners and detained persons to attend burial of their close family members was absolute - whether granting temporary permission to prisoners and detained persons to attend burial of their close family members would interfere with legitimate interests of correctional institutions - Constitution of Kenya, articles 28 and 51; Persons Deprived of Liberty Act section 30(2)(h).*



***Statutes** - operationalization of statutes - development of rules and regulations under statutes - statute requiring the development of rules providing for mechanisms and structures for temporary releases for persons detained or imprisoned under section 30(2)(h) of the Persons Deprived of Liberty Act - whether the failure to make such rules curtailed the rights of imprisoned and detained Persons to be treated humanely and to have their dignity respected and protected - Persons Deprived of Liberty Act section 30(2)(h).*

***Words and Phrases** – humane – definition - compassionate or benevolent-inflicting the minimum pain - Concise Oxford English Dictionary, Eleventh Edition.*

### **Brief facts**

The petitioner asserted that following his mother’s demise on July 12, 2021, he was not allowed to attend her funeral by the Prisons Department. The petitioner contended that that was inhumane and in breach of his right to dignity not only to himself but also to other pre-trial detainees and prisoners in similar circumstances who continued to suffer the similar treatment. The petitioner stated that the rules of the prisons system in Kenya did not provide for the manner in which pre-trial detainees and prisoners could be allowed to attend funeral or burial of their loved ones. He contended that the absence of legal provisions to allow for such attendances amounted to discriminatory application of the law which contravened articles 27, 28 and 51(1) of the Constitution.

### **Issues**

- i. Whether the failure by the Ministry of Interior and Co-ordination of National Government (State Department for Correctional Services) to make rules providing for mechanisms and structures for temporary releases for persons detained or imprisoned under section 30(2)(h) of the Persons Deprived of Liberty Act curtailed the rights of imprisoned and detained Persons to be treated humanely and to have their dignity respected and protected.
- ii. Whether prisoners and persons detained had a right to be permitted to attend burial of their close family members and if so, whether it was absolute.
- iii. Whether granting temporary permission to prisoners and detained persons to attend burial of their close family members would interfere with legitimate interests of correctional institutions.

### **Held**

1. The Constitution underscored that persons detained or imprisoned retained all their rights as human beings. It tasked Parliament to enact a legislation that shall ensure humane treatment of persons legally detained or imprisoned.
2. The Persons Deprived of Liberty Act (the Act) among others had provisions that were geared towards ensuring that persons detained, held in custody or imprisoned were held in conditions that upheld their human dignity and their health. Some of the rights given prominence in the Act included the right to humane treatment and human dignity, the right to due process of the law, right to reasonable accommodation, nutritious diet, right to education and to access information, right to be visited, family days among others.
3. Humane treatment of persons detained, imprisoned or held in custody’ existed within the precincts of the facility they were held and no more. The Constitution was a living thing, its growth seen through application and interpretation. Section 30(2)(h) of the Persons Deprived of Liberty Act gave the pointer that even Parliament understood article 51 of the Constitution beyond the four walls of institutional confinement and considered that such persons could have needs that could not necessarily be addressed inside the facility they were incarcerated. That was why Parliament enacted section 30(2) (h) of the Persons Deprived of Liberty Act that provided that the Cabinet Secretary could make regulations to give effect to instances when a person deprived of liberty could be allowed to leave the institution in which the person was held.
4. Article 24 of the Constitution provided that any restrictions on the rights or fundamental freedoms had to be reasonable and justifiable in an open and democratic society based on human dignity,



- equality and freedom taking into account all relevant factors including the importance and purpose of limitation as well as the nature and extent of limitation among others. Restrictions imposed on rights enjoyed by others when it came to prisoners must only be those that were necessary and proportionate to the legitimate objective of incarceration.
5. The Constitution and the Persons Deprived of Liberty Act did not expressly outlaw granting of temporary leave of absence to prisoners or detained person from the institutions of confinement whether it was for purposes of attending burial of their loved ones or for any other deserving reason. Granting temporary leave of absence to the prisoners or persons detained was not expressly granted either. Nonetheless, in the case of Persons Deprived of Liberty Act, section 30(2)(h) the intention towards granting such permissions was indicated through the mandate given to the Cabinet Secretary to enact regulations that would make that possible.
  6. The United Nations Standard Minimum rules for Treatment of Offenders were neither general rules of International law nor were they a treaty or a convention to be applied automatically as if they were the laws of Kenya even in absence of any particular legislation directly addressing the subject matter raised by the petitioner. That was not to say those rules had relevance to Kenya whatsoever. The rules could not be legally binding but they were universally accepted standards designed as the good practice or model guide on treatment of offenders. Kenya formed part of the civilized world and could not remain oblivious about the existence of the rules. The Constitution as read together with the Persons Deprived Liberty Act demanded that imprisoned, detained or persons detained in custody must be treated humanely.
  7. Article 20(3) of the Constitution required that when applying the bill of rights, the court should develop the law to the extent that it did not give effect to a right or fundamental freedom. In developing judge made law or jurisprudence on the law relating to human rights, the court must be cautious and resist the temptation of arrogating itself law-making power under the pretext of developing the law. Nevertheless, it was given the latitude to adopt an interpretation that mostly favoured or embraced the enforcement of a recognized right or fundamental freedom.
  8. The right of prisoners and detained persons' entitlement to leave of absence from institutional confinement was not expressly provided under the Constitution, the Prisons Act or the Persons Deprived of Liberty Act. However, in the context of provisions of section 30(2)(h) of the Persons Deprived of Liberty Act, the fact was that in Kenya's recognition of the right to leave of absence from institutional confinement was by implication a reality as all that remained was enactment of the regulations to make the enjoyment of that right by prisoners and detained persons possible. Section 30(2)(h) empowered the cabinet secretary to make regulations generally to give effect to the provisions of the Act which regulations provide for instances when a person deprived of liberty could be allowed to leave the institution in which the person was held.
  9. A blanket denial that precluded prisoners and detained persons from being granted an opportunity to mourn their loved ones, such as where a parent was denied the opportunity to bury a child or vice-versa was what the petitioner considered dehumanizing. It did not demonstrate a compassionate approach to their psychological well-being. Human experience had shown that giving last respect facilitated healing and closure hence should not be taken away. The right of a prisoner or detained person to temporarily be granted leave of absence to attend burial or funeral of a close relative was rooted in the principle of humane treatment and inherent dignity as a human being.
  10. Section 30(2)(h) of the Persons Deprived of Liberty Act as read with the provisions of article 51(1) of the Constitution, firmed up the right of prisoners, detained persons and persons held in custody to be granted temporarily leave of absence from institutional confinement to deal with exceptional deserving situations. The only impediment had been the lack of formulation of rules to provide a mechanism and structure for the implementation by the Cabinet Secretary concerned.



11. Incarceration served the purpose of retribution and deterrence. Nevertheless, those two objectives were not the only basis for incarceration. While incarceration served the aim of retribution by physically confining the offender and in that regard deterred such offenders by averting re-offending and those that were likely to commit such crimes, those two aims were basically conventional ones. As society continued to deal with crime, more progressive objectives continue to develop. Rehabilitation and re-socialization were part of those aims as offenders must also be prepared for the exit from the facility at one time. Humane treatment of prisoners was given emphasis and that could be confirmed by the development of the United Nations Standard Minimum Rules on Treatment of Prisoners. Kenya in its Constitution and a Statute also provided for the humane treatment of the Prisoners and Persons detained. The aim of incarceration was more than just punishment, it was also to rehabilitate and prepare the inmates for re-integration in the society.
12. Granting temporary permission to prisoners to attend burials, funerals or even death bed visits was not contrary to the aims of incarceration, rather, it was an affirmation that prisoners or the persons detained remain members of that community to which they anticipate to return at the end of their sentences. The temporary leave was for a short duration for a specific reason and did not erase the fact that they were serving a sentence and must remain under the strict control of the prison authority.
13. Granting of such leave would foster inequality and bring resentment if some offenders were granted such permission and others were denied. Such rules were to be developed by ensuring that no discrimination prevailed based on any of the prohibited grounds expressly disallowed by the Constitution. In all other cases, differentiations could be made, as long as they could be reasonably justified. It was not every differentiation that amounted to discrimination.
14. Whereas permission to prisoners and detained persons to attend burial or funerals of their close relatives fell within the principles of humane treatment of offenders under article 51 of the Constitution; the decision to grant such permission could not be made mechanically. It must take into account all the relevant factors including any compelling reasons. In certain instances, a refusal could be justified. It was not every request that qualified. The right was not absolute as it must be balanced with all the relevant considerations. Every request must be assessed on its own merits.
15. The petitioner made his request to the Commissioner General of Prison through the Officer in charge of Prison he was serving in. The Prisons Act did not provide for grant of temporary leave of absence. The Commissioner General was thus not in a position to grant such leave as there was no procedural framework for the same. The Commissioner General did not violate the petitioner's rights.
16. The 1<sup>st</sup> respondent was the one tasked with the responsibility of formulating the rules to provide for temporary leave of absence for the Persons Deprived of Liberty Act in exceptional instances. He had failed to formulate the rules since 2014 when the Act was enacted and that was detrimental to imprisoned or detained persons who could have such needs that were deserving as the instant case demonstrated. The need to formulate those rules to guide the officers in charge of institutions of confinement holding imprisoned or detained persons compels the 1<sup>st</sup> respondent to perform that duty.
17. Under the rule of law principle, it was improper to refuse or neglect to carry out a mandate imposed by legislation especially when the inaction was adversely affecting others. The absence of the rules was an impediment to the enjoyment of the imprisoned, detained and persons held in custody from being granted temporarily leave of absence to attend burials of their loved ones or other deserving cases.
18. Allowing prisoners and detained persons temporary leave of absence to attend funerals, burials or death bed visits of their loved ones had the calming effect to their emotional and psychological well-being and was anchored on humane treatment of prisoners under article 51 of the Constitution. That was a constitutional dictate that found support in rule 70 of the UN Standard Minimum Rules for Treatment of Offenders and was equally a right that was accorded to inmates in several other jurisdictions.



19. The right was not absolute. It was subject to other relevant factors which must be taken to account and could be declined if there were compelling reasons not to grant it. Rule 70 of the UN Standard Minimum Rules for Treatment of Offenders had a rider, which provided that whenever circumstances allowed, the prisoner should be authorized to go, either under escort or alone. Before any determination was made all the relevant facts must be laid bare. For instance, information on whether there had been an escape attempt or if he was a violent person or not, whether there were resources for facilitating the prisoner's request or if the prisoner's family was able to cater for the expenses, how long the period of absence was anticipated (if more than a day, where would the prisoner held) or if the funeral or burial could take place in the presence of persons that were hurt by the crime and the likely consequence of his presence there.
20. There was no background information that could assist the High Court in making an informed decision and it was difficult for the court to make a balanced assessment. Had the rules contemplated under section 30(2)(h) of the Persons Deprived of Liberty Act been in place, those procedural requirements would have been addressed adequately hence the absence of those rules to guide the process continued to complicate the assessment. Although the court upheld the right of prisoners to mourn their loved ones by being allowed to attend their burials, funerals and death bed visits, the decisions could not be made without regard to the safety of the prisoners and the general public. That would defeat the whole essence of incarceration and compromise the ends of justice.
21. Prisoners and persons detained had a right to be permitted, whenever possible, to attend burials or funerals of their close relative within the principle on humane treatment of prisoners and persons detained under article 51 of the Constitution and respect for their inherent dignity under article 28 of the Constitution. Nevertheless, the right was not absolute had to be balanced to avoid prejudicing the safety of the public or that of the person detained or imprisoned.
22. Article 23(3) of the Constitution empowered the High Court to grant various reliefs to enforce fundamental rights and freedoms. The use of the opening words, 'may grant an appropriate relief' and then 'including' before the specific reliefs under article 23 had two important implications. Firstly, the words 'may grant an appropriate relief' gave the court a wide discretion to fashion the most suitable relief depending on the circumstances of each particular case. Secondly, the use of word 'including' coming immediately before listing down of the specific reliefs the court may grant lay emphasis on the fact that that list was not exhaustive.

*Petition partly allowed.*

### **Orders**

- i. *Declaration issued that all sentenced prisoners and pretrial detainees held in custody had the right to be treated humanely which right included permitting them to attend funerals and burials of their close family members or for any other exceptional deserving reason unless there were compelling reasons for declining granting of permission.*
- ii. *Declaration issued that the 1<sup>st</sup> respondent's omission to make rules providing for mechanisms and structures for temporary releases for persons detained or imprisoned under section 30(2)(h) of the Persons Deprived of Liberty Act curtailed the rights of imprisoned and detained Persons to be treated humanely and to have their dignity respected and protected thus violated articles 28 and 51 of the Constitution.*
- iii. *An order of mandatory injunction was issued directing the 1<sup>st</sup> respondent to make the rules under section 30(2)(h) of the Persons Deprived of Liberty Act within six (6) months from the date of the instant order.*
- iv. *Each Party was to bear its own costs.*

### **Citations**

#### **Cases**

#### **India**



*Gunasekaran v Deputy Inspector General of Prison, The Superintendent Central Prison Madurai and Inspector NIB-CID Theni District* WP(MD) No 229 of 2024 - (Explained)

### **Australia**

*Johnson Tyre Foundry Pty Ltd v Maffra Shire Council* (1948) 77 CLR 544 - (Explained)

### **Regional Court**

*Ploski v Poland* Application Number 267/61/95 - (Explained)

### **Lesotho**

*Kamoli v Commissioner of Lesotho Correctional Services and others* CIV/APN/251/2021; Civ 90 LSHC ( 5 August 2021) - (Explained)

### **Statutes**

#### **Kenya**

1. Constitution of Kenya articles 2 (5)(6); 10 (2) (b); 19; 20; 21; 23 (3); 34; 25; 27; 28; 29 (f); 35; 45; 47; 48; 50 (1); 51 (1), (3); 165 — (Interpreted)
2. Persons Deprived of Liberty Act (cap 90A) section 30(2)(h) — (Interpreted)
3. Prisons Act (cap 90) article 5 — (Interpreted)

#### **India**

Constitution of India article 21 — (Interpreted)

#### **Poland**

Code of the Enforcement of Sentences, 1969 article 59 — (Interpreted)

#### **Lesotho**

Correctional Services Act, 2016 (Act No 3 of 2016) section 44 — (Interpreted)

### **Texts**

Autores, V., (Ed) (2008), *Concise Oxford English Dictionary* New York: Oxford University Press Revised Edition 11th Edn

### **Instruments**

1. European Convention on Human Rights, 1950 article 8
2. Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 1955 rules 70, 91

### **Advocates**

Ms *Eve Mbeda*, State Counsel, for the respondents.

## **JUDGMENT**

### **Introduction**

1. The petition dated December 14, 2022 was filed under article 22(1) of the [Constitution](#) for the alleged contravention of articles 19, 20, 21, 23, 25, 28, 35, 45, 47, 48, 50(1), 51(1) and 165 of the [Constitution](#).
2. The litigation revolves around the respondents' alleged failure to avail mechanisms and structures in Kenya Prisons and Borstal institutions to grant an opportunity to pre-trial detainees and prisoners to condole and attend the funeral services of their departed family members.
3. Accordingly, the petitioner seeks the following relief against the respondents:
  - a. The court be pleased to hold and declare that all sentenced prisoners and pretrial detainees continue to enjoy all the rights and fundamental freedoms in the Bill of Rights including



sepulchral rights as prescribed under article 51 of the Constitution as read together with rule 70 of the Nelson Mandela Rules.

- b. The court be pleased to hold and declare that the respondents herein have acted in violation of the provisions of the Constitution and the national values and principles of governance embodied under article 10(2)(b) of the Constitution.
- c. The court be pleased to hold and declare that the respondents herein have infringed on, infringed and violated the petitioners right to inherent dignity and to have that dignity respected and protected as decreed and protected under articles 27, 28 and 51(1) of the Constitution.
- d. The court be pleased to hold and declare that the respondents herein have infringed on, infringed and violated the petitioner's sepulchral rights right to mourn and grieve the death of his beloved mother.
- e. The court be pleased to hold and declare that all sentenced prisoners and pre-trial detainees have the right to mourn and take part in the funeral and attend the burial of their loved ones.
- f. An order of prohibition do issue prohibiting the respondents herein by themselves, their servants, agents or employees from denying the 1<sup>st</sup> petitioner, or pretrial detainees or sentenced prisoners from taking part in funerals and attending supervised burial functions of their loved ones, and/ or family members.
- g. The court be pleased to award the 1<sup>st</sup> petitioner general damages against the respondents herein jointly and severally for breach of his fundamental rights and freedoms which also include his sepulchral rights-right to mourn and grieve the death of his beloved mother.
- h. The court be pleased to order and direct the 2<sup>nd</sup> respondent to escort the 1<sup>st</sup> petitioner to his deceased mother's grave in Yimbo Usenge, Bonda sub-county, Siaya County to pray, lay a wreath of flowers and pay his last respect.
- i. The costs consequent upon this petition be borne by the respondents in any event on indemnity basis.
- j. The court do make any such other or further orders as it may deem meet and expedient in the circumstances to remedy the violation of the petitioners' fundamental rights and freedoms.

### **The Petitioner's Case**

4. The petitioner asserts that following his mother's demise on July 12, 2021, he was not allowed to attend her funeral by the Prisons Department. The petitioner contended that this was inhumane and in breach of his right to dignity not only to himself but also to other pre-trial detainees and prisoners in similar circumstances who continue to suffer the similar treatment.
5. The petitioner stated that the rules of the prisons system in Kenya do not provide for the manner in which pre-trial detainees and prisoners may be allowed to attend funeral or burial of their loved ones. He contended that the absence of legal provisions to allow for such attendances amounts to discriminatory application of the law which contravenes articles 27, 28 and 51(1) of the Constitution.
6. The petitioner pointed out that under section 5 of the Prisons Act, the Commissioner General of Prisons is given the general power to make regulations in a manner that upholds the Constitution. Further, that by virtue of articles 2(5) and (6) of the Constitution, the respondents are obligated under



the [UN Standard Minimum Rules for the Treatment of Prisoners \(the Nelson Mandela Rules\)](#) and other international instruments to enrich the regime of protection of prisoners.

### **The Respondents' Case**

7. In response, the respondents filed grounds of opposition dated June 12, 2023 on the premise that:
  - i. The petitioner claims a fundamental right to attend the burial of loved ones, but no such right is expressly guaranteed by the [Constitution](#). While the [Constitution](#) enshrines certain fundamental rights and freedoms, it is essential to note that these rights are not absolute and can be subject to reasonable limitations. The absence of explicit constitutional protection for the claimed right weighs against the petitioner's case.
  - ii. Correctional institutions have legitimate penological interests in maintaining order, security, and the effective administration of justice. Allowing prisoners unrestricted access to attend funerals could disrupt the operations of correctional facilities, compromise security measures, and pose potential risks to public safety. The court must balance the individual rights of prisoners with the broader interests of the correctional system and the welfare of society as a whole.
  - iii. While physical attendance at funerals may be challenging for prisoners, alternative means of participation and emotional support can be provided. These alternatives, such as allowing communication with family members, providing counseling services, or facilitating memorial services within the correctional facility, can address the emotional needs of prisoners without compromising security or straining limited resources.
  - iv. Granting the petitioner's claim could lead to disparities within the prison population, potentially causing dissatisfaction and discontent among other prisoners. Ensuring equal treatment among prisoners is crucial for maintaining order and harmony within correctional facilities. Allowing certain prisoners to attend funerals based on individual circumstances may create an appearance of preferential treatment and undermine the principle of equality.
  - v. While the petitioner seeks to exercise their rights, it is equally important to consider the rights of victims and their families. Granting the petitioner's claim could potentially reopen wounds and inflict emotional distress on victims or their loved ones. Balancing the rights of prisoners with the rights and well-being of victims and their families is crucial to achieve a fair and just outcome.
  - vi. This petition is frivolous vexatious and an abuse of the court process.

### **Petitioner's Submissions**

8. The petitioner did not file written submissions. However, he was briefly given an opportunity by the court to submit orally.
9. The petitioner contended that the [Prisons Act](#) cap 90 does not have any clause that bars prisoners from being allowed to go and pay their last respects to their loved ones. He accordingly urged the court to be guided by the principle that what the law does not prohibit, it allows.
10. Reacting to the respondent's argument that permitting temporary release would infringe on public safety, the petitioner contended that the prison authority has instruments of restraint to address that concern. On the same breath, the Petitioner pointed out presently prisoners get permission to go to hospitals, banks with only the authority granted by the Officer in Charge, not even by the court.



11. Citing article 2(5) and 2(6) of the Constitution, he argued that Kenya has ratified the Standard minimum rules for treatment of offenders which rules recognize the right of prisoners to attend the burial of their relatives and loved ones.

### **Respondents' Submissions**

12. State Counsel, Eve Mbede on behalf of the respondents filed written submissions dated June 10, 2023. Counsel sought to submit on the following issues: whether the petitioner's claim infringes on the legitimate interests of correctional institutions; whether the petitioner's claim is a fundamental right that is protected by the Constitution; whether pre-trial detainees should be allowed to attend burials for their loved ones and whether the claim for damages is merited.
13. On whether the petitioner's claim infringes on the legitimate interest of the correctional institutions; counsel answered in the affirmative and submitted the petitioner's claim is against principles of criminal law. She submitted that correctional institutions have a legitimate interest in maintaining security, order, and control within the facilities which ensures the overall functioning of the prison system. As such granting temporary release to prisoners to attend funerals will create potential risk of escape attempts, disruption of institutional order or harm to inmates and the public.
14. Counsel further submitted that the purpose of incarceration is to impose retribution on individuals who have committed criminal acts. Thus, by depriving offenders of their liberty through incarceration, society expresses its disapproval of their wrongful actions and seeks to restore a sense of balance and justice while deterring similar acts by the individual and the public in general. Counsel observed that the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) do recognize the importance of maintaining family relationships but they also insist on the necessity of security measures and the discretion of correctional authorities in determining the appropriateness of temporary release.
15. Counsel took cognizant of the petitioner's plight and explained that such situations can as well be handled through alternative means of providing support and closure should whereby correctional institutions can provide counseling services, religious support, and communication channels for prisoners to express their condolences or participate in memorial services within the facility.
16. Ms Mbede further submitted that correctional institutions face various challenges ranging from limited budgets, overcrowding, and staffing constraints. She argued that are pressing issues that require prioritization of resources in order to maintain the smooth operation of the prison system as opposed to allocating resources for escorting prisoners to attend funerals that will place undue burden on the already strained resources, potentially compromising the functioning of correctional facilities and impeding the fulfillment of other essential responsibilities.
17. To this end, counsel argued that, the legitimate interests of correctional institutions, including security, order, and consistency, outweighs the petitioner's claim to attend the funeral of their loved ones while serving their sentence.
18. On the second issue counsel admitted that constitutional rights apply to all persons equally but the rights and freedoms, save for those protected under article 25 are not absolute. Considering this, counsel submitted that the petitioner's claim must be examined in light of article 24 of the Constitution and of the broader interests of prison management and public safety.
19. In that regard to pre-trial detainees, counsel vehemently opposed their temporary release to allow them to attend funerals of their loved ones stating that granting this kind of leave will undermine the integrity of the bail system and risks compromising the administration of justice.



20. In the end, counsel categorical that the petitioner was not entitled to the any relief including damages as the petition lacks merit. Further because the respondents do not bear any responsibility for the petitioner's detention. For these reasons, counsel urged the court to dismiss the petition.

### **Analysis and Determination**

1. Does the claim to attend burial of a close family member by the petitioner and any other person who is lawfully detained or imprisoned have a legal or constitutional backing?
2. Will granting of temporary leave to prisoners and detained persons to attend burials of close family members interfere with the legitimate aims of incarceration?
3. Are there valid concerns and risks associated with permitting prisoners and other detained persons to attend burials of close family members?
4. Having regard to the above and considering the circumstances of this case, were the rights of the petitioner violated by being denied permission to attend the burial of his mother?
5. Is the petitioner entitled to any of the reliefs sought?

### **Does the claim to attend burial of a close family member by the petitioner and any other person who is lawfully detained or imprisoned have any legal or constitutional backing?**

21. In the supporting affidavit to the petition, the petitioner swore that sentenced prisoners and pre-trial detainees in various Kenyan Prisons have suffered due to the absence of proper mechanisms and structures within Kenyan Prisons to grant leave of absence to allow them condole with their families and attend burial ceremonies of their loved ones or family members. The petitioners contended that the absence of these provisions is inhumane and infringes on prisoner's dignity and value as human beings contrary to articles 27, 28, and 51(1) of the Constitution. That the limitation imposed by absence of this arrangement is unreasonable, and unjustifiable in an open and democratic society.
22. The petitioner further contends that pursuant to article 2(5) and 2(6) of the Constitution, Kenya is obliged to apply the UN Standard Minimum Rules for Treatment of Prisoners (Nelson Mandela Rules) 70 and 91 to enrich the regime of protection of prisoners. That the failure to grant leave to pre-trial detainees and sentenced prisoners to bereave with their families or attend burials of close family members subjects them to psychological and mental torture which is contrary to the the Constitution and International standards.
23. Commenting on the lack of an express provision in the Constitution allowing prisoners or persons in lawful detention to attend burial of their loved ones, the petitioner submitted and urged the court to apply the legal maxim that states that "everything that is not forbidden is allowed" as a guide to determining this particular issue. He contended that the Prisons Act does not have any express provision that bars prisoners from being allowed to go and pay last respect to their loved ones. He stated:

“... Around the petitioner's mother, clear love and memories stick such that any rule of action that touch on a human should touch on the death of the relatives in prison so that it allows sentenced inmates under exceptional circumstances to attend burial of their loved ones...”
24. Ms Eve Mbeda for the respondent acknowledged that United Nations Standard Minimum Rules for Treatment of Prisoner (Nelson Mandela Rules) and comparative jurisprudence stresses the need to maintain family and social ties for prisoners. However, she argued that the requirement must be counterbalanced with security concerns. She urged the court to consider that this objective can still be



met through alternative means of support and closure such as providing counselling services, religious support and channels for prisoners to express their condolences including participation in memorial services within the facility. Counsel noted that under article 51(1) of the Constitution

“A person detained, held in custody or imprisoned under the law retains all rights and fundamental freedoms in the Bill of rights, except to the extent that any particular right or fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned”.

Ms Mbeda asserted that this constitutional provision does not explicitly provide for the right for prisoners to attend burials of their loved ones. Counsel thus submitted:

“...If the petitioner wishes to enjoy certain fundamental rights and freedoms that are ordinarily enjoyed by persons who are not in lawful custody, then he ought to have sought for review of his judgment or applied for appeal of his sentence to either lead to an acquittal or shorter sentence. This would subsequently allow him to attend to attend funerals of his loved ones and other social gatherings and activities including weddings amongst others...”

25. Kenya’s Constitution underscores that persons detained or imprisoned retain all their rights as human beings. It proceeds to task Parliament to enact a legislation that shall ensure humane treatment of persons legally detained or imprisoned. Article 51 of the Constitution states:

Rights of persons detained, held in custody or Imprisoned

1. A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.
- (2) A person who is detained or held in custody is entitled to petition for an order of *habeas corpus*.
- (3) Parliament shall enact legislation that—
  - (a) provides for the humane treatment of persons detained, held in custody or imprisoned; and
  - (b) takes into account the relevant international human rights instruments.

26. Sub-article 3 of article 51 specifically imposes a duty on Parliament to enact legislation that ‘provides for humane treatment of persons detained, held in custody or imprisoned.’

27. Concise Oxford English Dictionary, Eleventh Edition defines the word ‘humane’ to mean: ‘compassionate or benevolent-inflicting the minimum pain.’

28. In essence, the Constitution directs Parliament to come up with a law that assimilates compassion while dealing with the people held in custody, detained or imprisoned as way of ensuring that their human dignity respected and protected.

29. Parliament in compliance with article 51(3) of the Constitution enacted the Persons Deprived of Liberty Act No 23 of 2014. The preamble to the Act declares that it is

“An Act of Parliament to give effect to articles 29(f) and 51 of the Constitution and for connected purposes.”



30. The Act among others has provisions that are geared towards ensuring that persons detained, held in custody or imprisoned are held in conditions that uphold human dignity and their health. Some the rights given prominence in the Act include the right to humane treatment and human dignity, the right to due process of the law, right to reasonable accommodation, nutritious diet, right to education and to access information, right to be visited, family days among others.

31. On the face of it, one might be tempted to peremptorily agree with submissions by Ms Mbeda that

‘If the petitioner wishes to enjoy certain fundamental rights and freedoms that are ordinarily enjoyed by persons who are not in lawful custody, then he ought to have sought for review of his judgment or applied for appeal of his sentence to either lead to an acquittal or shorter sentence’

and thus hastily conclude that humane treatment of ‘persons detained, imprisoned or held in custody’ exists within the precincts of the facility they are held and no more. Our Constitution however is a living thing, its growth seen through application and interpretation. A look at section 30(2)(h) of the Persons Deprived of Liberty Act gives the clearest pointer that even our Parliament understood Article 51 of the Constitution beyond the four walls of Institutional confinement and considered that such persons might have needs that may not necessarily be addressed inside the facility they are incarcerated. That is why Parliament enacted section 30(2)(h) of the Persons Deprived of Liberty Act which states:

S 30- Regulations

1) The Cabinet Secretary may make regulations to give effect to the provisions of this Act.

2) Without prejudice to the generality of sub-section (1), such regulations may provide for-

.....

.....

h) instances when a person deprived of liberty may be allowed to leave the institution in which the person is held.

32. Article 24 of the Constitution, provides that any restrictions on the rights or fundamental freedoms must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including the importance and purpose of limitation as well as the nature and extent of limitation among others. This means that even restrictions imposed on rights enjoyed by others when it comes to prisoners must only be those that are necessary and proportionate to the legitimate objective of incarceration.

33. Both the Constitution and the Persons Deprived of Liberty Act do not expressly outlaw granting of temporary leave of absence to prisoners or detained person from the institutions of confinement whether it is for purposes of attending burial of their loved ones or for any other deserving reason. By the same breath, granting temporary leave of absence to the prisoners or persons detained is not expressly granted either. Nonetheless, in the case of Persons Deprived of Liberty Act, section 30(2) (h) the intention towards granting such permissions is indicated through the mandate given to the Cabinet Secretary to enact regulations that would make this possible. In the absence of the any explicit provisions prohibiting the grant of such leaves, the petitioner urges this court to resort to the United Nations Standard Minimum Rules for Treatment of Prisoner (Nelson Mandela Rules) and find that they apply in Kenya by dint of article 2(5) and 2(6) of the Constitution.



Rule 70 provides of *United Nations Standard Minimum Rules for Treatment of Offenders* States:

‘The prison administration shall inform a prisoner at once of the serious illness or death of a near relative or any significant other. Whenever circumstances allow, the prisoner should be authorized to go, either under escort or alone, to the bedside of a near relative or significant other who is critically ill, or to attend the funeral of a near relative or significant other’

34. Can this rule be applied under article 2(5) and (6) of our *Constitution* to fill the void left by lack of any express provision in our domestic law on this issue as suggested by the petitioner?

Article 2(5) provides thus:

“The general rules of International law shall form part of law of Kenya”

Article 2(6)

“Any treaty or convention ratified by Kenya shall form part of the law of Kenya”

35. My humble view is that the *United Nations Standard Minimum rules for Treatment of Offenders* are neither general rules of International law nor are they a treaty or a convention to be applied automatically as if they were the laws of Kenya even in absence of any particular legislation directly addressing the subject matter raised by the petitioner. This is not to say these rules have relevance to Kenya whatsoever. The rules may not be legally binding but they are universally accepted standards designed as the good practice or model guide on treatment of offenders. Kenya forms part of the civilized world and cannot therefore remain oblivious about the existence of these rules. In any case, Our *Constitution* as read together with the Persons Deprived Liberty Act demands that imprisoned, detained or persons detained in custody must be treated humanely.
36. Article 20(3) requires that in applying the Bill of rights, the court should be guided by the following principles among others:
- a. to develop the law to the extent that it does not give effect to a right or fundamental freedom
  - b) adopt an interpretation that most favours the enforcement of a right or fundamental freedom.
37. The phrase to ‘develop the law to the extent that it does not give effect to a right or fundamental freedom’ in my view means that in developing the judge made law or jurisprudence on the law relating to human right, the court must be cautious and resist the temptation of arrogating upon itself the law-making the power under in the pretext of developing the law. Nevertheless, it is given the latitude to adopt an interpretation that mostly favours or embraces the enforcement of a recognized right or fundamental freedom.
38. Venturing now into whether or not prisoners and detained persons are entitled to leave of absence from Institutional confinement, one finds that even though this right is not expressly provided under the *Constitution*, the *Prisons Act* or the *Persons Deprived of Liberty Act*, in the context of provisions of section 30(2)(h) of the *Persons Deprived of Liberty Act* the fact is that in this Country recognition of the right to leave of absence from institutional confinement is by implication now a reality as as all what remains is enactment of the regulations to make the enjoyment of this right by prisoners and detained persons possible. This section empowers the Cabinet Secretary to make regulations generally to give effect to the provisions of the Act which regulations to provide for ‘instances when a person



deprived of liberty may be allowed to leave the institution in which the person is held.' It should also be remembered that this provision contained in a Statute whose preamble says it is

“An Act of Parliament to give effect to articles 29(f) and 51 of the Constitution and for connected purposes.”

39. Death of a close relative is one of the most difficult emotional experience that any human being has to deal with. Prisoners and detained persons are not an exception. They too experience those intense shocking moments when they lose their loved ones. A blanket denial that precludes prisoners and detained persons from being granted an opportunity to mourn their loved ones, such as where the parent is denied the opportunity to bury a child or vice-versa is what the petitioner considers dehumanizing, it does not demonstrate a compassionate approach to their psychological well-being. Compassionate impacts on their mental well-being and works beyond improvement of the institution in which they are confined. It means offering understanding and support during such difficult times. Human experience has shown giving last respect facilitates healing and closure hence should not be lightly taken away. The right of a prisoner or detained person to temporary leave of absence to attend burial or funeral of a close relative is rooted in the principle of humane treatment and inherent dignity as a human being.
40. Comparative jurisprudence confirms this right is recognized beyond our borders and is enforced in many jurisdictions across the world. In the Indian case of Gunasekaran v Deputy Inspector General of Prison, The Superintendent Central Prison Madurai and Inspector NIB-CID Theni District, Madras High Court WP (MD) No 229 of 2024; a writ petition had been filed seeking the direction of the 2nd respondent to grant leave for five days ie, from 05.01.2024 to 09.01.2024 to the petitioner's grandson and the petitioner's son who were confined at Central Prison, Madurai, to attend the funeral of a close relation. Leave was denied by the Prison Authorities hence a petition was filed. The Prosecutor argued that the rules did not permit prisoners charged with certain crimes to be granted leave of absence. The judges dismissed the objection and allowed the petition stating thus:

“...In the present case, the reason that has been assigned seeking for leave of the detenus is that they want to attend the 16<sup>th</sup> day ceremony of the mother and sister of the detenus respectively. Considering the relationship and the importance of the ceremony... which attaches a lot of sentimental value for a son and brother, we are of the considered opinion that rules should not come in the way and stop the son and brother from attending the ceremony. Rules are meant to bring consistency while granting leave to the convict prisoners and to keep the movement of the convicts outside the jail under control. But, however, when it comes to the relationship between a mother and a son, the rule has to be mended and it will be tyrannical to deprive a son from attending death ceremony of his own mother. After all, even a prisoner, who has committed a heinous crime is entitled to be treated as a human being and such a right is guaranteed under article 21 of the Constitution of India ...”

41. The Code of the Enforcement of Sentences 1969 of Poland provides as follows in article 59:

- “1. In compassionate cases the penitentiary judge may allow the prisoner to leave the prison, if necessary under escort of Prison Officers, for a period not exceeding five days.
2. In urgent cases the prison governor may grant temporary leaves for a period described in 1.



3. The leave described in article 59 may be granted only after permission has been obtained from the organ at whose disposal the detainee remains...”
42. The above provisions were put to test before the European Court of Human Rights in the case of *Ploski v Poland* Application Number 267/61/95; when Ploski who was at the time in custody was denied permission to attend the funerals of his two parents. The state’s refusal was weighed against article 8 of the *European Convention on Human Rights* which provides:
- “1. Everyone has the right to respect for his private and family
  2. There shall be no interference by public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for prevention of disorder of crime, for protection of health or morals, or for protection of rights and freedoms of others...”
43. The court finding for the applicant; held *inter alia*:
- “...It is aware of the problems of a financial and logistical nature of escorted leaves and instances of shortage of police and prison officers. However, taking into account the seriousness of what is at stake, namely refusing an individual the right to attend the funerals of his parents, the court is of the view the respondent state could have refused attendance only if there had been compelling reasons and if no alternative solution-like escorted leaves-could be found...”
44. The High Court of Lesotho in the case of *Tlali Kennedy Kamoli and Commissioner of Lesotho Correctional Services and 2 other* CIV/APN/251/202 was called upon to decide on whether a prisoner awaiting trial could be granted leave to attend a funeral and whether the correctional authorities were conferred with discretion to grant such leave. Not being a convicted prisoner, the applicant could not seek leave of absence from the Commissioner General as allowed under section 44 of *Correctional Services Act* No 3 of 2016 and it was thus argued that he should instead apply for bail. The Honourable Chief Justice SP Sakaone rejected that contention holding thus:
- “...Parliament has clothed the Commissioner with overall administration of correctional facilities. In this regard, the Correctional Services Act, 2016 has one of its objects, the securing of ‘humane treatment of offenders in accordance with universally acceptable human rights standards.’ This object enjoins the correctional authorities to follow and apply the *UN Standard Minimum Rules for Treatment of Offenders, 1957* and other International Protocols to enrich the regime of protection of prisoners...The Commissioner is enjoined by values of presumption of innocence, dignity and humanity to consider in good faith, a request for leave to attend a funeral and provide necessary appropriate escort. For a ‘Man’s inhumanity to man makes countless thousands mourn...”
45. This court finds that section 30(2)(h) of the *Persons Deprived of Liberty Act* as read with the provisions of article 51(1) of the *Constitution*, firms up the right of prisoners, detained persons and persons held in custody to be granted temporarily leave of absence from institutional confinement to deal with exceptional deserving situations. The only impediment has been the lack of formulation of rules to provide a mechanism and structure for the implementation by the Cabinet Secretary concerned.



**Issue No 2 Whether granting temporary permission to prisoners and detained persons to attend burial of their close family members will interfere with legitimate interests of Correctional Institutions?**

46. Ms. Mbeda submitted that allowing prisoners to attend funerals will be against the legitimate interest of correctional institutions and the principles of criminal law especially its retributory and deterrent effect of imprisonment. She posited that incarceration is a form of punishment that ensures that the prisoner is removed from society for supervision in a correctional facility. One of the primary objectives being to impose retribution or punishment proportionate to the harm they have inflicted as a way of expressing of societal disapproval of their criminal acts thus restoring a sense of balance and justice. That incarceration also serves as a deterrent measure either to the person concerned and generally and that the threat of imprisonment aims to discourage other potential offenders by magnifying the repercussions of engaging in criminal conduct thus promoting respect for the rule of law. Finally, she argued that incarceration provides an opportunity for rehabilitation by giving prisoners an opportunity for personal growth, education, vocational training and treatment programmes in order to address the underlying causes of criminal behaviour and re-integrate them into the society as law abiding citizens. Ms Mbeda maintained that allowing the petitioner to attend the funeral would dilute the deterrent effect of imprisonment.
47. Reacting to the submissions during the brief oral highlights in court, the petitioner stated:
- “...By petitioner asking leave to attend funeral, it means the petitioner must have leave and be in control of prison authority...”
48. Granted, incarceration serves the purpose of retribution and deterrence as correctly submitted by Ms Mbeda on behalf of the respondents. Nevertheless, these two objectives are not the only basis for incarceration. While incarceration serves the aim of retribution by physically confining the offender and in that regard deters such offenders by averting re-offending and those that are likely to commit such crimes, these two aims are basically conventional ones. As society continues to deal with crime, more progressive objectives continue to develop. Rehabilitation and re-socialization are now part of those aims as offenders must also be prepared for the exit from the facility at one time. Humane treatment of prisoners is given emphasis and this can be confirmed by the development of the United Nations Standard Minimum Rules on Treatment of Prisoners. Kenya in its Constitution and a Statute also provides for the humane treatment of the Prisoners and Persons detained. The aim of incarceration is more than just punishment, it is also to rehabilitate and prepare the inmates for re-integration in the society.
49. Granting temporary permission to prisoners to attend burials, funerals or even death bed visits is not contrary to the aims of incarceration, rather, it is an affirmation that prisoners or the persons detained remain members of that community to which they anticipate to return at the end of their sentences. In any case, the temporary leave is for a short duration for a specific reason and does not erase the fact that they are serving a sentence and must remain under the strict Control of the Prison authority.
50. Ms Mbenda further argued that granting of such leaves will foster inequality and bring resentment if some offenders are granted such permission and others are denied. My view is, such rules are to be developed by ensuring that no discrimination prevails based on any of the prohibited grounds expressly disallowed by the *Constitution*. In all other cases, differentiations can be made, they can be made as long as they can be reasonably justified. It is not every differentiation that amounts to discrimination.



**Issue No. 3 Whether concerns and risks associated with permitting prisoners and detained persons attend burials of close family members outweigh the need of allowing the same.**

51. The respondents contended that correctional institutions have a legitimate interest in maintaining security and order within their facilities and permitting prisoners to attend funerals outside the prison presents potential risks, which includes escape attempts, disruption of institutional order and harm to the public, hence the restriction on attending funerals while in custody is for preservation of security and order.
52. Further submission was made that presently, correctional facilities are experiencing challenges of limited budgets, overcrowding and under staffing. Ms Mbede contended that allocating resources to escort prisoners to attend funerals will place an undue burden on the already strained budget and compromise the execution of the primary responsibilities by the correctional facilities. She argued that the economic viability of granting the petitioner's claim must be balanced with the essential goals of the correctional system. She thus remarked:
- “...in conclusion, the legitimate interests of correctional institutions, including security, outweighs the petitioner's claim to attend the funeral of their loved ones while serving their sentence in prison. Granting such requests could undermine the purpose of incarceration, compromise institutional security, and lead to potential inequalities among prisoners. We respectfully urge this court to prioritize the well-being of correctional institutions and deny the petitioner's claim...”
53. In rejoinder to the respondent's submission that granting such permission would infringe on the safety of the public and the institution, the petitioner submitted that Prison Authorities have instruments of restraint to counter those threats.
54. The court cannot turn a blind eye to the fact there is cost implication and attendant risks in allowing the petitioner's claim for prisoners and detained persons to enjoy the right for temporary leave of absence to attend burials of their loved ones. As an illustration, a prisoner seeking permission to attend the funeral of a close relative may be serving in Mombasa- Shimo La Tewa Prison yet he hails from Busia County where the burial is to be conducted. The distance apart between Mombasa and Busia is almost 900 Kilometres. Travel and subsistence cost of both the prisoner and the escorting prison officers will be astronomical as most secure means of travel must be factored. This may not be the only request bearing in mind this country with a huge prison population estimated at almost 50,000 inmates. Prisons will definitely be constrained in terms of financial resources and personnel to cope with high number of requests for escorts across all the corners of the Country. There are risks too, some of these prisoners might have a history of escape or could be extremely violent.
55. Consequently, although this court harbours no doubt in holding that permission to prisoners and detained persons to attend burial or funerals of their close relatives falls within the principles of humane treatment of offenders under article 51 of the Constitution; the decision to grant such permission cannot be made mechanically. It must take into account all the relevant factors including any compelling reasons. In certain instances, a refusal may be justified. It is not every request that qualifies. The right is therefore not absolute as it must be balanced with all the relevant considerations. Every request must be assessed on its own merits.
56. The petitioner made his request to the Commissioner General of Prison through the Officer in charge of Prison he was serving in. It is a fact that our Prisons Act does not provide for grant of temporary



leave of absence. The Commissioner General was thus not in a position to grant such leave as there is no procedural framework for the same. I hold that he thus did not violate the petitioner's rights.

57. The 1<sup>st</sup> respondent is the one tasked with the responsibility of formulating the rules to provide for temporary leave of absence for the *Persons Deprived of Liberty Act* in exceptional instances. He has failed to formulate the rules since 2014 when the Act was enacted and this has been detrimental to imprisoned or detained persons who may have such needs that are deserving as the present case demonstrates. In the Australian case of *Johnson Tyre Foundry Pty Ltd v Maffra Shire Council* (1948) 77 CLR 544 the court said:

“...May, unlike ‘shall’ is not mandatory but a permissible word, although it may acquire a mandatory meaning from the context in which it is used, just as ‘shall’ which is a mandatory word, may be deprived of the obligatory force and become permissive...”

58. I find that the need to formulate these rules to guide the Officers in charge of Institutions of confinement holding imprisoned or detained persons compels the 1<sup>st</sup> respondent to perform this duty.
59. Under the rule of law principle, it is improper to refuse or neglect to carry out a mandate imposed by legislation especially when the inaction is adversely affecting others. The absence of the rules is an impediment to the enjoyment of the imprisoned, detained and persons held in custody from being granted temporarily leave of absence to attend burials of their loved ones or other deserving cases.

**Issue No. 5 Considering the circumstances of this case, were the rights of the Petitioner violated by being denied permission to attend the burial of his mother?**

60. The petitioner claimed that his rights were violated when his request to attend the funeral of his mother was violated. I have already found that allowing prisoners and detained persons temporary leave of absence to attend funerals, burials or death bed visits of their loved ones has the calming effect to their emotional and psychological well-being and is anchored on humane treatment of prisoners under article 51 of the *Constitution*. That is a constitutional dictate finds support in rule 70 of the *UN Standard Minimum Rules for Treatment of Offenders* and is equally a right that is accorded to inmates in several other jurisdictions as already demonstrated.
61. However, from my analysis, and even from the perspective of the UN Standard Minimum Rules and from the comparative jurisprudence, the right is not absolute. It is subject to other relevant factors which must be taken to account and can be declined if there are compelling reasons not to grant it. Rule 70 which is relevant to this case has a rider, which partly states:

‘...Whenever circumstances allow, the prisoner should be authorized to go, either under escort or alone...’

“Rule 70

The prison administration shall inform a prisoner at once of the serious illness or death of a near relative or any significant other. Whenever circumstances allow, the prisoner should be authorized to go, either under escort or alone, to the bedside of a near relative or significant other who is critically ill, or to attend the funeral of a near relative or significant other.”

62. In *Ploski v Poland* (*supra*) the court among others observed:

“... The court would reiterate that article 8 of the Convention does not guarantee a detained person an unconditional right to leave to attend a funeral of a relative (see the case-law



referred to in paragraph 27 above). It is up to domestic authorities to assess each request on its merits...”

63. It is thus important that before any determination is made all the relevant facts must be laid bare. For instance, information on whether there has been an escape attempt or his conduct if he violent person or not, whether there are resources for facilitating prisoner’s request or if the prisoner’s family is able to cater for the expenses, how long the period of absence is anticipated (if more than a day, where would prisoner held) or if the funeral or burial might take place in the presence of persons that were hurt by the crime and the likely consequence of his presence there.
64. In respect to the petitioner before me, there is absolutely no such background information that can assist the court in making an informed decision and is thus very difficult to make a balanced assessment. Had the rules contemplated under section 30(2)(h) been in place, these procedural requirements would have been addressed adequately hence absence of these rules to guide the process continue to complicate the assessment. Although the court upholds the right of prisoners to mourn their loved ones by being allowed to attend their burials, funerals and death bed visits, the decisions cannot be made without regard to the safety of the prisoners and the general public. This will defeat the whole essence of incarceration and compromise the ends of justice.
65. This petition thus succeeds partly in one respect. The court acknowledges that prisoners and persons detained have a right to be permitted, whenever possible, to attend burials or funerals of their close relative within the principle on humane treatment of prisoners and persons detained under article 51 of the Constitution and respect for their inherent dignity under article 28 of the Constitution. Nevertheless, the right is not absolute has to be balanced to avoid prejudicing the safety of the public or that of the person detained or imprisoned.

## Reliefs

66. Under article 23(3) of the Constitution, the court is empowered to grant various reliefs to enforce fundamental rights and freedoms. It is worth noting that article 23(3) does not only restrict the court to the reliefs that are particularized thereunder or to those that party has specifically prayed for. If the court considers a violation can be cured by a different relief, it is not stopped from granting the different the relief. Article 23(3) reads:

“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.

67. The use of the opening words ‘may grant an appropriate relief’ and then ‘including’ before the specific reliefs has two important implications. Firstly, the words ‘may grant an appropriate relief’ gives the court a wide discretion to fashion the most suitable relief depending on the circumstances of each



particular case. Secondly, the use of word ‘including’ coming immediately before listing down of the specific reliefs the court may grant lays emphasizes on the fact this list is itself not exhaustive.

68. Having regard to the circumstances of this petition, I grant the following reliefs:
1. A declaration be and is hereby issued that all sentenced prisoners and pretrial detainees held in custody have the right to be treated humanely which right includes permitting them to attend funerals and burials of their close family members or for any other exceptional deserving reason unless there are compelling reasons for declining granting of permission.
  2. A declaration be and hereby issued that the 1<sup>st</sup> respondent’s omission to make rules providing for mechanisms and structures for temporary releases for Persons detained or imprisoned under section 30(2)(h) of the *Persons Deprived of Liberty Act* curtails the rights of Imprisoned and Detained Persons to be treated humanely and to have their dignity respected and protected thus violates articles 28 and 51 of the *Constitution*.
  3. An order of mandatory injunction be and is hereby issued directing the 1<sup>st</sup> respondent to make the rules under section 30(2)(h) of the *Persons Deprived of Liberty Act* within six (6) months from the date of this order.
  4. Each Party to bear its own costs of the Petition.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

**L N MUGAMBI**

**JUDGE**

