



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. CRIMINAL APPLICATION NO. 69 OF 2019

AMOS MUTAMBA PETITIONER

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The petitioner was convicted by a magistrate's court of the offence of robbery with violence contrary to Section 296 (2) of the penal Code and sentenced to suffer death. He appealed to the High Court wherein the conviction was upheld but the sentence of death was on the 5/4/2018 substituted with one of 14 years imprisonment.

2. The petitioner has now filed an application dated 4th September, 2019 seeking for orders:-

(1) That he be granted remission of his sentence under S. 46 the Prisons Act Cap. 90 and under the provisions of Articles 19, 21 (1), 25 and 27 of the Constitution.

(2) That the court considers that he serves the remaining period of the sentence on probation.

3. The petition is supported by the affidavit of the petitioner sworn on 13th September, 2019 in which he states that he is a reformed prisoner. That he has a family to take care of and old parents. That he suffers from hypertension, diabetes and peptic ulcers that require specialized medical attention which is not available in prison. That he has acquired various skills and knowledge in prison that will enable him to face life outside prison.

4. The petitioner is seeking for this court to make orders for remission of his sentence. Section 46 of the Prisons Act, Cap 90 states as follows:-

“(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].”

5. The constitutionality of Section 46 (1) (ii) of the Prisons Act on whether a prisoner serving sentence for robbery with violence under S. 296 (2) of the Penal Code is entitled to remission was comprehensively dealt with by Odunga J. in the case of **Sammy Musembi Mbugua & 4 Others –Vs- Attorney General & Another (2019) eKLR** where he held that prisoners serving a fixed or definite or determinate period of imprisonment are entitled to remission of their sentence in accordance with the provisions of Section 46 of the Prisons Act Cap 90. He further held that Section 46 (1) (ii) of the Act that limits such prisoners from benefiting from remission of their sentences was unconstitutional. I am entirely in agreement with the said judgment.

6. The petitioner is serving a determinate term of 14 years imprisonment. He is therefore entitled to remission. However the power to grant remission under the provisions of section 46 of the Prisons Act lies with the Commissioner of Prisons and the Cabinet Secretary for Internal Security and not with this court. The application that this court orders that the petitioner be given remission on his sentence is legally untenable. The petitioner can only come to this court if he is unreasonably denied remission by the Commissioner of Prisons. There is no evidence that he has been denied remission of his sentence.

7. This court has no powers under the Probation of Offenders Act, Cap 64 to order a person serving sentence to be released on probation. It is only during an appeal on the severity of the sentence or on a revision that the court has such powers. The prayer that the court makes an order that the petitioner serves the remaining sentence on probation is therefore declined.

8. The upshot is that there is no merit in the petition. The petition is thereby dismissed.

Delivered, dated and signed in open court at Kakamega this 12th day of March, 2020.

J. NJAGI

JUDGE

In the presence of:

Ms. Omondi for State/Respondent

Petitioner - present

Court Assistant - Polycap

14 days right of appeal.