REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 399 OF 2019

(Arising from the judgment in High Court Misc. App No. 59 of 2019 before Kimaru J dated 24th September 2019)

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 2, 3, 10, 22, 23(1), 25(A), (C), 27, 28, 29 (A), (F), 50, 159(2), (e), 165, 258 AND 259 CONSTITUTION OF THE REPUBLIC OF KENYA AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW

AND

IN THE MATTER OF SECTION 46 CAP 90 OF THE PRISON'S ACT AND SECTION 333 (2) OF THE CRIMINAL PROCEDURE CODE

BETWEEEN

ISMAEL MZEE ISMAEL...…….....……..…….... PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL…….....1ST RESPONDENT

OFFICE OF THE DIRECTOR OF

PUBLIC PROSECUTIONS.....2ND RESPONDENT

JUDGEMENT

PETITION

1. The Petitioner through undated Petition filed on 8th October 2019 seek the following reliefs:-

> ***a) That the handing a prisoner a fresh sentence is unconstitutional as causes an unjustified differentiation and is inconsistent with Article 27(1), (4), 29(F) of the Constitution.***
>
> ***b) This Honourable Court may be pleased to issue a declaration that Section 333(2) of the Criminal Procedure Code should be applied equally as interpreted by the Court of Appeal decision in Ahamad Abolfathi Mohammed & another V Republic [2018] that declared that a sentence should run from the date of arrest.***
>
> ***c) This Honourable Court may be pleased to order that the Petitioner's sentence to run from the date of arrest which is 30th June 2007.***
>
> ***d) The Court be pleased to make such other order(s) as it shall deem just.***

PETITIONER'S CASE

2. The Petitioner aver that he was arrested and charged with an offence of trafficking contrary to ***Section 4 of the Drugs and Psychotropic Substances Act 1994 in Criminal Case No. 4064 of 2007*** at Chief Magistrate's Court at Kibera. He was convicted and sentenced to serve life imprisonment on 18th June 2019. He appealed to Court of Appeal, which appeal was heard and dismissed. He later sought review of the sentence and was sentenced to serve 5 years imprisonment on review on 24th September 2019.

3. The Petitioner urges in review of his sentence, the Court did not take into account the time he had spent in custody prior the review of the sentence, contending he has been treated unequally and discriminated against in computing of remission as remission under ***Section 46(1) of the Prisons Act*** is computed from the date of conviction.

4. The Petitioner further state he was sentenced to life imprisonment on 18th June 2010 (contrary to earlier date of 18th June 2019) and that his sentence was reviewed under ***Francis Muruatetu decision*** to 5 years after serving 17 years and that failure to compute sentence from the date of arrest therefore mean that he will serve a higher sentence than the law anticipated, and may serve a sentence that is 4 years and 4 months higher than any other prisoner serving a 17 years sentence.

THE 1ST RESPONDENTS RESPONSE

5. The 1st Respondent filed grounds of opposition to the Petition dated 23rd October 2020 being as follows:-

> ***a.) That the Petitioner has not demonstrated how the Respondents have infringed or contravened on their constitutional rights.***
>
> ***b.) That this Court lacks jurisdiction to adjudicate and determine the issue of remission of sentences as the same falls within the purview of the Kenya Prisons as was held in the recent decision of Hudson Okunda Ochola vs. R [2018] eKLR.***
>
> ***c.) That the Powers to grant remission lies within Commissioner of Prisons as Per Section 46 of the Prisons Act and the Criminal Procedure Code Section 333(1). We also relay on the case of Francis Opondo vs. Republic [2017] eKLR. Where it was held that he Powers to grant remission lies within the Prisons authorities and the court should not usurp such powers.***
>
> ***d.) That the Petitioner has failed to demonstrate how and whether they have exhausted the correct avenues to be awarded the remission by relevant avenues but has failed.***
>
> ***e.) That there is no evidence that the Petitioner has been denied remission of his sentence.***
>
> ***f.) That the Petitioners Application that this Honourable Court grants the orders that the petitioner be given remission of his sentences is legally untenable.***
>
> ***g.) That there are no orders that are sought by the Petitioner against the Respondents.***

THE 2ND RESPONDENTS RESPONSE

6. The 2nd Respondent is opposed to the Petitioner's Petition and in doing so filed grounds of objection being as follows:-

> ***a) That this Honourable Court lacks jurisdiction to entertain the Petition to reduce sentence as prayed.***
>
> ***b) That this Honourable Court is limited by Article 50(6) of the Constitution in so far as a convicted person is seeking an order for a new trial and not for a review of sentence issued by a court of competent and parallel jurisdiction.***
>
> ***c) That the Petitioner has had an opportunity to raise the issue of sentence during his appeal in the High Court and the Court of Appeal. That upon Petitioning the High Court for resentencing in light of the Muruatetu case which was determined on 24th September 2019, his sentence was reduced from life imprisonment to five (5) years imprisonment.***
>
> ***d) That the Petitioner has not pleaded precisely how any of his rights were violated by the Honourable Court that reviewed his sentence or the Respondents herein to invoke the jurisdiction of this Court.***

ANALYSIS AND DETERMINATION

7. I have carefully considered the Petitioner's Petition; the Respondents grounds of opposition and objection as well as parties submissions and from the above the issues arising for determination can be summed up as follows:-

> ***a) Whether the Petitioner has demonstrated how the Respondents have infringed or contravened on his constitutional rights?***
>
> ***b) Whether this Court has jurisdiction to adjudicate and determine the issues of remission of sentence and whether Petitioner has demonstrated he has exhausted the correct avenues to be awarded the remission by relevant avenues before filing of the Petition?***
>
> ***c) What relief can the court grant this Petition?***
>
> ***A. WHETHER THE PETITIONER HAS DEMONSTRATED HOW THE RESPONDENTS HAVE INFRINGED OR***

CONTRAVENED ON HIS CONSTITUTIONAL RIGHTS?

8. The Petitioner in his Petition has not mentioned the role played by any of the Respondents in violation or contravening his constitutional rights. There is nowhere in the whole Petition where the Petitioner has raised a complaint against the two Respondents nor stated the Articles of the Constitution allegedly violated by any of the Respondents against him. He has stated various articles but failed to demonstrate how they relate to the Respondents acts or commission (if any). In view of the aforesaid, it is clear that the Petitioner has failed to demonstrate, how the Respondents herein have infringed or contravened on his constitutional rights. The Petition discloses no cause of action against the Respondents.

B. WHETHER THIS COURT HAS JURISDICTION TO ADJUDICATE AND DETERMINE THE ISSUES OF REMISSION OF SENTENCE AND WHETHER PETITIONER HAS DEMONSTRATED HE HAS EXHAUSTED THE CORRECT AVENUES TO BE AWARDED THE REMISSION BY RELEVANT AVENUES BEFORE FILING OF THE PETITION?

9. The Petitioner contend that upon exhausting his appeal and in light of ***Francis Kariokor Muruatetu decision*** he petitioned the High Court Nairobi for resentencing, which upon determination on 24th September 2019, sentenced the Petitioner to serve 5 years imprisonment to start from the date of its pronouncement of its decision, which judgment is subject of this Petition. The Petitioner makes it clear that this Petition is not intended to disturb the said Judgment but rather is seeking a declaratory orders so as to make the judgment executable in light of ***Section 46 of the Prisons Act*** and ***Section 333(2) of the Criminal Procedure Code***.

10. The Petitioner relies on ***Section 46 of the Prisons Act*** and ***Section 333(2) of the Criminal Procedure Code. Section 46 of the Prisons Act*** provides:-

> ***"a convicted criminal offender sentenced to imprisonment whether by one sentence or consecutive for a period exceeding one month, may be good industry and conduct earn a remission of 1/3 of their sentence …. from the date of conviction."***

Whereas ***Section 333(2) of the Criminal Procedure Code*** provides :-

> ***"subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from and include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code, provided where the person sentenced under Section (1) has, prior to such sentence, been held in custody, the sentence SHALL take into account of the period spent."***

11. The Petitioner urge by virtue of ***Section 46 of the Prisons Act*** he is entitled to benefit from 1/3 of the Sentence, that would mean he should serve a term of 3 years 4 months and not 5 years jail term imposed on him on 24th September 2019.

12. Under ***Section 333(2) of the Criminal Procedure Code*** the Petitioner urge the Provision was interpreted in the decision of Court of Appeal in the case of ***Ahamad Abolfathi Mohammed & another in Criminal Appeal No. 135 of 2016*** where the Court held that ***"sentence should commence from the date of arrest"*** a decision he contends has been followed as it binds the High Court and all subordinate Courts in the County.

13. Before I consider the Petitioner's submission on the issues of remission and provision of ***Section 333(2) of the Criminal Procedure Code***, I am bound to consider the Respondents contention that this Court lacks jurisdiction to adjudicate and determine the issue of remission of sentence.

14. The Petition arises from the Judgment in the ***High Court Misc. Application No. 59 of 2019*** which was delivered by Hon. Justice L. Kimaru on 24th September 2019, a Judge of a Court of parallel and competent jurisdiction to the constitutional and Human Rights Division and which Court is charged with duty and responsibility of dealing with criminal matters which is not the case with this court. I find by purporting to pronounce myself on any matter on my brother's judgement, a Court of equal status, I would either be acting as an appellate court or seeking to review the judgment which I cannot pronounce myself on, as my division does not deal with criminal nor civil matters, as it is neither a criminal nor civil court.

15. Further to the above this Court's jurisdiction is limited by virtue of ***Article 50(6) of the Constitution*** in so far as a person convicted is seeking an order for a new trial and for a review of sentence issued by a Court of competent and parallel jurisdiction, ***Article 50(6) of the Constitution*** provide:-

> ***"Article 50(6) Fair hearing***
>
> ***6. A person who is convicted of a criminal offence may petition the High Court for a new trial if-***
>
> > ***a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and***
> >
> > ***b) new and compelling evidence has become available."***

I find that none of the above grounds has been established.

16. From the Court's record it is clearly demonstrated that the Petitioner has had an opportunity to move the resentencing, having exhausted

all avenues of appeal at the High Court and Court of Appeal. He moved the High Court in light of ***Francis Kariokor Muruatetu decision*** resulting to his sentence being reduced from life imprisonment to 5 years. He has not shown how such reduction of his sentence has violated any of his constitutional rights.

17. Upon perusal of the ruling dated 24th September 2019 Justice L. Kimaru states at the last paragraph that:-

> ***"In the premises therefore, the sentence of life imprisonment that was imposed on the Applicant is set aside and substituted by a sentence of this Court. The Applicant is sentenced to serve five (5) years imprisonment with effect from the date of this Ruling. It is so ordered."***

18. The Ruling is clear that the fresh 5 years sentence was to run from the date of the ruling. The Petitioner has not even stated how long he was to serve life imprisonment nor has he demonstrated that there was a violation or infringement of his rights by being sentenced to serve 5 years. Further there is nothing that is vague to require this Court's interpretation.

19. ***Section 46(1) of the Prisons Act*** provides the remission is subject to good industry and conduct of the convict; while one is serving the sentence and which can only be assessed by the prison administration and not by any Court. In view whereof I find that he Court lacks jurisdiction to adjudicate and determine the issue of remission of sentence as sought herein, as the same squarely falls within the purview of Kenya prisons as was clearly enunciated in the case of ***Hudson Okunda Ochola vs. R (2018) eKLR***.

20. I find ***Section 46 of the Prisons Act*** can only be exercised by Commissioner of Prisons. It clearly follows the power to grant remission lies with Commissioner of Prison as per ***Section 46 of Prisons Act***. The Respondents in support of this Proposition placed reliance in the case of ***Francis Opondo v Republic (2017) eKLR*** where it was held that the powers to grant remission lies with the Prisons authorities and the court should not usurp such powers. I find the Court in an attempt to interfere with such powers would be acting in clear violations of Prison authorities powers granted by a statute. The Court should therefore decline the invite.

21. The Petitioner on 5 years sentence raises the issue as to whether the 5 years substituted sentence took into consideration of the mandatory provisions of ***Section 333(2) of the Criminal Procedure*** Code, how if at all, this will affect the Petitioner's right to remission under ***Sections 46(1) of the Prisons Act*** and whether failure to provide for the same in the sentence are discriminatory to the Petitioner as a result of which the Petitioner's rights under the Bill of Rights may be infringed and/or violated.

22. ***Section 38 of the Penal Code*** provides that every sentence shall be deemed to commence from and to include date of pronouncement. This was fortified in the case of ***Joseph Mutunga vs. Republic (2019) eKLR*** where it was held that:-

> ***"2) Subject to the provision of Section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***
>
> ***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."*** *(Emphasis added).*

23. The Petitioner in the instant case had been sentenced to life Impressment and was not held in custody when he applied for resentencing in light of ***Francis Kariuko Muruatetu decision*** and his case is distinguishable from the case of ***Ahamad Abolfathi Mohammed & another vs. Republic (2018) eKLR*** where the Court of Appeal held:-

> ***"The Appellants had been in custody from the date of their arrest on 19th June 2012. By dint of Section 333(2) of the Criminal Procedure Code, the Court was obliged to take into account the period that they had spent in custody before they were sentenced.***

24. In view of the above ***Section 333(2) of the Criminal Procedure Code*** the period in custody cannot apply in the case of resentencing of the Petitioner who was serving life sentence, and who after reviewing of his case was sentenced to serve 5 years sentence, this is because he was no longer in custody but serving life sentence. The Judge resentencing the Petitioner put into consideration the time spent by the Petitioner in serving sentence and all mitigating factors and reduced Life Imprisonment to 5 years. The Petitioner in the instant Petition has not demonstrated violation of any of his constitutional and fundamental rights in this Petition to warrant issuance of any orders in his favour.

25. In view of the aforesaid I agree with the Respondents objections that this Court lacks jurisdiction to adjudicate and determine the issue of remission of sentence as the same falls within the purview of the Kenya Prisons, who have powers to grant remission through the Commissioner of Police. Furthermore on resentencing the period of when sentence is to commence solely relies on the Judge dealing with the matter and constitutional and Human Rights Division has no jurisdiction to intervene with the Sentence thereto as it is neither a Criminal Court or Civil Court but a Constitutional and Human Rights Court.

26. ***The upshot is that the Petition is without remits and is dismissed.***

27. ***Each party to bear its own costs.***

Dated, Signed and Delivered at Nairobi on this **4th** day of **March, 2021.**

J. A. MAKAU

JUDGE