



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL PETITION NO. 11 OF 2019

IN THE MATTER OF ARTICLES 22, 23, 27 (1), (2), 28,

50 (2)(p), AND 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 296(2) OF THE PENAL CODE

AND

IN THE MATTER OF SECTION 46 OF THE PRISON'S ACT

BETWEEN

JOSEPH ODHIAMBO OENGA.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Petitioner was initially convicted to death and was resentence in Kisumu High Court Criminal Petition No. 38 of 2018 to serve 30 years.
2. He has moved this court for further re-sentence and remission. He also seeks court's direction concerning the sentence that was left abeyance.
3. The first prayer for re-sentence is in the form of Appeal of this court's order. This court has no jurisdiction to review its own orders and the prayer for further resentence is declined.
4. At the trial, the Petitioner was convicted to death in the 1st count and to 5 years on counts 2, 4, 5 and 6. His conviction on counts 4, 5 and 6 were quashed and the sentence on count 2 was reduced to 2 years. The 2 years was left in abeyance following the death sentence in count 1.
5. Section 14 of the Criminal Procedure Code Chapter 75 Laws of Kenya provides that in the event that a person is convicted of more than one offence, the sentences imposed for each of the offences run consecutively except where the court directs that they run concurrently.
6. It therefore follows that the sentence of **two years** on count 2 is to run concurrently with the 30 years that the Petitioner has been re-sentenced in count 1.
7. 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].”

8. The Petitioner 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.”

9. 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.

10. The Petitioner was a convicted criminal prisoner when remission of sentence was reintroduced in 2015 and his sentence on count 1 has been commuted to a definite term.

11. There is no evidence that the Petitioner is excluded from remission by operation of Section 46 (3) and (4) of *the Act*. Consequently, this court finds that the Petitioner is entitled to benefit from remission.

Disposition

12. Consequently, the Petition succeeds and the court makes the following orders:

1) This prayer for further re-sentence is dismissed

2) The sentence of two years on count 2 is to run concurrently with the 30 years that the Petitioner has been re-sentenced in count 1.

3) Petitioner is 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 Assistant - Felix & Okodoi

Petitioner - Present in person

For the Respondent - Ms. Gathu