



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC CRIMINAL APPLICATION NO. 229 OF 2018

SAMMY KITONGA MUKUSYA

MATTHEW MULINGE MUTISO

THOMAS MUTINDA MUNEE.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicants were resented to 20 years imprisonment by the magistrate's court in respect of the offences they were charged with and applied to this court and averred that they be awarded a remission to serve one third of the sentence.
2. The state opposed the application vide grounds of opposition and averred that the jurisdiction to grant the orders sought rests with the Commissioner for Prisons. The application was disposed of by way of oral submissions and the appellants submitted that the sentence ought to be reduced to the time served and that the sentence be remitted to one third of the sentence. They submitted that the court ought to consider mitigating circumstances and presented their various certifications indicating the skills they attained while serving their sentences.
3. Mr. Cliff Machogu, prosecution Counsel, opposed the application and reiterated his grounds of opposition.
4. The issue for determination is whether the court may make an order for remission of sentence.
5. The question to be addressed in this appeal in considering whether or not the sentence should be remitted will be dependent on whether the appellant was convicted and sentenced between 8th December, 2014 and 15th December, 2015 when remission of sentences had been removed from the Prisons Act and does not fall within the proviso that bars granting of remission to **“a prisoner sentenced to imprisonment for life or for an offence under Section 296(1) or 297(1) of the Penal Code (Cap. 63) or to be detained during the President's pleasure.”** and whether the court has jurisdiction to grant the orders sought.
6. Section 46(1) of the Prisons Act states:

“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....”

7. The facts of this matter are not disputed. By the Statute Law (Miscellaneous Amendments) Act, 2014 Section 46 of the Prisons Act which provided for remission of sentence was deleted. Section 46 was reinstated on 15th December, 2015 through the Statute Law (Miscellaneous Amendments) Act, 2015 thus bringing back remission of sentence to the Prisons Act. The appellant does not fall within the proviso to the aforementioned act and therefore is entitled to remission. However, the court in **Francis Opondo v Republic [2017] eKLR** stated that the power of remission lies with the prisons authorities and not the court and therefore the appellant ought to address his request to the prisons authorities.

8. Having found that the issue of remission be addressed to the commissioner of prisons by the applicants, I find that the instant application is devoid of merit. Indeed the issue of the appellant's character and industry can only be addressed by the Commissioner of prisons who is

mandated by the law to deal with matters regarding remission of sentences and who is expected to exercise his discretion as appropriate. No evidence has been shown by the applicants that the commissioner of prisons has failed to discharge his duties regarding the issue of the applicant's quest to enjoy remission of one third of their sentences. The applicants are well aware that they will only be entitled to remission once they meet all the conditions set out under section 46 of the Prisons Act and which is to be exercised by the commissioner of prisons.

9. In the result it is my finding that the Applicants' application lacks merit. The same is ordered dismissed.

It is so ordered.

Dated and delivered at Machakos this 19th day of September, 2019.

D.K. Kemei

Judge