IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 13 OF 2021

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 AS AMENDED ROM TIME TO TIME

AND

IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT ACT [CAP. 3, R.E., 2019]

AND

IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT (PRACTICE AND PROCEDURE) RULES, 2014

AND

IN THE MATTER OF A PETITION TO CHALLENGE THE PROVISIONS OF SECTION 33, 34, 39 AND 71 OF THE PRISONS ACT [CAP 58 R.E 2002], REGULATIONS 2 (C), (i) & (l), 4 (a), 5(a)(i), 5(b)(i), 6(a) & (b), 7, 8 AND 9 OF THE PRISONS (PRISONS OFFFENCES) REGULATIONS G.N No. 13 OF 1968, REGULATIONS 2(a), (b), (d) & (e) OF THE PRISONS(RESTRAINT OF PRISONERS) REGULATIONS G.N No. 18 OF 1968, REGULATION 12(4) OF THE PRISONS (PRISON MANAGEMENT) REGULATIONS, G.N No. 148 OF 1968 FOR BEING UNCONSTITUTIONAL

BETWEEN

JOSEPH OSMUND MBILINYI.....1ST PETITIONER

PETER SIMON MSIGWA.....2ND PETITIONER

VERSUS

THE COMMISSIONER GENERAL

TANZANIA PRISON SERVICE.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL .....2ND RESPONDENT

JUDGEMENT

31st August & 19th December, 2022

LUVANDA, J.:

This petition is by way of originating summons made under the provisions of Article 26(2) and 30(3) of the Constitution of the United Republic of Tanzania (hereinafter to be referred as the Constitution) and section 5 of the Basic Rights and Duties Enforcement Act, Cap 3 R.E. 2019 (hereafter to be referred as BREDEA) and rule 4 of the Basic Rights and Duties Enforcement (Practice and procedure) Rules, 2014.

The Petitioners above mentioned are challenging the provisions of sections 33,34, 39 and 71 of the Prisons Act Cap 58 (R.E. 2002) for being unconstitutional for offending Articles 13(6)(a),(e) and 18 of the Constitution; regulations 2(c), 2(i), 2(l), 5(a)(i), 5(b)(i) and (ii), 6(a) and (b) and 9 of the Prisons (Prisons Offences) Regulation G.N. No. 13/1968 being unconstitutional for offending the provisions of Articles 13(6)(e), 14 and 18 of the Constitutional; regulation 12(4) of the Prisons (Management of Prison) Regulations, G.N No. 148/1968, being unconstitutional for

offending the provisions of Article 13(b)(e) of the Constitution; regulations 2(a),(b),(d) and (e) and 3(1) of the Prisons (Restraint of Prisoners) Regulations, G.N. No. 18/1968 being unconstitutional for offending Article 13(6)(a),(b) and (c) of the Constitution.

Specifically, the Petitioners are complaining the alleged practice of the Tanzania Prisons Services subjecting prisoners to mandatory HIV testing upon admission in prison without consent and providing results thereof in public; limiting the number of times a prisoner can use and remain longer than necessary in latrine facilities; barbaric and undignified search of prisoners by stripping off clothes and remain naked in front of others; availment of one pairs of uniform to prisoners without alternative attire; overcrowding in prisons and inadequate bedding/sleeping equipment; engaging prisoners in works without payment of remuneration; solitary confinements and denial of visitation thereof; provision of meal and diet below the recommended diet scale; powers vested to the in charge of prison to punish prisoners for prison offences without due regard to due process and enough safeguard mechanism and corporal punishment meted to the prisoners by the prison wardens.

The petition was supported by the affidavit of Peter Simon Msigwa who deposed that he was convicted and sentenced on 10/3/2020 to pay fine

of 40,000,000 or jail term of five months in default, and was released on 14/3/2020 after staying in prison for four days. The deponent stated that upon admission into prison that is Segerea Prison, was compelled to parade naked, searched on his body and private parts, compelled to excrete on an iron bucket used by others; medically examined HIV status without consent and result released to prisoners on public; slept in overcrowded cubicle/cell up to three times of the normal capacity with poor and inadequate bedding while other prisoners slept on the floor without bedding. That he was locked in cells at 3:00 pm and forced to sleep at 6:00 pm; provided with inadequate, unbalanced, very poor food below the scale recommended; there is no special diet for people living with HIV, hypertensive, and diabetic prisoners.

There is also an affidavit in support of a petition deposed by Joseph Osmund Mbilinyi, who stated in tandem with the first respondent, adding that upon admission in prison at Ruanda Prison on 26/2/2018 he was forced to excrete on iron bucket used by other prisoners without being washed or sanitized; at the time and day of visitation he was given two minutes only; he was provided with one pair of prison uniform; it came to his knowledge that solitary confinement is still practiced as form of punishment for prison offences, where a prisoner is kept naked, isolated

with no light and bedding equipment, sleep on floor up to 14 days, with punishment of reduction of diet, with no visitation rights; while in prison prisoners are not allowed to attend burial ceremony of their close relatives including parents, wife husband and children.

The Petitioners also relied on a statement of SSP Amina Kavirondo annexure AA to the petition, that she admitted that mandatory HIV testing is a standard operation procedure in prison.

In opposition, A/Insp. Yusuph Jumanne Mwiru countered Peter Simon Msigwa's affidavit, that prison officers are not mandated and do not compel or direct prisoners to excrete on iron buckets for any purpose, rather latrine. That upon searching the prisoner, the responsible officer takes the prisoner to the prison dispensary for medical examination to establish special needs. That testing the prisoner on admission is conducted in compliance with the law for purpose of establishing the prisoner's health status and arrangement for specific needs. That testing of HIV/AIDS is only conducted upon prisoners consent and results communicated to the respective prisoner in camera. That there is enough bedding for human use in prison cell. That the Second Petitioner was locked up at 17:30 hours and unlocked at every day break in accordance with the law regulating prison. That prisoners including the Second

Petitioner was served with dietary rations in compliance with the law and directives of the officer in-charge of prison. That dietary rations for prisoners with health issues is changed upon discovery of health status of the respective prisoner. That prisoners are accommodated in prison in observance of all hygienic and sanitary requirement as provided by the law. That prisoners are not prohibited to use latrines as many times as they wish. That observation of sanitary by the prison officer is a compulsory requirement under Prison Laws to protect the prisoners and officers against outbreak of diseases.

CPL Ramadhani Mkama Masoud deposed a counter affidavit against the affidavit of Joseph Osmund Mbilinyi, along the line of a counter affidavit by A/Insp. Yusuph Jumanne Mwiru, adding that the time allowed by the visitors is fifteen minutes subject to extension by the prison officer in-charge, upon request by the prisoner. That prisoners are given two pairs of trousers, shirts, underpants and other basic needs. That sanitary confinement with or without penal diet is provided by the law and is issued to incorrigible prisoner for specific time to deter the offence committed. That penal diet commences after the prisoner has been certified fit by the medical officer. That during the serving of the solitary confinement prisoner enjoys one hour exercise in the open air daily, right to divine

services, medical treatment and visitation by the Commissioner General of Prisons, religious leaders, visiting justices and officer in charge of prison. That the believed convict and remandee have a right to mourn within the prison upon reporting the same to the prison officer in charge.

In support of the petition, Mr. Barnabas Kaniki and Mr. Charles Tumaini learned Advocate for the Petitioners submitted on general overview that an inmate in prison is required to enjoy his right to life, right to privacy, right to equal treatment, freedom of work and freedom to earn as well, freedom to participate in public affairs of the country as proclaimed in the Constitution. They cited **Johnson vs Avery 393 US 483 (1909)** where the Supreme Court of the United States affirmed that the court has power to enforce a fundamental right of access to justice to a prisoner; **Sunil Batra Vs Delhi Administration 1978** AIR 1675, on the protection of prisoners' rights; **Francise Coralie Mullin vs The Demonstration, Union of India,** 1981 AIR 746, on the relationship of a prisoner and his rights; **P. Nedumaran vs The State of Tamil Nadu,** on the fairness of regulations and procedures laid down by prison official; **Charles Sobraj vs The Superintendent, Central Jail of Tihar** (1978) AIR 1514.

Regarding mandatory HIV testing in prison and providing results in front of other prisoners, the learned Counsel for Petitioners submitted that HIV

testing and related services in Tanzania are regulated by the HIV and AIDS (Prevention and Control) Act No. 28 of 2008, where section 15(1) and (3) prohibits mandatory HIV testing, save for an exceptional circumstances under subsection (4) where no consent for testing HIV shall be required under an order of the court, on the donor of human organs and tissues and to sexual offenders. They invited the court to draw inspiration in **Vandom vs Repulbic of Korea, Communication No. 2273** regarding mandatory HIV testing, that must be envisaged by law and in furtherance of protection of public health and maintenance of public order.

They submitted that HIV testing in contravention of the HIV and AIDS (Prevention and Control) Act, is illegal and cannot be justified, because the prohibition applies to all persons in Tanzania including those behind the bar. Also cited **C vs Minister of Correctional Services**, 1996 South African Court, **Walker vs Sumner, 917 F. 2.d 382** (9th Cir. 1990), in relation to mandatory HIV testing. They submitted that the two cases above highlighted the importance of informed consent before subjecting prisoners to mandatory HIV testing.

On barbaric and undignified search on prison, the learned Counsel for the Petitioners submitted that as standard operating procedures in prison

every prisoner undergo search every time he or she get in prison. That the Petitioners are not challenging the search itself but the manner such search is being conducted where petitioners pleaded to have been compelled to parade naked in front of other prisoners, intrusively and undignified search on their bodies including private parts. Thereafter Petitioners were forced to excrete on an iron bucket which are not hygienically safe. They submitted that it is serious intrusion of personal privacy right, right to dignity and freedom from inhuman and degrading treatments by prison authority as enshrined by Articles 16 (1),12(2) and 13 (6)(e) of the Constitution.

Regarding solitary confinement, the learned Counsel for the Petitioners submitted that any forms of solitary confinement, separate cell with or without penal diet, or segregation as form of punishment amount to torture, inhuman and degrading treatment and punishment prohibited under international and regional human rights citing International Covenant on Civil and Political Rights, 1966, the Constitution, The Nelson Mandela Rules. They submitted that sections 33 and 71 of Cap 58 R.E.2002 and regulations 4(a) and 5(a)(i) of G.N. No. 13 of 1968 provides for some form of solitary confinement as a means of punishment for prisoners, for prison offences. That it violates human rights and amount

to torture and other cruel, in humane and degrading treatment or punishment which is prohibited under Article 13(6)(c) and 12(1) of the Constitution.

On the issue of denial of visiting rights to prisoners in solitary confinement. They submitted that restriction of visitation rights to prisoners under solitary confinement or undergoing punishment of separate cell violets prisoners' human rights and contravene Article 18(c) and (d) of the Constitution. Also cited rule 58(1) of the United Nations Standard Minimum Rules for Treatment of Prisoners (The Nelson Mandela Rules) 2015, Kampala Declaration on Prison Conditions in Africa.

In reference to providing meal and diet below the recommended diet scale, the learned Counsel for Petitioners submitted that the right to adequate food is an inclusive right. That this right is guaranteed to all human being prisoners not being exceptional. They cited Nelson Mandela Rules, regulation 23 of G.N. No 148/1968, which provide for diet scale III applicable to all prisoners, to wit two meals daily, breakfast and main menu. They submitted that meals provided to prisoners in Tanzania is below the recommended scale, for all time in prison the Petitioners have been provided with maize porridge every morning and *ugali* beans every day except Sunday where they eat rice meat. They have never been

provided with fruits and green vegetables as part of main menu meal or cassava, potatoes as part of breakfast meal.

Regarding power vested to in-charge of prisons to punish prisoners for prison offence without due regard to due process and enough safeguarding mechanism. The learned Counsel for the Petitioners cited section 33(1)(a),(b) and (c) and 2(a),(b) and (c) of Cap 58. They submitted that the Prison Act and Regulations are silent on the duly inquiry procedure to be followed, authority or body with mandate to conduct reasonable investigation/inquiry as required. They submitted that lack of inquiry procedure on how prison officers, senior or subordinate can arrive to the decision that a prison has committed a prison offence under section 33 Cap 58, fall short of due process requirement and contravene Article 13(6)(a) and (e) of the Constitution.

Regarding punishment by the Commissioner, they submitted that it seems the decision of the Commissioner under section 34 cap 58, is final, as prisoners have no right to appeal or challenge it. They submitted that, it contravenes Article 13(6)(a) of the Constitution which requires the right to a fair hearing, appeal or other legal remedy.

On the issue of corporal punishment, the learned Counsel for Petitioners submitted that it is inhuman as even the manner it is executed is scary.

They cited rule 43 (1) of the United Nations Standards Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules). They submitted that the manner corporal punishment is executed as described under regulation 9 of G.N No. 13 of 1968, is cruel, inhuman and degrading and it offends Article 13 (e) of the Constitution. They cited **South Africa Versus South Africa VS Williams, 1995 ZACC6**

In reference to the offence of visiting latrines without permission and remaining there longer than necessary as prison offences, the learned counsel for the Petitioners submitted that the offences under regulation 2 of GN No. 13 of 1968 are extremely vague, irrational and likely that power vested to officers In charge will be abused and results to violation of Article 14 and 13(6)(e) of the Constitution. They submitted that it is unusual undertaking to set time limit for the use of latrines to human being.

Regarding availing only one pair of uniform to prisoners without alternative clothes for changing in the event the one provided is being washed, the learned counsel for petitioners submitted that, during the stay in prison, the Petitioners were provided with only one pair of uniform, meaning they were forced to remain naked when the uniform was washed. The submitted that this amount to violation of right to dignity,

privacy and it amount to cruel, inhuman, and degrading treatment against the provision of Article 12(2), 16(1) and 13(6)(e) of the Constitution.

On the issue of overcrowding in prison, they submitted that prisoners are overcrowded by prisoners far above the capacity of the prisons, which make it practically impossible to maintain social distancing, self-isolation during the challenge of covid 19 pandemic. They submitted that failure to take appropriate measures to decongest prisons can amount to serious human rights violation contravening Article 12(2),13(6)(e) and 14 of the Constitution which provide for the right to dignity, right to life and freedom from cruel, inhuman and degrading treatment. They argued officers in charge of prison be prohibited to overpopulate prisoners as it amount to continuous violation of our Constitution.

In opposition Mr. Stanley Kalokola learned State Attorney for the Respondents submitted in response to the alleged mandatory HIV testing in prison and providing results in front of other prisons. The learned State Attorney submitted that one of the basic principles guiding the prison service in Tanzania on part of health for which issue of testing HIV and AIDS may be addressed, is that every prisoner has the right to access health services and voluntary testing is one of the key principles in addressing issue of HIV and AIDS.

He cited order 2(xiii) of the Standing Orders which deal with HIV and AIDS. He also cited order 408 of the Standing Order for the argument that a justification of testing prisoners HIV and AIDS is viable and saved under Article 11(1) and 30 (2) (b) of the Constitution, also he cited order 2(xii) of the Standing Orders. He cited **Kukutia Ole Pumbuni and Another vs The Attorney General** (1993) TZR 159. He submitted that the prisoner testing is justifiable as the government is obliged to take all necessary measures to protect the public health and the limitation on the free consent given the circumstances under the prison facility is justifiable.

It is the contention of the learned State Attorney that there is no law which permit mandatory testing to HIV. He submitted that not every legal principle which have been developed in a certain country may be applicable in Tanzania, because material setting of prison facility are different from one country to another. He submitted that most of the International Human Rights instruments which promote and protect social, economic and cultural rights such as right to health recognize the progressive realization of rights depending on economic status and availability resources of each member state, citing Article 2(1) of the International Covenant on Social, Economic and Cultural Rights, 1996.

Regarding barbaric and undignified search of prisoners, the learned State Attorney submitted that, the Petitioners are not challenging searching of prisoners during admission, rather they are challenging the manner in which search is conducted. He submitted that the manner in which search is conducted in prison is regulated and the same pay regards to human dignity and right to privacy. He cited order 2(i) and 228 of the Standing Orders. He submitted that there is no law which permits the search in manners portrayed by the Petitioners. That even if is assumed the same was conducted, a mere abuse of power does not render what is stated in the Standing Order unconstitutional.

He cited **Rev. Christopher Mtikila vs Attorney General** (1995) TLR 31, page 34. He submitted that there is nothing to prove that the law governing prisons services permit search on barbaric and undignified manner as alleged by the Petitioners. That the Petitioners failed to cite any provision of the law for which the alleged act is permitted for this court to declare the same unconstitutional.

On the alleged sanitary confinement, the learned State Attorney submitted that sanitary confinement is one of the punishment imposed in offences committed within the prison facility. He submitted that the imposition of the said punishment is subject to the safeguards imposed

under regulation 8 of the Prison (Prison Offence) Regulation of 1968 and order 438 of the Standing Orders, which embrace the spirit of Article 13(6)(e) of the Constitution. He cited order 2(xv) of the Standing Orders.

Regarding denial of visitation rights to prisoners in solitary confinement, he submitted that the prisoner is visited by the prisoner officer, minister religion and visiting justice. He submitted that, it is not true that prisoners in solitary confinement do not receive visitation, but it is only that visitation is not the same as those of normal prisoners who are not in disciplinary punishments. He submitted that Nelson Mandela Rules and Kampala Declaration, are self-laws with persuasive value the aim of creating moral and political influence and they do not create legally binding obligation on the state unlike conventions and treaties. It was the contention of the learned State Attorney that unless the Mandela Rules and Kampala Declaration are transformed into binding convention or treaty, the United Republic of Tanzania cannot be held to be in violation of the same and in order for this court to declare its violations, the same has to be domesticated to create binding obligations.

Regarding provision of meal and diet below the recommended diet scale, he submitted that, the contention of meal and diet is factual issue and not legal issue. That G.N. No. 148/1968 clearly provides for the dietary scale

for which prisoners are entitled. That even the Standing Orders emphasizes adherence of dietary scales to the prisoners and no changes should be made without approval of Principal Commissioners, citing order 787.

He submitted that whether the allegation that the meal provided is below the scale, does not raise a constitutional question, as the law stipulates for the meal and diet and the petitioners do not challenge the diet scale provided by the law. He submitted that, there are several mechanism under which the prisoners may lodge their complaints or ill treatment including treatment or meal and diet as alleged. That as a general rule, every prisoner is furnished with the information relating to the regulation of the prison and complaints mechanism during admission. He cited order 2(xvi) of the Standing Orders. He submitted that the Petitioners had opportunity to file complaints to the principal commissioner under order 685 of the Standing Orders on the alleged ill treatment in the prisons, or lodge complaint before the visiting justices under order 831, or before the President of the United Republic of Tanzania under order 709 of the Standing Orders.

Regarding powers vested to the in-charge of prisons to punish prisoners for prison offence without due regard to due process and enough

safeguarding mechanism hence contravention of Article 13(6)(a) and (e) of the Constitution, the learned State Attorney submitted that, the power to impose punishment vested to prison office in-charge under section 33 of Cap 58, has to be exercised in due regard with G.N. No. 13/1968, as there must be due inquiry of the offence alleged to have been committed by prisoner. While making reference to section 33(1) and (2) of Cap 58 and the definition of the word 'due' used in that section as provided in Black's law Dictionary, 11th Edition, Bryan A. Garner at page 631, the learned State Attorney contended that, it was intended by the law makers intended that In making inquiry and determination of the offences alleged to have been committed, the officer in charge of prison, will adhere with all legal requirements of fair hearing to make sure that the finding just and proper in the eyes of law. The learned State Attorney, further cited section 37 of Cap 58, to justify his contention that the right to fair hearing under Article 13(6)(a) of the Constitution is guaranteed by the complained of provision of the law.

On the allegation of corporal punishment, the learned State Attorney submitted that imposition of corporal punishment in Tanzania is a creature of statute that is the Corporal Punishment Act, Cap 17 R.E. 2002, which have never been repealed to abolish corporal punishment.

That the penal system in Tanzania continues to recognize corporal punishment as one of punishment which can be imposed by the courts of law, citing sections 25(c),28, 131(1),131(2)(c) and (d),131A(3),132(1), of the Penal Code, Cap 16 R.E. 2019. He submitted that he cannot address the manner in which the punishment is inflicted without addressing the law which create that punishment. That the Petitioners have failed to give material facts as how the manner in which the corporal punishment is imposed constitute cruel, inhuman, and degrading punishment. He submitted that it is the role of this court to construe statutes to make them operative and not otherwise, citing **Julius Ishengoma Francis Dyanabo vs Attorney General**, 2004 TLR 14, Page 29 by the Court of Appeal of Tanzania.

On the alleged offence of visiting latrines without permission and remaining there longer than necessary as prison offences.

He submitted that the allegation is based on speculation and fear that the powers vested to the officer in charge of prison may be abused. Submitted that, it is one of the constitutional principles that a mere assertion would not tender a statute unconstitutional, citing **Rev. Christopher Mtikila vs Attorney General** (1995) TLR 31 page 34. He submitted that the Petitioners have not discharged their duty to provide sufficient evidence

to justify the existence of abuse of powers alleged. He cited **Centre for Strategic Litigation Limited and Another vs Attorney General and Others,** Misc. Civil cause No. 21 of 2019 (TZHC) (unreported) at page 42.

On the alleged availing only one pair of uniform to prisoners without alternative clothing for changing in the event the one provided is washed, he submitted that prisoner clothing is regulated by G.N No. 148/1968 specifically regulation 20. That as a matter of law the prisoners are availed with more than one uniform in prescribed scale as stated in order 356 of the Standing Orders. He submitted that the scale provided under order 557 for men and order 258 for women prisoners, is evident that prisoners are availed by more than one uniform contrary to what the Petitioners are alleging. He cited **Attorney General vs W. K. Butambala** (1993) TZR 46, page 51.

Regarding an argument of overcrowding in prisons. The learned State Attorney submitted that allegations on overcrowding are factual issues which need evidence to substantiate the same. He submitted that the Petitioners were under obligation to supply information and evidence as to the capacity size of each prison, the number of prisoners in a particular's day so as to establish on whether such a number of prisoners in particular day so as to establish on whether such a number is over and

above the accommodation capacity of the prison for it to constitute overcrowdings. He cited **Ganga Sugar Corporation v. State of U.P & Others**, AIR 1980 SC 286, page 7. He submitted that the Petitioners ought to have been guided by the standards of accommodation prescribed under order 479 of the Prison Standing Orders, which govern accommodation area per person. He submitted that the Petitioners ought to have named the prisons for which there is overcrowding and further to state the accommodation size of that prison for the court to be able to ascertain that fact.

On our part we shall address the sub issues recapitulated above which in our views they revolve around one main issue as to whether the complained of acts/conducts by the petitioners are violative of the provision of the Constitution as alleged.

We start with the first sub-issue on the complaint of mandatory HIV testing in prison and providing results in front of other prisoners. As alluded by the learned State Attorney, there is no law which permits mandatory testing to HIV. The law relating to prevention, treatment, care, support and control of HIV and AIDS and for promotion of public health in relation to HIV and AIDS to wit the HIV and AIDS (Prevention and

Control) Act, No. 28 of 2008, prohibit compulsory HIV testing. Section 15(3) of Act No. 28/2008, provide

'A person shall not be compelled to undergo HIV testing.'

Above all, the law requires confidentiality in the handling of all medical information and documents particularly the identity and status of persons living with HIV and AIDS. Section 16(1) of Act No. 28 of 2008 provides thus:

'The results of an HIV test shall be confidential and shall be released only to the person tested.'

Throughout Act No. 28 of 2008 and including in the exception to the general rule where no consent is required on HIV testing, there is no mention of the word prison or prisoner as among those saved under exception. See section 15(4) of Act No. 28/2008. Even disclosure to a third party the results of an individual HIV test without prior consent of that individual is restricted and the prisons or prisoner does not fall under exception provided for under rule 24(2)(b)(v) of the HIV and AIDS (Counselling and Testing, Use of ARV's and Disclosure) Regulations, 2010. The laws on HIV and AIDS, its fundamental principal revolves on consent for testing, confidentiality of information relating to testing and non-disclosure of HIV result to third parties. Order 2(xiii) of the Prisons

Standing Orders cited by the learned State Attorney envisages the spirit of the laws on HIV and AIDS, we quote:

> *"The fact that HIV/AIDS is taking its toll both within the prisons and the service in general, it is important that effort should be made in all prisons and within the service to promote the national HIV/AIDS policy and strategy. This should be done through education, awareness programmes, and* ***voluntary testing****. The Principal Commissioner will issue guidelines on how this objective should be achieved." (Emphasis supplied)*

As submitted by the learned State Attorney, in effect, there is nowhere the Prison Standing Orders has permitted what the petitioners alleged to be mandatory and forced testing. Essentially, the petitioners did not cite any provision of the law or rule under the regime of prisons which direct for mandatory and forced testing. Even in the clip if the Tanzania Prison Services Spokesperson SSP Amina Kavirondo annexure "AA" to the reply to counter affidavit by the Second Petitioner, she did into admit the fact that prisoners are forced to undergo compulsory HIV testing, rather she was addressing on a fact that results of HIV test are released to the prisoner in the presence of one or two prison wardens who escort the offender to the medical facility for testing.

The learned State Attorney submitted that the justification for every prisoner to be tested his health status, is provided under order 408 of the Prisons Standing Orders. We quote for appreciation of the above argument:

> *'HIV/AIDS is currently associated with cases of tuberculosis and other infectious diseases. In this case, subject to availability of medical facilities and medication, Medical Officers are encouraged to follow National Guidelines on HIV/AIDS in the effort to minimize the effects of HIV/AIDS to prisoners and other people working in the prison's environment'.*

With due respect, the above order cannot be said to justify testing of HIV and AIDS to all prisoners involuntarily. The order merely encourages medical officers to follow National Guidelines on HIV/AIDS in efforts to minimize the effects of HIV/AIDS to prisoners. The learned State Attorney also took refugee under Article 11 (1) and 30(2)(b) of the Constitution to justify his recourse. The said Article 30(2)(b) of the Constitution, provides:

> *(2) it is hereby declared that the provisions contained in the Part of this Constitution which set out the principles of rights, freedom and duties, does not render unlawful any existing law or prohibit the enactment of any law or the doing of any lawful act in accordance with such law for the purpose of;*

"(b) ensuring the defence, public safety, public peace, public morality, public health, rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property of any other interests for the purpose of enhancing the public benefit."

Therefore, it cannot be said that testing prisoners' HIV/AIDS status is viable under Article 11 (1) and 30(2)(b) of the Constitution, as forcefully argued by the learned State Attorney. We so view as the catchword under the said Article is the principle enunciated under that part of not rendering unlawfully any existing law or prohibit the enactment of any law or the doing of any lawful act in accordance with such law. In our case as observed above, there is no any existing law permitting compulsory testing to prisoners and therefore it cannot be said the act done is in contravention of the lawful law or itself is lawful. To crown it all, the acts of compelling prisoners to test HIV and disclosure of result of testing to third parties, is not backed by any law, therefore they offend prisoners right to dignity, privacy and freedom enshrined under Article 12(2) and 16(1) of the Constitution. The Spokesperson for Tanzania Prison Services SSP Amina Kavirondo, in her press conference stated that HIV testing is done upon admission to and discharge from prison, and the same is done on good faith to ensure the prisoners are handled according to their health

status. Certainly, we entertain no doubt that the exercise can be done in good faith when it is in line with practice of standard operation procedures thereat. However, everything done must abide to the dictate of the letter of the law. In fact, law makers did not see any exception to it. In other words, law makers avoided any encroachment of offender's dignity and privacy. We therefore find merit in this sub-issue as the same is answered in affirmative.

Next for determination is sub-issue two, on complaint of barbaric and undignified search of prisoners. We wish to state from the outset that, here petitioners are not protesting against search, rather are complaining on the manner search is being conducted allegedly compelled to parade naked, intrusively and undignified search on their bodies including private parts, forced to excrete on an iron bucket. The petitioners relied on a video clip of SSP Amina Kavirondo on press conference that, the spokesperson confirmed their complaint regarding the manners they were searched. However, upon listening footage of that statement, we are satisfied that nowhere the spokesperson mentioned the alleged barbaric and undignified search. The spokesperson merely alluded to a fact that search is done to ensure that no prisoner enters into prison with prohibited and dangerous materials or equipment.

Order 2(i) of the Prison Standing Orders, provide we quote:

> *'All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. In this regard, the Service requires that staff must treat prisoners at all times with humanity, and with regard for their status as individuals. This is particularly important at the point at which someone is received in a prison. Whilst all prisoners, and their property and clothing, must be searched, searches must be carried out with dignity and regard for privacy'*

The above exposition of the law calls for respect of prisoner's inherent dignity and value as human being and requires search unto them to be carried out with dignity and due regard to privacy. Order 228 of the Prisons Standing Order, buttresses on self-respect and decency search, of which we hereby endeavour to quote in extensor:

> *'When searching is necessary it will be done by Officers of the sex of the prisoner concerned. Every prisoner shall be searched on admission, and after entering the prison from labour and before leaving workshops and kitchens. The searching of a prisoner shall be conducted with due regard to decency and self-respect and in as seemly a manner as is consistent with the necessity of discovering any concealed article. At least two Officers will always be present when a search of*

prisoners is being conducted. A prisoner will not be stripped for ordinary daily search'

'For normal searching it will be sufficient to remove only the shirt of the prisoner and he will be required to hold his hands up and stand with his legs apart. The prisoner will not be searched more closely than is necessary for the purpose'

'Special searching may be ordered by the Senior Officer at a prison. Escapees, bad characters, prisoners subject to special security and those undergoing punishment, will always be subjected to special search. When a special search is ordered, the prisoners to be searched will be moved out of sight of other prisoners. All his clothing will be removed and the prisoner will stand with his legs apart and arms extended. All parts of the body where articles might be concealed will be examined. As each article or clothing is examined it will be returned to the prisoner without delay and search should be conducted expeditiously so that the prisoner may suffer no unnecessary exposure. Two officers will always be present when a special search is being carried out'

In view of the above, we are constrained to hold the view that there is no law which permits the search in the manner portrayed by the Petitioners. The law as it is, call for dignified, decency search with due regards to self-

respect and privacy. As alluded by the learned State Attorney, a mere abuse of power does not render what is provided in the Prisons Standing Order, unconstitutional. In **Rev Christopher Mtikila** (supra), it was held, and we quote:

> *'The constitutionality of the statutory provision is not found in what could happen in its operation but in what it actually provides for; the mere possibility of a statutory provision being abused in actual operation will not make it invalid'*

In view of the above, there is nothing for us to storm in and declare the complained of acts unconstitutional. This is because the law governing conduct of search of offenders or prisoners upon admission into prison, is in order and provide enough safeguards with regard to the manner dignified and decency search is to be conducted. If there is individual conducts of prisons officers violating of the governing law of conduction of search in prisons, which however we were not provided with any poof by the petitioners, we find the same the same can be dealt with administratively. Hence this sub–issue is destitute of merit.

We now move to consider the third sub-issue, on solitary confinement. Undeniably, solitary confinement is one of the punishments imposed by the prison officer in-charged to prisoners who commits certain prison

offences within the prison facility, in terms of sections 33(1)(a) and 2(a) of Cap 58. In the present matter the petitioners made general and unsubstantiated allegations that, the prisoner under solitary confinement is kept naked, isolated, in a separate cell with no light and bedding equipment and that, prisoner has to sleep on the floor up to 14 days, and sometimes with reduced diet and no right to visitation from his family members. The first petitioner his affidavit made a vague statement that, prisoners subjected to solitary confinement end up experiencing serious health issues including pneumonia. In their submission, the learned counsel for petitioners, amplified this fact, that it is so especially during cold session (sic, season) for prison located in Northern and Southern High Lands part of Tanzania. In **Rev Christopher Mtikila** (supra) page 31, the Court held, and we quote:

> *'A breach of the constitution is such a grave and serious matter that cannot be established by mere inference but by proof beyond reasonable doubt.'*

The first petition herein was inferring from what he stated to have come to his knowledge as he neither stated to have seen someone being confined in a manner he portrayed, nor did he aver to have seen someone traumatized as a result of the alleged woeful experience. Even Tito Elia Magoti (PW1) who was summoned at the instance of the petitioners'

counsel for examination, in his testimony in chief he ended up making opinion regarding his experience on solitary confinement. In cross examination he disowned staying therein, save during re-examination when he said he was confined on solitary confinement. As such we find his evidence is of little value, because PW1 did not prove as to his personal experience while in the alleged solitary confinement. The Prions Standing Orders, prohibit torture, inhuman or degrading punishment or treatment to offenders. Order 2(xv) of the Prison Standing Orders, provides:

> *'No prisoner shall be punished except in accordance with the terms set out in the law or regulation, and never twice for the same offence. All extrajudicial forms of punishment such as torture, or inhuman or degrading punishment or rehabilitation shall be completely prohibited as punishments for disciplinary offences'*

From the penal order above, we find there is nothing inconsistence to the provisions of the Constitution. The said order does not embrace act of torture, inhuman or degrading punishment to offenders. In fact, the penal order above quoted prohibits such forms of punishment to prisoners. In the case of **Centre for Strategic Litigation Limited and Another** (supra), this Court had this to say, we quote:

'Apart from citing the provision of law, there must be facts showing that what is contained in the provisions contradicts the Constitution. Those facts must be clearly shown in the Affidavit supporting the petition and substantiated by the arguments during submissions. This is what we call proof and as pointed out; they must be put in such a way that leave no doubts...'

As we have demonstrated above, the evidence herein regarding the complaints of torture, inhuman or degrading punishment in the solitary confinement is wanting. Indeed, the penal order does not embrace the same as aforesaid.

Our verdict on sub-issue number two above regarding abuse in actual operation, applies. Actually, even the international instruments cited by the learned counsel for the petitioners, to wit the Nelson Mandela Rules, does not oust or declare solitary confinement as unlawful, rather prohibit indefinite solitary confinement, prolonged solitary confinement, exceeding 15 consecutive days, which is not a case in Tanzania Prison Service Standing Orders, which provide for solitary confinement for the aggregate not exceeding 19 days in any period of twelve months, see regulation 8(1) of GN No. 13/1968.

According to regulation 8(4)(a) of GN No. 13 1968, prisoners on solitary confinement are entitled to a right of visit by the prison officer, medical officer, minister of religion and visiting justices. As such an argument for denial of visitation right to prisoners in solitary confinement, is unmerited. This is because the law imposes safeguard on the limitation of communication by the prisoner on solitary conferment to the outside world. To sum up there is no merit in this compliant and we so find.

Regarding sub-issue four, on the grievance of provision of meal and diet to the prisoners below the recommended diet scale, as per the submission of the learned counsel for petitioners, diet scale for prisoner is provided for in the Schedule to GN No. 148/1968 made under regulation 23 of the Prisons (Prison Management) Regulations G.N Nos. 19 of 1968, which provide for diet scale III to be applicable to all prisoners. This scale include two meals daily which is breakfast and main menu. Now with that provided standard scale of meals the petitioners' argument that they used to be provided with maize porridge every morning and *ugali* beans every day except Sunday where they were provided with rice and meat, or a complaint that prisoners are never provided with fruits or green vegetables, as part of their main menu, or cassava, potatoes as part of the breakfast, in our view is a factual situation which invariably does not

raise any serious constitutional question for determination. This is so as the petitioners do not challenge the dietary scale provided in the Regulation nor did they furnish any evidence if at all they exhausted remedy available in the Prisons Laws, for lodging their grievances of being swindled with meals by being given less than what was due to them. Order 2(xvi) of the Standing Order, provides for the prisoner's right to be informed of the prisons' regulations, disciplinary law and the modalities of forwarding their grievances if any. The same reads and we quote:

> *'Every prisoner on admission shall be provided with information about the regulations governing the rehabilitation of prisoners of his category, the disciplinary requirements of the prison, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of prison.'*

Much as there is no complaint of not being aware of the said regulations and modalities of raising complaints, if any, find we the petitioners had a forum to pursue their grievances under order 685, 831 and 701 to the Principal Commissioner, visiting Justice and President of the United Republic of Tanzania, respectively, but seemingly failed to exhaust that remedy.

Above all, section 99 (1) of Cap 58, sets a deadline for pursuing civil action for anything done or omitted in pursuance of that Act, to be a ceiling of one year from the date of action or commission complained of, and we quote:

> *"99(1) Notwithstanding the provisions of any other written law no civil action against the United Republic or any person for anything done or omitted in pursuance of any provision of this Act shall be commenced after the expiration of six months immediately succeeding the act or omission complained of, or in the case of a prisoner, after the expiration of six months immediately succeeding the date of his release from the prison,* ***but in no case shall any such action be commenced after the expiration of one year from the date of the act or omission complained of."*** *(Emphasis supplied)*

Having the above provision of the law in mind, we note that, the first petitioner was send to prison on 26/2/2018 and released on 26/4/2018 while the second petitioner incarcerated on 10/3/2020 and released on 14/3/2020. This petition was presented for filing on 31/5/2021, well out of a prescribed time of one year. As such the Petitioners apart from failure to exhaust remedy available prior to staging this petition, are also barred by limitation of action, hence the compliant in unmerited too.

The fifth sub-issue is on the powers vested to the in-charge of prison to punish prisoners for prison offences without due regard to due process and enough safeguard mechanism. In this complaint the Petitioners faulted the provisions of section 33(1)(a),(b) and (c) and (2)(a),(b) and (c) of Cap 58, as terming it unconstitutional on account of a fact that a phrase 'after due inquiry' of the offence during the process and before Imposition of punishment to the prisoner is not amplified anywhere, be it in Cap 58 or its Regulations. The learned State Attorney construed the word "due", to connote adherence with all legal requirements of fair hearing to make the finding just and proper.

Principally, it is our view that, this complaint has been lodged without sufficient complaints. It is true that section 33(1) and (2) of Cap 58, require due inquiry to be made by the presiding prisoner's officer before any punishment is imposed unto the prisoner. However, that provision should not be read in isolation. This is because, reading the provision of section 34 (3) of Cap 58, which cater for transfer of a case by the officer in charge to the commissioner, the same entails the officer in charge transferring the case to forward the following documents and information used during the proceedings against the prisoner before the prison in-charge. The provision of section 34(3) of Cap. 58 provides:

34(3) An officer in-charge, if he transfers a case to the Commissioner under subsection (2), shall forward to the Commissioner

(a) a copy of the charge;

(b) the record of all the evidence he has taken, including the evidence of the prisoner;

(c) the reason why he has found the prisoner guilty; and

(b) any representation the prisoner may wish to make to the commissioner in regard to punishment'

To our view, the above set of documents and information constrain us to hold that the hearing by the officer in charge meets the minimum threshold of a fair hearing guaranteed under Article 13(6)(a) and (c) of the Constitution. More importantly under section 37 of Cap 58, it is more clearly amplified on the right of hearing by the prisoner before Is found guilty for any prison offence. We quote for appreciation of the argument:

'No prisoner shall be found to be guilty of a prison offence until he has an opportunity of hearing the charge or charges against him and making his defence'

It cannot be therefore said that there is no due process and enough safeguarding mechanism during the trial of a prison offence by the officer in charge. The situation could be different if the argument was, who would be the complainant to a charge, witnesses, prosecutor, judge and who

would carry out the execution of the sentence imposed. That could perhaps be a matter of serious concern. However we cannot land there, because that is out of scope of the line of argument by the Petitioners.

Regarding an argument that there is no remedy for appeal against the punishment imposed by the Commissioner, it is true that the decision by the Commissioner under section 34 of Cap 58, implies finality effects. However, as alluded to by the learned State Attorney, of which we are in agreement with, the decision of the commissioner is amenable to review by any aggrieved party. The complaint in this sub-issue too is wanting and we so find.

Now we move to the sixth sub-issue in which the compliant is on imposition of corporal punishment to the prisoners. The learned counsel for the petitioners challenged corporal punishment provided for under section 33(3)(a) of Cap 58, regulations 6(a) and 9 of G.N No. 13/1968. However, we embrace the argument by the learned State Attorney that the Court cannot be invited to fault the corporal punishment under the above proviso, while the Corporal Punishment Act, Cap 17 of 2002, is still valid and is not subject for this litigation. Equally there are other penal laws which still recognize and embrace corporal punishment among forms or types of punishment which can be imposed by the court, to wit the

Penal Code, Cap 16 R.E. 2019, under sections 28, 131(1), 131(2)(a) and (d), 131 A (3) and 132 (1). In view of the above expounded reasons we find no merit in this complaint too.

Moving to seventh sub-issue, the compliant is on the prisoner's act of visiting latrines without permission and remaining there longer than necessary as a prison offence. The learned counsel for the petitioners submitted that powers vested to officers under regulation 2 of G.N. No. 13/1968 are likely to be abused. The learned State Attorney resisted the contention arguing that the allegation are based on speculation and fear that the powers vested to the officer in-charge of prison may be abused. We nod heads together with the learned State Attorney that a mere assertion cannot render a statute unconstitutional. In other wards we cannot act on a mere speculation to declare a statute unconstitutional. The Petitioners are duty bound to furnish the Court with sufficient materials facts for the Court to examine the constitutionality of the impugned statute or provision of the law. It is not enough for the petitioners to merely allege and then rush to invite the Court to declare certain section of the law unconstitutional without evidence vindicating that the unconstitutionality actually exists. This compliant is destitute of merit too.

The eight sub-issue, is on the petitioners' grievance of availing only one pair of uniform to prisoners without clothes for changing in the event the one provided is being washed. Without going afar, the manner this ground is premised, we find can hardly be said is a serious question drawing the attention of constitutionality. No wonder the petitioner's failure to cite a specific Article of the Constitution in contravention nor any rule which is inconsistence with the Constitution renders the compliant devoid of merit. We so find as the Constitution being a serious and living document cannot be invoke in unserious matter as it was stated in the case of **Attorney General vs. W.K. Butambala** (1993) TLR 46, page 51 where the Court observed thus:

> *"We need hardly say that our constitution is a serious and solemn document. We think invoking it and knocking down laws or portion of them should be reserved for appropriate and really momentous occasion"*

With the above findings we disregard this complaint and move to the next concern by the petitioners.

Sub-issue number nine to the petitioner's grievances is on the concern of overcrowding of prisons. The petitioners invited this court to declare that overpopulation in prison is against the law and contravenes Article 12(2),

13(1), 14 and 29 of the Constitution. With due respect to their compliant the petitioners did not provide any imperial data to support their contention and proposition on the alleged congestion in prisons. Without empirical evidence, the alleged overpopulation remain imagination and we so find. In their urge to beef up this concern petitioners through PW1 attempted to explain the situation in a cell he was accommodated, that for a period he stayed therein, up to 180 or 160 people were accommodated against its actual capacity of 100 people. However, as argued by the learned State Attorney the argument which we embrace, the petitioners were duty bound to mention the prison or prisons which there is or are overcrowded and further to state the accommodation size of that prison to enable us ascertain that fact.

Order 479 of the Prison Standing Orders which governs accommodation area per person, provide for the following perimeters and sizeable area for each prison, and we quote for easy of reference:

> *'2.8 square metres (30 sq. ft) of floor space should be allocated to each prisoner confined in a ward. To determine the number of prisoners to be accommodated in a particular ward, the total area of the ward in square metres should be divided by 2.8 square metres to get the authorized accommodation of the ward'*

With the above exposition of the law in mind, we are of the unquestioned views that, petitioners ought to align their argument for a proposition of congestion of prisoners in prison, in line with the practical applications vis-à-vis the arithmetic formula enumerated above. Short of that, the argument for unconstitutionality or otherwise of the alleged overcrowding cannot be entertained and sustained by this Court as it held in the case of **Ganga Sugar Corporation** (supra), which though Indian case and persuasive authority to this Court we find it to be relevant to our case, where it was observed thus:

> *"We will make to with it although litigants, especially in the battle-field of unconstitutionally, must produce the socio-economic bio-data of challenged legislation, explaining the how ,the why and why not of each clause lest lay minds, lost in legal tuning, should miss meaningful sound and social sense which experts may explain".*

Therefore, the constitutionality on the alleged prisoners overcrowding is unfounded and we disregard the complaint.

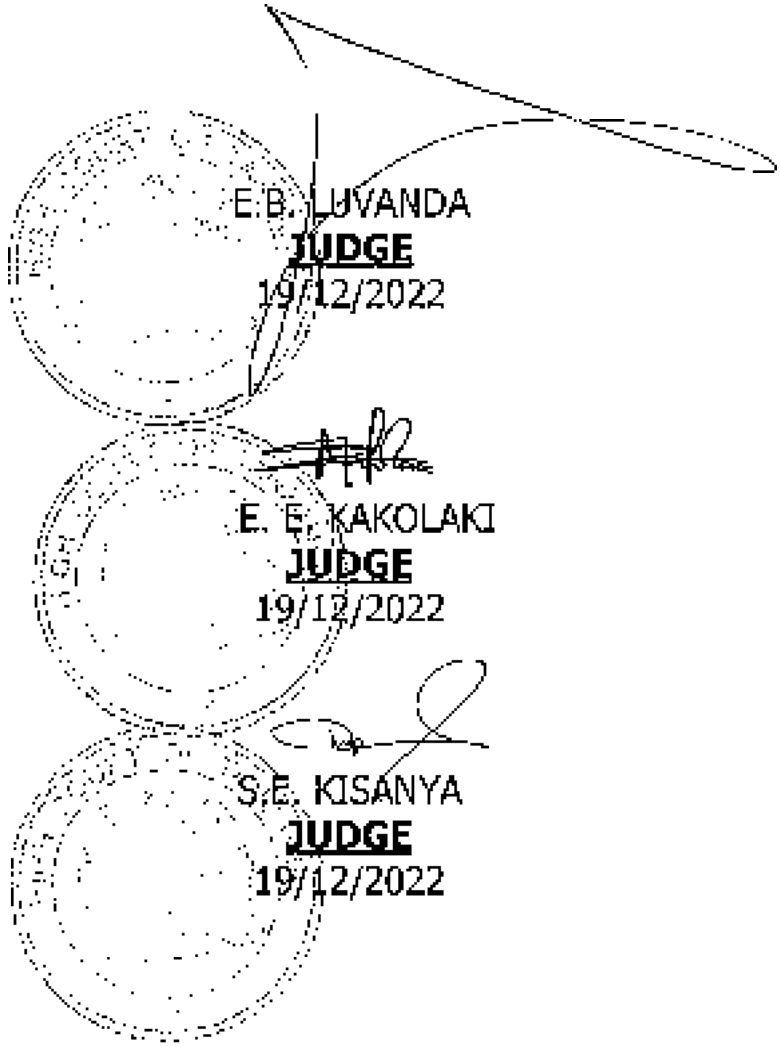
To put in a nutshell, save for ground in the first sub-issue where we have found that the acts of compelling prisoners to test HIV and disclose or release results of testing to third parties, being not backed by law and therefore offending prisoners right to dignity, privacy and freedom

enshrined under Article 12(2) and 16(1) of the Constitution, the rest of the complaints are all dismissed.

Having so found, we make no order to costs, given that this petition is on a nature of public litigation.

Order accordingly.

DATED at **DAR ES SALAAM** this **19th** day of **December, 2022.**



E.B. LUVANDA
JUDGE
19/12/2022

E. E. KAKOLAKI
JUDGE
19/12/2022

S.E. KISANYA
JUDGE
19/12/2022