



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 57 OF 2019

GEOFFREY MWITI GIKUNDA.....1ST PETITIONER

SOLOMON NDEREBA M'IRURA.....2ND PETITIONER

NATHAN KIMAITA GUANTAI.....3RD PETITIONER

ZAKAYO MWITI MBUL.....4TH PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The petitioners were convicted and sentenced to death for murder contrary to *section 203 as read with section 204 of the Penal Code*. They later petitioned the Court under the **Muruatetu Case** and had their sentence of death set aside and substituted with 25 years imprisonment on 12/7/2018 and 16/10/2018, respectively by Majanja J.

2. They have now come to Court vide a Motion on Notice dated 1/10/2019 seeking two substantive orders, viz that the sentence of imprisonment do commence from the date of their arrest and that the Court do order that there be remission of a third of their sentence pursuant to *section 46 of the Prisons Act*.

3. The application was supported by their respective affidavits sworn on 1/10/2019. They contended that their sentences had been reviewed to determinate sentences after resentencing. That they had acquired various skills while in custody and that they had not been granted bond during the period of their trial. They sought that the decisions that had resented them be reviewed accordingly.

4. It was submitted on their behalf that *section 333 of the Criminal Procedure Code* was apt about taking into consideration of the period one has been in custody when meting out sentence. The Court of Appeal decision of **Ahamad Abolfathi Mohamed & Another v. Republic [2008] eKLR** was relied on in support of that submission.

5. On its part the state did not oppose the application. It was only submitted on its behalf that the application of *section 333 of the Code* is in the discretion of the sentencing Court.

6. I have considered the submissions of the respective Counsels and the averments on record. The applicants were arrested in or about 2002. They spent about 5 years in remand before they were eventually convicted and sentenced in 2007. At the time of their original sentences, the proviso to *section 333 of the Code* was not applicable since they were all sentenced to death. The proviso reads:-

“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”.

7. In **Petition No. 47 of 2018** in respect of which the 1st applicant was re-sentenced to 25 years, Majanja J specifically stated in paragraph 10 of the judgment that he had taken into consideration of the period of 4 years that the petitioner therein had spent in custody. He made that judgment on 12/7/2018.

8. Three months later on 16/10/2018, the same Judge made the judgment in **Petition Nos. 16, 68, 92 and 93 of 2018** wherein the 2nd to 4th applicants were involved. The Judge did not therein expressly refer to *section 333 of the Code* as he had earlier done. In both decisions however, the Judge meted out a sentence of 25 years imprisonment.

9. In view of the foregoing, I am of the view and so hold that the Court was alive of its obligations under the proviso to **section 333 of the Code**. It must have considered the same before reducing the applicants' sentences from that of death to 25 years imprisonment.

10. Accordingly, the applicants should have appealed against that decision if they felt aggrieved that the Court had not referred to that section while re-sentencing them. I reject the first prayer in the Motion under consideration. The sentences shall run from the dates of the applicants original sentences as ordered by the Court that revised their sentences.

11. The next issue is that of remission. It is no doubt that **section 46 of the Prisons Act**, bestows upon any prisoner who is meted out with a determinate sentence to remission of his sentence. That is a right that can only be lost in circumstances set out in the section.

12. Before the applicants' sentences were reviewed in July and October, 2018, respectively, they were not entitled to any remission as their sentences were indeterminate. The Courts have ruled that so long as a prisoner is under a determinate sentence, notwithstanding that the offence committed may have been robbery with violence or murder, such a prisoner is entitled to remission. See **Brown Tunje Ndago v. Commissioner of Prisons [2019] eKLR** and **Sammy Musembi Mbugua & 4 Others v. Attorney General & Another [2019] eKLR**, respectively.

13. In this regard, I hold that the applicants are entitled to remission of their sentences under **section 46 of the Prisons Act**. Accordingly, the Commissioner of Prisons is directed to allow remission on the Petitioner sentences as per the law provided.

It is so ordered.

DATED and DELIVERED at Meru this 23rd day of January, 2020.

A. MABEYA

JUDGE