



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT GARISSA**

**CRIMINAL MISC. APPLICATION NO. 2 OF 2019**

**JAMAAL OMAR HUSSEIN.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**Introduction:**

1. The applicant in the herein Chamber Summons Application is seeking the following Orders:-

**1) That, the Hon. Court be pleased to issue orders for the sentence imposed on me to be given rights as enshrined in section 333(2) of the C.P.C for consideration of the period spent in Custody.**

**2) That, the Hon. Court be pleased to issue orders for remission of term served in custody.**

2. The application is supported by the affidavit sworn by the applicant.

**Background:**

3. The applicant was charged with the offence of Robbery with Violence Contrary to section 296(2) of the Penal code vide Criminal Case No. 1359 of 2011 Garissa Law Court. He was Convicted and sentenced accordingly. He appealed to the Court of Appeal through Criminal Appeal No. 59 of 2014, where the court of appeal sustained the conviction, however in respect to the sentence it took Judicial Notice the **Francis Karioko Muruatetu & Others vs Republic** decision and sentenced the applicant to 12 years imprisonment.

**Submissions:**

4. In support of this application, the applicant filed written submissions and submitted on three grounds. On the first ground the applicant urged the court to invoke section 333(2) of the Criminal Procedure Code providing that where a person had been held in custody during the trial period, the said period shall form part of the sentence. He states that he was arrested on 9/7/2011 and convicted on 2/5/2012, and therefore this Court ought to consider the said period. He relies on the case of **Robert Mutashi Auda vs Rep Cr APP No. 247 of 2014** at Nairobi.

5. In regard to the second ground, the applicant urges the court to direct the Prison Authorities to factor in the 1/3 remission provided in law applying the 12 years sentence issued by the Court of Appeal. In this relies on Articles 27(1), 27(4) and 159(2)(a) and (d) of the Constitution which provides for equal protection and benefits of the Law.

6. The third ground is a prayer for a non-custodial sentences, where he submits that in view of the remaining time, it would be the best alternative sentence to allow him serve non-custodial time as it would enhance his rehabilitation, submitting that he would be willing to strictly abide by all terms and conditions the Hon. Court would deem fit. Further, he submits that he learnt his lessons, and now fears God, respects life and Properties of others and learnt hard work to earn own daily bread.

**Determination:**

7. The power to remit sentence as provided by Section 46 of the Prisons Act, Cap 90 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, Sch.]”

8. Therefore Section 46 above is clear that remission of sentence is available to convicted criminal prisoners including the applicant.

9. Further, a convicted criminal prisoner is entitled to the least severe sentence that is the one in which remission has been applied if available. This is supported by Article 50(2)(p) of the Constitution, which provides:-

“(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.”**

10. The power of remission of sentence belongs to the prisons authorities as granted by the statute and should be exercised accordingly. In this case the officer in Charge vide a letter dated 26<sup>th</sup> February, 2019 produced by the applicant states that the Applicant has been in Prison for a period of 8 years including remand period and that he has a good prison record and very disciplined and has attained certificate in Alternative to Violence Project Kenya.

11. Furthermore, as submitted by the Applicant, the court is required to consider the period that a convicted person has spent in custody prior to the sentence as provided under Section 333(2) of the Criminal Procedure Code.

**Conclusion:**

In conclusion, pursuant to Section 46 of *the Act above* it is clear that remission of sentence is available to all convicted criminal prisoners. The Applicant is entitled to benefit from remission, and the Prison ought to consider awarding him remission and if he merits the same render him the same accordingly accordingly.

**(i) Thus court makes the order that the applicant is entitled to have his right to remission considered and be awarded the same remission if he merits the same according to the factors set out in the law.**

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

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**C. KARIUKI**

**JUDGE**