



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC. CRIMINAL APPLICATION NO. E031 OF 2021

NAOMI BONARERI ANGASA.....ACCUSED/APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR

RULING

1. Notice of Motion dated 23rd March, 2021 is filed by **NAOMI BONARERI ANGASA (Naomi)**.
2. Naomi was convicted before Thika Chief Magistrate's Court, on 8th December, 2016 for the offence of defilement as provided under **Section 8(1)(2)** of the Sexual Offences Act. She was sentenced by that court to life imprisonment.
3. She appealed before Kiambu High Court being **Criminal Appeal No. 95 of 2017**. By this Court's judgment dated 21st February, 2018, her conviction and sentence were quashed and were substituted with the conviction of the offence of committing an Indecent Act with a child contrary to **Section 11(1)** of the Sexual Offences Act, and she was sentenced to 10 years imprisonment.
4. Naomi appealed that High Court's judgment at the Court of Appeal Nairobi, being **Criminal Appeal No. 60 of 2019**. The Court of Appeal upheld the High Court judgment and dismissed Naomi's appeal.
5. By the Notice of Motion application dated 23rd March, 2021 Naomi seeks before this court the following prayers:-

“THAT this honourable court be pleased to make an order and/or a declaration that the accused sentence made on 21st February, 2018 takes effect and/or commences from the time the accused was taken into custody, i.e. 2.5.2014.

THAT this Court be pleased to also make an order that the accused person is entitled to Remission subject to the Commissioner General's direction and/or decision.”

ANALYSIS

6. I will begin by considering the second prayer of the application which seeks this Court to make an order that Naomi is entitled to remission. Remission is considered as provided by **Section 46** of the **Prison Act Cap. 90**. That Section provides:-

(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.

Provided that in no case shall:-

(i) Any remission granted result in the release of a prisoner until he has served one calendar month;

(ii) Any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the Penal code or to be detained during the President's pleasure.

(2) For the purpose of giving effect to the provisions of subsection (1), each prisoner on admission shall be credited with the full amount for remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.

(3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period-

(a) spent in hospital through his own fault; or

(b) while undergoing confinement as a punishment in a separate cell.

(4) A prisoner may be deprived of remission -

(a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner;

(b) where the Cabinet Secretary for the time being responsible for Internal security considers that it is in the interests of public security or public order.

(5) Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground. [Act No. 25 of 2015].

7. That Section, under **sub-section (1)** provides that remission is earned by industry and good conduct. Who can determine whether a prisoner, such as Naomi, has earned remission as provided under **Section 46(1) of Cap 90**? In my view, that determination can only be made by Commissioner General of Prison. Although Naomi attached recommendations by officer in charge of Langata Women Prison and by Seventh Day Adventist Church and certificates of courses she has undertaken, I find that those should be directed to the Commissioner General of Prisons.

8. For the above reason the prayer that this Court do make an order that Naomi is entitled to remission is rejected.

9. The remaining prayer seeks this Court to make an order that Naomi's sentence commenced from the date she was placed in custody. That prayer is in tandem with the provision under **Section 333(2)** of the Criminal Procedure Code (CPC). The section provides:-

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

10. The High Court considered the case **JAMLICK NJERU IRERI & ANOTHER VS. REPUBLIC (2019) eKLR**, a Court of Appeal decision as follows:-

“I associate myself with the decision in AHAMAD ABOLFATHI MOHAMMED [supra] where the Court of Appeal held that:-

‘The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.’”

11. My perusal of the Thika Court file (the trial court) reveal that Naomi was arrested on 2nd May, 2014 and was retained in custody until 5th May, 2014 when she was presented to the trial court for plea. That court granted her bail but my perusal of that file showed that Naomi was unable to meet the terms of her release on bail and was in custody throughout her trial until her conviction and sentence. Naomi, as provided under **Section 333(2)** of CPC, is entitled to the prayer that her sentence should commence from 2nd May, 2014.

DISPOSITION

12. The prayer for remission of sentence being at the discretion of the Commissioner General of prisons as provided under **Section 46 of Cap 90** is dismissed.

13. An order is hereby made that the ten (10) years sentence in Kiambu High Court Criminal Appeal No. 95 of 2017 of **NAOMI BONARERI ANGASA** commenced from 2nd May, 2014.

RULING DATED, SIGNED and DELIVERED at KIAMBU this 20TH day of MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant.....Ndege

Applicant:N/A

Respondent:Ms. Kathambi

COURT

RULING delivered virtually.

MARY KASANGO

JUDGE