



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Case No: 191/15

In the matter between:

BOYCE BHEKI GAMA

APPLICANT

and

**THE CHAIRMAN OF THE PREROGATIVE
OF MERCY COMMITTEE**

1ST RESPONDENT

**THE COMMISSIONER GENERAL
OF CORRECTIONAL SERVICES**

2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS

3RD RESPONDENT

THE ATTORNEY GENERAL

4TH RESPONDENT

Neutral Citation : Boyce Bheki Gama vs The Chairman of the Prerogative of Mercy
Committee & 3 Others (191/15) [2017] SZHC 199 (5
OCTOBER
2017)

Coram : S.B. MAPHALALA PJ; J.P.ANNANDALE J; MABUZA J.

Delivered : 5 OCTOBER 2017

SUMMARY

Criminal Law and Procedure - Applicant's death sentence commuted to life imprisonment – Condition that he be released at 75 years attached – Applicant now seeks order reviewing and setting aside such condition – Application granted.

JUDGMENT

By the Court

- [1] The Applicant in his founding affidavit describes himself as an adult Swazi male of Kalanga in the District of Lubombo.

- [2] The 1st Respondent is the Chairman of the Prerogative of Mercy Committee established in terms of Section 92 (2) of the constitutional Act No. 5 of 1968.

- [3] The 2nd Respondent is the Commissioner General of Correctional Services who is the head of His Majesty's Correctional Services in Swaziland, and is cited herein in his capacity as such.

- [4] The 3rd Respondent is the Director of Public Prosecutions who is in charge of all Public prosecutions in Swaziland, and is cited herein in his capacity as such.
- [5] The 4th Respondent is the Attorney General who is the legal representative of the Government of Swaziland and all its departments and is cited herein in his capacity as such.
- [6] The Applicant in his founding affidavit states that on the 23rd September, 1993 he was convicted and sentenced by the High Court of Swaziland to death under case number 81/1992, and the conviction and sentence were confirmed by the Court of Appeal.
- [7] That on or about the 6th November, 2001 he received a pardon which **“commuted the death sentence imposed by the Court of Appeal, to that of life sentence with the condition that the convict shall on the attainment of the age of 75 years be unconditionally released from custody ”** (Emphasis added). He states that at the time of the pardon on the 6th November 2001 he had already been in custody for eight (8) years. He

further stated that as on the date of hearing of this application (1/12/2016) he had been in custody for twenty three (23) years.

[8] He contends that in terms of the Prison Act No. 40/1960 a life sentence translates to twenty years and in terms of the Constitution to not less than twenty five years. He argues that in both aspects he has completed a life sentence in terms of the law. Hence the present application in which he seeks *inter alia* the following:

(a) An order reviewing, setting aside and/or correcting the condition of the pardon recommended by the Prerogative of Mercy Committee that Applicant may only be released on attainment of the age of 75 years.

(b) An order declaring that Applicant has served a life sentence in form of the pardon recommended by the Prerogative of Mercy Committee.

(c) That Applicant be released from custody for the reason that he has served his sentence.

[9] We have listened to compelling and commendable submissions on behalf of the respective parties.

[10] In coming to our decisions we are persuaded by the following legislation:

(a) The Prisons Act 40/1960 section 43 (2):

“a prisoner sentenced to imprisonment for life, shall for the purposes of this section be deemed to be a prisoner sentenced to imprisonment for 20 years.”

Section 43 (3)

“For the purpose of giving effect to this section, a prisoner on admission shall be credited with the full amount of remission to which he would be entitled at the end of his sentence or sentences as if he would not lose such remission”.

(b) Section 15 (3) of the Constitution Act No. 5/2005 states:

“A sentence of life imprisonment shall not be less than twenty five years”.

[11] We are mindful of the fact that the Constitution was not promulgated when the Applicant was sentenced to death and when he was granted a pardon which commuted the death sentence to life imprisonment. We consider the relevant section in the Constitution as a compelling guideline and benchmark. What was in existence at the time of his imprisonment was the relevant section in the Prison Act No. 40/1964.

[12] It is our considered opinion that the Applicant has made out a good case for our intervention. We make the following order:

- (a) An order reviewing and setting aside and/or correcting the condition of the pardon recommended by the Prerogative of Mercy Committee that Applicant may only be released on attainment of the age of 75 years is hereby granted;
- (b) An order declaring that the Applicant has served a life sentence in form of the pardon recommended by the Prerogative of Mercy Committee is hereby granted.
- (c) An order that the Applicant be released from custody for the reason that he has served his sentence is hereby granted.

**S.B. MAPHALALA
PRINCIPAL JUDGE**

I agree

**J.P. ANNANDALE
JUDGE**

I agree

**Q.M. MABUZA
JUDGE**

For the Applicant : Mr. L. Gama

For the Respondents : Mr. N.G. Dlamini