



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL PETITION NO. 28 OF 2019

IN THE MATTER OF DISCRIMINATION IN THE MATTER OF REMISSION UNDER SECTION 46 (1) (II) OF THE PRISONS ACT CAP 90 LAWS OF KENYA

BETWEEN

EDWIN MAKUMBA OUTA.....1ST PETITIONER

ELIUD MOSES OWINO APWAPO.....2ND PETITIONER

RICHARD OMONDI MBEWA.....3RD PETITIONER

JOEL NYANJA OCHIENG.....4TH PETITIONER

AND

OFFICER IN CHARGE KISUMU PRISON KODIAGA....1ST RESPONDENT

THE COMMISSIONER GENERAL OF PRISONS.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

JUDGEMENT

1. The Petitioners have moved the court on the ground that Section 46 of the Prisons Act, Cap 90 (hereinafter referred to as *the Act*) discriminates offenders who were previously on death row and life sentences whose sentences have been commuted in the enjoyment of the remission of sentence. The state conceded to the Petition.

2. The power to remit sentence as provided by Section 46 of *the Act* is 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].”

3. The Petitioners herein is entitled to the rights under Article 50(2) (p) of the Constitution states that:

“(2) Every accused person has the right to a fair trial, which includes the right-

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

4. There are numerable decisions from this court that Section 46 of *the Act* is clear that remission of sentence is available to all convicted criminal prisoners which the Cabinet Secretary for the time being responsible for Internal security and the Prisons Commissioner General seem not to be aware of or have ignored.

5. The Petitioners were convicted criminal prisoners when remission of sentence was reintroduced in 2015 and their sentences have been commuted to definite terms.

6. There is no evidence that the Petitioners are excluded from remission by operation of Section 46 (3) and (4) of *the Act*. Consequently, this court finds that the Petitioners are entitled to benefit from remission. It is so ordered.

DATED AND DELIVERED IN KISUMU THIS 31st DAY OF July 2019

T.W. CHERERE

JUDGE

Delivered in open court in the presence of-

Court Assistants - Felix & Okodoi

For the Petitioner - N/A

For the Respondent - Ms Gatho

Petitioners – Present