REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

MISC. APLICATION NO. 1B OF 2021

(Coram: Odunga, J)

BETWEEN

FREDRICK DAVID TSUMA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE KENYA PRISON SERVICE.....3RD RESPONDENT

OFFICER IN CHARGE KAMITI MEDIUM PRISON.....4TH RESPONDENT

IN CHARGE DOCUMENTATION OFFICE,KAMITI MEDIUM.....5TH RESPONDENT

JUDGEMENT

1. On 18th January, 2021, this court delivered a judgement in Petition No. 15 of 2020 – **Vincent Sila Jona & Others of 2020 vs. The Kenya Prison Service & 2 Others** - in which it granted the following reliefs:

2. In the result I issue the following orders:

> **a. A declaration that trial courts are enjoined by section 333(2) of the *Criminal Procedure Code*, in imposing sentences, other than sentence of death to take account of the period spent in custody.**
>
> **b. A declaration that those who were sentenced in violation of the said section are entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences.**
>
> **c. A declaration that section 333(2) applies to the original sentence as well as the sentence imposed during resentencing.**
>
> **d. A declaration that in determining "admission" by the prison authorities for the purposes of section 46(2) of the *Prisons Act*, the relevant date is the date when the prisoner was first admitted to prison upon conviction and not the date of resentencing.**
>
> **e. That any review of the sentences be considered on a case to case basis.**
>
> **f. There will be no order as to the costs.**

3. The Petition before me is an offshoot from that petition. The Petitioner herein was one of the Petitioners in the said case and this petition is anchored on (e) above.

4. According to the petitioner herein, he is an inmate at Kamiti GK Medium Prison serving 5 years imprisonment from the date of resentencing on 13th February, 2019 for the offence of Murder. According to him, since his sentence on 6th August, 2008, he has been in custody and both the prison authorities and the sentencing court failed to give him the benefit of remission sentence as provided under the section 46(2) of the ***Prisons Act***.

5. According to the Petitioner, for the 14 years he has served, in prison, he has exhibited a high level of discipline and utilised his time well having been of good industry and has undergone several courses which are valuable in integrating him back to the society.

6. Based on the above cited judgement, the Petitioner herein averred that the failure to compute his sentence from the date of his first conviction, otherwise known as admission date under the ***Prisons Act*** violated is right to enjoy the benefit of remission like any other convict thereby discriminating against him.

7. The Petitioner therefore seeks an order compelling the Officer in Charge, Kamiti Medium Prison, to compute his sentence from the date of his conviction on 6th August, 2008 and not from the date of his resentencing on 13th February, 2019.

8. In response to the Petition, the 1st Respondent herein, the Director of Public Prosecutions, through **Ms Felister Njeru**, a Prosecution Counsel submitted that having been convicted on 6th August, 2008, the sentence ought not to have been computed from the date resentencing without considering the period that the Petitioner had served.

9. On 29th December, 2021, I directed the 2nd Respondent, the Attorney General, to file and serve his submissions within 10 days. However, by the time of drafting this judgement, no such submissions had been filed.

Determination

10. I have considered the issues placed before me in this matter. It is important to set the record straight. It is not the duty of this Court to grant remission. That is the duty of the Commissioner of Prisons in the exercise of his discretion under section 46 of the ***Prisons Act***. This position was clearly set out by this Court in Petition No. 16 of 2019 between **Sammy Musembi Mbugua & Others vs. Attorney General & Others** where it was held that:

> **"the power to grant remission should not be confused with the right to remission. While there is a right to remission, the power to exercise it and the circumstances under which it is to be exercised must remain as provided for under section 46 of the *Prisons Act.* Just like my learned brother in the above case, I find that the only part of section 46(1) of the *Prisons Act* that is unconstitutional is that which denies remission to persons sentenced to imprisonment for an offence under section 296(2) of the *Penal Code*."**

11. In Petition No. 16 of 2019, this Court considered section 46 of the Prisons Act and in its understanding:

> **"the said provision is that all convicted criminal prisoners are, upon their admission entitled to be credited with the full amount for remission to which they would be entitled at the end of their sentence if they lost no remission of sentence… However, just like a bank gives a borrower a loan and credits his account with the sum advanced and as the borrower continues servicing the loan, the account is debited with the sum paid, a prisoner whose "account" has been credited with the period of remission may have that credit debited with the period spent in a hospital through his own fault or for the period the prisoner is undergoing confinement as a punishment in a separate cell. This is understandable because remission is a reward for industry and good conduct and a person who is in hospital through own fault cannot be termed as being industrious while a person undergoing confinement as a punishment is definitely not of good conduct. Based on the same reasoning, a prisoner may lose remission as a result of its forfeiture for an offence against prison discipline. There is however a power given to the Commissioner-General of Prisons to deprive a prisoner of the credited remission where he considers that it is in the interests of the reformation and rehabilitation of the prisoner that the said deprivation be undertaken. In other words, remission must only inure to those prisoners who have by industry and conduct manifested that they have reformed and have been rehabilitated to be sufficiently released back to the society. Apart from the powers given to the Commissioner, the Cabinet Secretary for the time being responsible for Internal security may also exercise the power to deprive a prisoner of remission where he considers that it is in the interests of public security or public order that the prisoner be so deprived."**

12. What the said section as interpreted by the Court means is that once convicted, the prisoner's remission is granted. However, that grant of the remission depends on his conduct. If he misconducts himself, he will in effect be chipping away the remission period. This is an incentive for a prisoner to ensure that during the term of imprisonment he does not misconduct himself since the primary objective of imprisonment is reformation of the prisoner. Therefore, the actual period that a prisoner serves in prison may well lie in his own hands since his earlier release may depend purely on whether or not he retains the credit that the law granted to him at the time of his admission. In other words, while all prisoners are entitled to remission, it is the prisoner's conduct that dictates whether or not that entitlement will actually be enjoyed.

13. Therefore, while that was the position in Petition 16 of 2019, in Petition 15 of 2020, this Court only dealt with the computation of time where the credit given to the Prison is still intact. While all prisoners are entitled to remission, depending on the decision of the Commissioner General as guided by the law and the prisoner's conduct, the actualisation of the remission must remain that of the Commissioner General of Prison.

14. In this case, the Petitioner was convicted on 8th August, 2008. While it is true that according to the decision in Petition No. 15 of 2020, in computing his sentence, the prison authorities ought to have computed his sentence from that date, upon resentencing, according to the committal warrant, it was directed that he serves **five years imprisonment with effect from today's date (13th February, 2019).** It is

important to point out that there is a difference between situations where, upon resentencing, the Court reduces the period to be served without stating the commencement date of the sentence and where the Court expressly states the commencement date. In the former case, the period is deemed to run from the date of the first conviction or admission while the second scenario, the period starts running from the date of resentencing. Unless that decision is reversed, the sentence runs from the date of resentencing. That presumption remains until set aside on appeal or revision.

15. In this case since the material placed before be reveals that the Petitioner was to serve **five years from the date of resentencing** in computing remission, the Prison authorities are perfectly entitled to do so from the date of resentencing and not from the date of the first admission.

16. Accordingly, I find no warrant in interfering with the remission as calculated by the Prison Authorities.

17. Consequently, this petition fails and is dismissed.

18. Judgement accordingly.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 14TH DAY OF DECEMBER, 2021

G.V. ODUNGA

JUDGE

In the presence of:

Petitioner virtually

Mr Ngetich for Ms Njeru the 1st Respondent

Ms Kiramana for the 2nd Respondent

CA Susan