



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**MISC. CRIMINAL APPLICATION NO 21 OF 2020**

**WILLIAM TONGORE.....1<sup>ST</sup> APPLICANT**

**LEXIAN LONGISA CHACHA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT**

**KENYA PRISONS SERVICE.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By the application dated 30<sup>th</sup> November 2020 the applicants seeks for:

I. Spent

II. An interpretation of the commencement of the applicant's jailed term in prison after the original sentence of 10 years passed by the subordinate court on 4/9/2018 was later reduced to five years by the High court on 30/9/2019.

III. The applicants release from jail as their jail sentence ended on 26/6/2020 after 1/3 of their remission totaling (1year 8 months)

2. The grounds upon which the Application was grounded are set out in its body and the supporting affidavits of the Applicants sworn on 2<sup>nd</sup> September 2020.

3. The main grounds relied upon are that the prisons Authorities have agreed that the applicants are entitled to 1/3 of the remission of their prison term. The letter dated 26/11/2020 the 2<sup>nd</sup> respondent informs that that remission amounts to 1year 8months. Further that it is trite law and normal practice (judicial sentencing policy) that the days/ period a sentenced person is in remand is taken into consideration and forms part of the sentence.

4. The application is opposed to by the 1<sup>st</sup> respondents who filed their grounds of opposition dated 4<sup>th</sup> December 2020 where they state that Section 361 of the CPC provides a remedy of a second appeal to the court of appeal on the grounds of a wrong decision on a question of law. Further that this court has no powers to determine or award a remission to a convicted criminal prisoner under section 46(1) of the Prisons Act. Finally, that there's no allegation of violation or infringement of the applicant's rights by the respondents under Articles 27(1) (2) (4), 28, 24(1), 25(a) and 29 (f) of the Constitution of Kenya 2010.

5. Both parties made their oral submission in court on 9.12.2020 where Ms Ndiso for the applicant submitted that the issue of remission has been sorted out and that the only issue remaining was that of interpretation of jail sentence. He further submitted that, contrary to the arguments by DPP, the court has both original and appellate jurisdictions to interpret commencement of sentence.

6. Ms Ndiso submitted that the applicants have already served their full sentence when remission was granted and that they are under detention without trial which is unconstitutional. That the Judge interpreted the sentence to commence on delivery of his judgment.

7. Ms Koina for the respondent submitted that computation of sentence is a preserve of the prisons under section 46 of the Prisons Act and that remission is not automatic as it is based on the good conduct of the prisoner. Remission is earned not a right.

8. She further submitted that the High Court pronounced itself and dismissed the ground and that if the applicant is aggrieved they should appeal. She contends that the court has not properly been invited to look into matters of alleged violations of rights as per Article 22 of the constitution which requires filing of a petition and that the applicant merely filed an application.

9. Ms Koina for DPP submitted that the 2<sup>nd</sup> respondent have not acted ultra vires and that in any case no JR has been filed to question computation of sentence and therefore the application should be dismissed.
10. Ms Ndiso replied that it's the High court which has jurisdiction and not court of appeal.
11. That the applicants filed the application themselves and that they are not lawyers and that court should be guided by Article 159 of the constitution which prohibits reliance of technicalities in disposition of justice.

#### **ANALYSIS AND DETERMINATION**

**12. The applicants herein were charged, convicted and sentenced at the chief magistrate's court with the offence of stock theft contrary to section 278 of Penal Code. The applicants appealed the judgment and the sentence of 10 years was reduced to 5 years. According to the record, the reduced sentences of five years commenced from the date of judgment. A clarification was sought over the matter and confirmation thereto was provided. The prisons computed the jail terms on that basis. They have also provided remission thereof, and according to them the applicants have not served full term yet.**

**13. The applicants now request the court to interpret the date of commencement of sentence. Questions abound. What is the applicants really asking the court to do? Does the court have jurisdiction to do what it is being asked to do? What is the appropriate course to take?**

14. The application is couched as seeking a simple interpretation of commencement of jail term. But, I do not think such could be an interpretation. It is really a request for determination of commencement of jail term. Notably, the decision that sentence begins from the date of delivery of judgment was made by BWONWONGÁ J. in the appeal herein. The applicant also stated that the judge directed that the sentence as reduced should commence from the date of delivery of judgment. If the applicant is aggrieved by that decision, he should prefer a second appeal on sentence to the Court of Appeal. Therefore, even if the application is disguised as one for interpretation, it is in fact and substance an appeal to this court on its decision (Bwonwong'a J.). Notably, I do not have supervisory jurisdiction over a decision of a court of concurrent jurisdiction. This kind of approaching the court is blatantly wrong; it has great potential of embarrassment.

15. Before I close on this point, I must state that the court will not have the jurisdiction to adjudicate such matter in the circumstances of the case. One other little thing; it was argued that this is not a petition.

16. Of importance to note is that the prison authority is the one which computes remission, and therefore the jail term one actually serves. The jail term commences on the date stated by the court. And, prison authority bases its computation of remission and jail term on the date of commencement of sentence stated by the court. They were careful to seek clarification from court on this matter when questions arose in relation thereto. They have provided the appropriate remission to the applicants. In the circumstances, the prison has not held the applicants in custody in violation of the Constitution.

**17. In the upshot, I decline the invitation to sit on appeal over the decision by a judge of concurrent jurisdiction. The arguments put forth are good for appeal.**

**Dated, signed and delivered at NAROK through Teams Application this 17<sup>th</sup> day of December, 2020**

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**F. GIKONYO**

**JUDGE**