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NO. 21 OF 2011

POWER OF MERCY ACT

[Date of assent: 27th August, 2011.]

[Date of commencement: 5th September, 2011.]

An Act of Parliament to make further provision with respect to the power of mercy pursuant to Article 133 of the Constitution; to provide for the appointment, tenure of office of the members and the powers and functions of the Advisory Committee on the Power of Mercy, and for connected purposes

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Power of Mercy Act, 2011.

2. Interpretation

(1) In this Act, unless the context otherwise requires—

“**acquittal**” means a judgment that a person has not been found guilty of the crime with which the person had been charged;

“**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for matters relating to correctional services;

“**chairperson**” means the chairperson of the Committee provided for under section 5(2);

“**Chief Registrar**” means the Chief Registrar of the Judiciary referred to in Article 161 of the Constitution;

“**Committee**” means the Advisory Committee on the Power of Mercy established pursuant to Article 133(2) of the Constitution;

“**convicted criminal prisoner**” means any criminal prisoner under sentence of a court or a court martial, and includes a person detained in prison under sections 162 to 167 of the Criminal Procedure Code (Cap. 75);

“**correctional facility**” means an institution used to detain persons who are in the lawful custody of the State, whether accused persons awaiting trial or convicted criminal prisoners serving a sentence, and includes a prison established or deemed to have been established under section 24 of the Prisons Act and a youth corrective training centre established under section 66 of the Prisons Act;

“**court**” means any court of Kenya of competent jurisdiction;

“**felony**” has the meaning assigned to it in the Penal Code (Cap. 63);

“**member**” means member of the Committee appointed under the Constitution in accordance with the procedure set out in section 9;

“**misdemeanour**” means any offence which is not a felony;

“**panel**” means the selection panel constituted under section 8;

“**pardon**” means a pardon granted by the President under the Constitution and this Act;

“**pardon officer**” means a person appointed as such under section 17;

“**petitioner**” means any person who makes an application for the power of mercy pursuant to Article 133(1) of the Constitution;

“**power of mercy**” means the exercise by the President of the powers granted under Article 133 of the Constitution;

“**prisoner**” means any person, whether convicted or not, under detention in any prison;

“**prison officer**” means any member of the Kenya Prisons Service of whatever rank;

“**victim**” means any person who individually or together with one or more persons suffered harm in the form of physical mental or emotional injury, pecuniary loss, or substantial violation of human rights as a result of the criminal activity of the person for whom power of mercy is petitioned or otherwise under consideration.

(2) Until after the first general elections under the Constitution, references in this Act to a Cabinet Secretary or a Principal Secretary shall be construed to mean a Minister or a Permanent Secretary respectively.

3. Application

The provisions of this Act shall govern all matters relating to a petition for the exercise of power of mercy by the President pursuant to Article 133 of the Constitution.

4. Guiding principles

In the performance of the functions and exercise of powers under the Constitution and this Act, the President and Committee shall act in accordance with Article 47(1) of the Constitution and be guided by the values and principles set out in Article 10 of the Constitution.

PART II – COMPOSITION, FUNCTIONS AND POWERS OF THE COMMITTEE

5. Composition of the Committee

(1) The Committee established pursuant to Article 133(2) of the Constitution shall be an unincorporated body consisting of—

- (a) the members appointed under Article 133(2)(a) and (b) of the Constitution; and
- (b) seven other members appointed in accordance with the provisions of this Act.

- (2) The Attorney-General shall be the chairperson of the Committee.
- (3) The members under section 5(1)(b) shall serve on a part-time basis.

6. Qualification for appointment as a member

A person is qualified for appointment as a member under section 5(1)(b) if the person—

- (a) is a citizen of Kenya;
- (b) possesses a degree from a university recognized in Kenya;
- (c) has had a distinguished career in their respective field;
- (d) has at least ten years proven knowledge and experience in matters relating to any of the following fields—
 - (i) law;
 - (ii) psychiatry;
 - (iii) psychology and counselling;
 - (iv) correctional services;
 - (v) medicine;
 - (vi) human rights;
 - (vii) governance;
 - (viii) religion;
 - (ix) gender;
 - (xi) children matters;
 - (xii) disability; and
- (e) meets the requirements of Chapter Six of the Constitution.

7. Disqualification for appointment as a member

(1) A person shall not be qualified for appointment as a member under section 5(1)(b) if the person—

- (a) is a member of a governing body of a political party;
- (b) is an undischarged bankrupt;
- (c) has been convicted, whether in Kenya or elsewhere, of an offence and sentenced to imprisonment for a term exceeding six months without the option of a fine;
- (d) is unable to perform the functions of office due to mental incapacity; or
- (e) has been removed from public office for contravening the provisions of the Constitution or any other law.

(2) Notwithstanding subsection (1)(c), a person who has fully served the sentence shall be not be disqualified for appointment as a member of the Committee.

8. The constitution of the panel

(1) At the commencement of this Act or whenever a vacancy arises in the membership of the Committee under section 5(1)(b), as the case may be, the

President shall, within fourteen days after the commencement of this Act or of the occurrence of the vacancy, by notice in the *Gazette*—

- (a) declare vacancies in the panel; and
- (b) constitute a panel.

(2) The panel referred to under subsection (1) shall comprise of one person from each of the following bodies respectively—

- (a) a chairperson, who shall not be a State officer or public officer, appointed by the President;
- (b) the Principal Secretary in the Ministry for the time being responsible for matters relating to justice or his or her representative appointed in writing;
- (c) the Principal Secretary in the Ministry for the time being responsible for correctional services or his or her representative appointed in writing;
- (d) the Commissioner of Prisons or his or her representative appointed in writing;
- (e) a representative of the Office of the President;
- (f) a representative of the Office of the Prime Minister;
- (g) the joint forum of the religious organizations described in subsection (3);
- (h) a representative of the commission for the time being responsible for matters of human rights; and
- (i) a representative of the department or commission for the time being responsible for matters of gender.

(3) The joint forum of religious organizations referred to in subsection (2)(g) shall consist of representatives of—

- (a) the Supreme Council of Kenya Muslims;
- (b) the Kenya Episcopal Conference;
- (c) the National Council of Churches of Kenya;
- (d) the Evangelical Fellowship of Kenya; and
- (e) the Hindu Council of Kenya.

(4) The Office of the President shall provide secretariat services to the panel.

(5) A vacancy in the panel arising after it has been constituted shall be filled within seven days by the nominating body, in accordance with this section.

(6) Notwithstanding subsection (5), a vacancy arising in the membership of the panel as required by subsection (2)(f) after first general elections under the Constitution, shall not be filled.

(7) The quorum of the panel shall be five members.

(8) Subject to this section, the panel shall regulate its own procedure.

(9) The panel shall stand dissolved upon the appointment of the members under section 5(1)(b).

9. Procedure for appointment of a member

(1) Once the panel is constituted in accordance with section 8, the panel shall, within seven days of its convening, by advertisement in at least two daily newspapers of national circulation, invite applications from persons who qualify for appointment as members of the Committee under section 5(1)(b).

(2) The selection panel shall—

- (a) consider the applications received under subsection (1) to determine their compliance with the provisions of the Constitution and this Act;
- (b) short list the applicants;
- (c) publish the names of the shortlisted applicants and the qualified applicants in at least two daily newspapers of national circulation;
- (d) conduct interviews of the shortlisted persons in public;
- (e) recommend to the President ten suitably qualified persons for appointment as members.

(3) The President shall, within seven days of receipt of the shortlisted persons under subsection (2), by notice in the *Gazette*, appoint seven members from among the persons recommended by the panel.

10. General principles of appointing of members

In recommending or appointing members, the panel and the President shall—

- (a) have regard to ethnic and regional diversity of the people of Kenya;
- (b) ensure that not more than two-thirds of the members are of the same gender;
- (c) ensure that the competencies provided in section 6 are reflected in the membership of the Committee; and
- (c) take into account the national values set out in Articles 10 and 232 of the Constitution.

11. Oath of office

Before assuming office, the members and secretary of the Committee shall each make and subscribe, before the Chief Registrar, the oath or affirmation set out in the First Schedule.

12. Election of vice-chairperson

(1) The chairperson shall, within seven days of the appointment of the members, convene the first meeting of the Committee at which the members shall elect the vice chairperson of the Committee from amongst their number.

(2) The vice chairperson shall be elected from amongst the members appointed under section 9(3).

(3) The chairperson and vice chairperson shall not be of the same gender.

13. Tenure and vacancy in the office of a member

(1) Members of the Committee, apart from the Attorney-General and Cabinet Secretary, shall hold office, for a single term of five years, and shall not be eligible for re-appointment.

(2) The office of a member shall become vacant if the holder—

- (a) dies;
- (b) resigns from office by notice in writing addressed to the President;
- (c) is convicted of an offence and sentenced to imprisonment for a term exceeding six months without the option of a fine;
- (d) is absent from three consecutive meetings of the Committee without good cause;
- (e) is adjudged bankrupt;
- (f) is found guilty of gross misconduct; or
- (g) is unable to perform any of the functions of the office.

(3) The President shall notify every resignation, vacancy or termination in the *Gazette* within fourteen days thereof.

(4) Where a vacancy occurs in the membership of the Committee, the appointment procedure provided for in Article 133(2) of the Constitution and section 9 shall, with necessary modifications, apply.

(5) A member appointed under subsection (4), shall serve for a single term of five years and shall not be eligible for re-appointment.

(6) Subject to paragraph (2) of the Second Schedule, a vacancy in the Committee shall not affect the proceedings and decisions of the Committee.

14. Functions of the Committee

In addition to the functions set out in Article 133(1) and (4) of the Constitution, the Committee shall—

- (a) undertake or commission research and collect data on matters relating to the power of mercy;
- (b) work with State organs responsible for correctional services to educate persons in correctional services on the power of mercy and procedures relating to applications for its exercise;
- (c) carry out any necessary investigations required to make a determination on a petition for power of mercy;
- (d) partner with State and non-state actors to educate the public on the nature and implications of the power of mercy;
- (e) undertake such other activities as may be necessary for the discharge of its functions and the exercise of its powers; and
- (f) carry out any other function as may be conferred on it under any other written law.

15. Powers of the Committee

(1) The Committee shall have all powers necessary for the execution of its functions under the Constitution and this Act.

(2) In the performance of its functions and in the exercise of its powers, the Committee—

- (a) may, subject to this Act, determine its procedure;

- (b) shall, where appropriate, receive written or oral statements;
- (c) may establish sub-committees;
- (d) may co-opt into its sub-committees persons whose knowledge and expertise it requires;
- (e) is not bound by the strict rules of evidence; and
- (f) shall conduct interviews of the individuals on whose behalf the petition is made.

16. Secretariat

(1) The office of the President shall provide secretariat services to the Committee.

(2) There shall be a secretary to the Committee who shall be a public officer nominated by the Public Service Commission through a competitive process and appointed by the President.

17. Appointment of a pardon officer

(1) For the purpose of this Act, the Cabinet Secretary shall, by notice in the *Gazette*, appoint pardon officers, who shall be public officers seconded to the Committee and stationed at correctional facilities as shall be prescribed.

(2) The persons appointed under subsection (1) shall—

- (a) report directly to the Committee on all matters related to the power of mercy;
- (b) advise the internal mechanism in each correctional facility on all matters relation to the power of mercy; and
- (c) be responsible for assisting the applicants in the preparation of petitions and providing general information on the power of mercy to the prisoners.

18. Conduct of the affairs of the Committee

(1) The business and affairs of the Committee shall be conducted in accordance with the Second Schedule.

(2) Except as provided for in the Second Schedule, the Committee may regulate its own procedure.

(3) The Committee may invite any person to attend any of its meetings and to participate in its deliberations, but such a person shall not have a vote in any decision of the Committee.

PART III – PETITION FOR THE EXERCISE OF POWER OF MERCY**19. Eligibility to file a petition**

(1) Any person may, subject to the Constitution and this Act, petition the President, through the Committee, to exercise the power of mercy and grant any relief specified in Article 133(1) of the Constitution.

(2) Notwithstanding the generality of subsection (1), a petition shall not be permitted where—

- (a) the person for whose benefit it is made, is on probation or serving a suspended sentence; or
- (b) an application for any judicial remedy is pending before a court.

20. Commencing a petition

(1) An application for the exercise of the power of mercy shall be by a petition in the prescribed form.

(2) The petition referred to in subsection (1) shall comply with the requirements set out in the Third Schedule.

(3) For the avoidance of doubt, a petition that provides the requisite information shall not be incompetent only for the reason that—

- (a) it does not accord strictly with the prescribed format; or
- (b) it has been commenced in person or through a representative other than an advocate.

(4) A petition under this section may be lodged by electronic means.

(5) The Cabinet Secretary and Committee shall ensure that the relevant forms and information are supplied to all the correctional facilities.

21. Consideration of petitions, notification of victims, etc.

(1) Upon receipt of a petition for the exercise of the power of mercy, the Committee shall—

- (a) determine the admissibility of the petition;
- (b) have all the necessary powers to determine the petition under this section, including—
 - (i) calling for evidence;
 - (ii) where appropriate conducting interviews;
 - (iii) conducting investigations;
 - (iv) receiving and reviewing the necessary reports from appropriate government agencies or officials; and
- (c) make appropriate recommendations to the President in accordance with the Constitution.

(2) In determining the admissibility of the petition under subsection (1)(a), the Committee may consider—

- (a) whether the convicted criminal prisoner has served at least one-third of the sentence pronounced by a court;
- (b) where a person who is convicted and sentenced to imprisonment for life or to death and whose sentence has not been effected, has served for at least five years; or
- (c) any other matter that the Committee may consider necessary.

(3) The Cabinet Secretary shall, by notice in the *Gazette*, from time to time, publish the venue and time where a public hearing and interviews by the Committee shall be conducted.

(4) Where the relief sought under this Part relates to a conviction for a felony in which there was a victim, and the Committee determines under subsection (1) (b) that there is need to contact the victim, reasonable efforts shall be made to notify the victim.

(5) The victim notified under subsection (4) shall be entitled to make representations to the Committee.

22. Criteria to be applied by the Committee

(1) The Committee shall, in making a recommendation under Article 133 of the Constitution and section 21(1)(c) consider—

- (a) the age of the convicted criminal prisoner at the time of the commission of the offence;
- (b) the circumstances surrounding the commission of the offence;
- (c) whether the person, for whose benefit the petition is made, is a first offender;
- (d) the nature and seriousness of the offence;
- (e) the length of period so far served by the convicted criminal prisoner;
- (f) the length of period served by the convicted criminal prisoner in remand;
- (g) the personal circumstances of the offender at the time of making the petition, including mental and physical health and any disabilities;
- (h) the interest of the State and community;
- (i) the post-conviction conduct, character and reputation of the convicted criminal prisoner;
- (j) the official recommendations and reports from the State organ or department responsible for correctional services;
- (k) where the petitioner has opted to pursue other available remedies, the outcome of such avenue; and
- (l) the representation of the victim where applicable.

(2) In addition to the requirements under subsection (1), the Committee may consider—

- (a) where applicable, a report of fellow inmates; or
- (b) reports from probation services.

23. Notification of grant or denial of petition

(1) The President shall, within thirty days of receipt of the recommendations by the Committee, consider the recommendations and either approve or reject the petition.

(2) Where the President approves or rejects a recommendation of the Committee pursuant to subsection (1), the Committee shall, in writing, notify the petitioner or their representative of the President's decision within seven days.

(3) The Committee shall cause the approved petitions under subsection (1) to be published, in the *Gazette*, within twenty-one days of the receipt of the President's decision.

(4) The decision of the President for each petition made under this section shall be final.

24. Re-petition

(1) Notwithstanding section 23(4), a person may, after the rejection of a petition under section 23(1), re-petition only once and on new grounds, to the President through the Committee.

(2) The Committee shall—

- (a) consider a request for a re-petition referred to it under subsection (1); and
- (b) where it is satisfied that the request raises reasonable facts, inform the petitioner of the outcome and require the petitioner to file the petition in the prescribed manner.

(3) The procedure for a petition under this Act shall apply to a re-petition.

25. Effect of pardon

(1) Where the relief sought and granted in a petition for the exercise of power of mercy is a pardon under Article 133(1)(a) of the Constitution—

- (a) such pardon shall operate as conclusive proof that the Committee and the President are satisfied that the petitioner for the pardon is deserving of the relief; and
- (b) the pardon shall not be construed to be an acquittal.

(2) The chairperson may require any person having the custody or control of any judicial record of a conviction in respect of which a pardon has been granted, to deliver that record into the custody of the Committee.

PART IV – MISCELLANEOUS PROVISIONS

26. Financial arrangements

(1) The expenses incurred by the Committee in accordance with the Constitution and this Act shall be borne by the Office of the President.

(2) The members of the Committee may be paid such allowances as may be determined by the Cabinet Secretary responsible for matters relating to finance in consultation with the Salaries and Remuneration Commission.

27. Conflict of interest

(1) A member of the Committee who has a direct or indirect personal interest in a matter being considered or to be considered by the Committee shall, as soon as reasonably practicable after the relevant facts concerning the matter have come to their knowledge, disclose the nature of the interest to the Committee.

(2) A disclosure of any such interest in a matter shall be recorded in the minutes of the meeting of the Committee and the member shall not be present while that matter is being dealt with by the Committee and shall not take part in any deliberations or vote relating to the matter.

(3) No member or staff of the Committee, including their family members, shall transact any business or trade with the Committee.

(4) A person who contravenes subsection (1) or (3) commits an offence and shall be liable, on conviction, to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both.

28. Recommendations of the Committee

(1) The recommendations of the Committee shall be in accordance with the opinion of a majority of the members reviewing a petition.

(2) If the members are equally divided in opinion, a recommendation for the grant of the relief sought shall be considered as having been affirmed.

29. Annual reports

(1) The Committee shall cause an annual report to be prepared for each financial year.

(2) The Committee shall submit the annual report to the President and Parliament within three months after the end of the year to which it relates.

(3) The annual report shall contain, in respect of the year to which it relates—

- (a) the financial statements of the Committee;
- (b) a description of the activities of the Committee;
- (c) such other statistical information as the Committee considers appropriate relating to its mandate;
- (d) any other information relating to its functions that the Committee considers necessary.

(4) The Committee shall cause the annual report to be published in the *Gazette* and in such other manner as the Committee may determine.

30. Legal proceedings

Proceedings against the Committee shall be deemed to be proceedings against the Government and shall be subject to the Government Proceedings Act (Cap. 40).

31. Protection from personal liability

No matter or thing done by a member of the Committee shall, if the matter or thing is done in good faith for executing the functions, powers or duties of the Committee, render the member personally liable to any action, claim or demand whatsoever.

32. Management of information and records

(1) The Committee shall publish and publicize all important information within its mandate affecting the nation.

(2) A request for information in the public interest by a citizen—

- (a) shall be addressed to the chairperson or such other person as the Committee may for that purpose designate and may be subject to the payment of a reasonable fee in instances where the Committee incurs an expense in providing the information; and
- (b) may be subject to confidentiality requirements of the Committee.

(3) Subject to Article 35 of the Constitution, the Committee may decline to give information to a petitioner where—

- (a) the disclosure of such information is undesirable in public interest or the interests of the administration of justice; or
- (b) the information requested is at a deliberative stage by the Committee.

(4) The right of access to information under Article 35 of the Constitution shall be limited to the nature and extent specified under this section.

(5) Every member and staff assigned to the Committee shall sign a confidentiality agreement.

33. General penalty

A person who contravenes the provisions of this Act commits an offence and shall be liable on conviction, where no other penalty is provided, to a fine not exceeding one million shillings, or imprisonment for a term not exceeding five years, or to both.

34. Prescribed forms

(1) Subject to the Third Schedule, the Cabinet Secretary shall, in consultation with the Committee, prescribe forms to be used for the purposes of filing petitions and relevant notices under this Act.

(2) Notwithstanding subsection (1), an instrument or document which deviates from the prescribed form shall not be void by reason of a deviation and such deviation shall not affect the substance of the instrument or document, unless it is calculated to mislead.

35. Regulations

(1) The Cabinet Secretary may make regulations generally for the better carrying into effect the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), such regulations may provide for among others—

- (a) the conduct of the Committee's operations and proceedings, including the mandatory interviews of the convicted criminal prisoner;
- (b) the manner of receiving and processing petitions;
- (c) any summary procedure the Committee may adopt in the execution of its mandate;
- (d) the steps that may be taken by the Committee before a determination;
- (e) matters relating to the conditions that shall apply in the determination and circumstances that may lead to the grant of power of mercy in accordance with Article 133(1)(a) to (d) of the Constitution;
- (f) the deployment of pardon officers to correctional facilities;

(g) the just, efficient and expeditious determination of petitions under the Constitution and this Act.

(3) Nothing in this Act shall limit or otherwise affect the power of the Committee conferred by the Constitution or under this Act, either on its own motion or on the application of any person, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Committee.

36. Transitional Provisions

The provisions of section 29(2) of the Sixth Schedule to the Constitution shall apply with respect to the appointment of the members of the panel and of the Committee.

FIRST SCHEDULE

[Section 11.]

OATH/AFFIRMATION OF OFFICE OF THE CHAIRPERSON/
SECRETARY/MEMBER OF THE COMMITTEE

I having been appointed (the chairperson/secretary/
member of) the Advisory Committee on the Power of Mercy under the Power of
Mercy Act, 2011, do swear/ solemnly affirm that I will at all times obey, respect
and uphold the Constitution of Kenya and all other laws of the Republic; that I will
faithfully and fully, impartially and to the best of my knowledge and ability,
discharge trust, perform the functions and exercise the powers devolving upon
me by virtue of this appointment without fear, favour, bias, affection, ill-will or
prejudice. (SO HELP ME GOD).

Sworn/Declared by the said

Before me this day of

.....
Chief Justice.

SECOND SCHEDULE

[Section 18.]

PROCEEDINGS OF MEETINGS OF THE COMMITTEE

1. (a) The Committee shall hold at least six meetings in every financial year and not more than three months shall lapse between one meeting and the next meeting.

(b) The chairperson may at any time convene a special meeting of the Committee, and shall do so within one month of the receipt by the chairperson of a written request signed by at least two other members.

(c) Unless three quarters of the members otherwise agree, at least seven days' notice of a meeting shall be given to every member.

(d) The chairperson shall preside over all meetings and in the absence of the Chairperson, by the vice-chairperson and in their absence, by a person elected by the Committee at the meeting for that purpose.

2. The quorum of the meeting of the Committee shall be five members.
3. A decision of the Committee shall be by a majority of the members present and voting and, in the case of an equality of votes the person presiding at the meeting, shall have a second or casting vote.
4. Minutes of all meetings shall be kept and entered in records kept for that purpose.

THIRD SCHEDULE

[Sections 20 and 34.]

GUIDELINES ON THE CONTENT OF THE FORMS

1. Particulars of the petitioner.
 2. Particulars of the convicted criminal offender, the subject of the petition, if different from the petitioner.
 3. The nature and particulars of the offence committed.
 4. Relief sought or nature of the petition.
 5. Grounds for the petition.
 6. The age of the offender at the time of the commission of the offence and at the time of making the petition.
 7. The circumstances surrounding the commission of the offence.
 8. Whether the person, for whose benefit the petition is made, is a first offender.
 9. The length of period so far served by the convicted criminal prisoner.
 10. The length of period served by the convicted criminal prisoner in remand.
 11. The personal circumstances of the offender at the time of making the petition, including mental and physical health, disabilities.
 12. The post-conviction conduct, character and reputation of the convicted criminal prisoner.
 13. Any other relevant information as may be prescribed by the Cabinet Secretary on the advice of the Committee.
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