



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. CRIMINAL APPLICATION NO. 12 OF 2019

PETER NJIRU NDWIGA.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

A. Introduction

1. This ruling pertains to the application dated 27th May 2019 in which the applicant seeks for a declaration that he is entitled to remission of a third of his 7 years sentence and a further declaration that limitation on benefiting from remission for convicts under Section 296(2) of the Penal Code is a contravention of Article 27(1) of the constitution.
2. The applicant and another not before court was charged with robbery with violence before the trial court. The applicant and his co-accused convicted of robbery and sentenced to seven (7) years imprisonment. Prior to the proceedings before the trial court, the applicant had been sentenced to death for robbery with violence in Siaya Criminal Case No. 48 of 2014 and a similar sentence for a similar offence in Vihiga Criminal Case No. 72 of 2014.
3. It is the applicant's case that the findings of the Supreme Court in the case of **Francis Karioko Muruatetu and Another v R. [2017] eKLR** made the death sentence unconstitutional.
4. It is the applicant's case that the period he was in custody should have been taken into consideration during his sentencing as he was arrested on 8/04/2014 and convicted on the 19/10/2016 and that he was in custody during all this time and not released on bond. The applicant relies on the Court of Appeal case of **Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR** where the court held that *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.*
5. The respondent opposes the application on the grounds that the applicant was granted bond by the trial court however since he had other cases in Siaya and Vihiga, he could not get out.
6. The respondent further stated that having been convicted with the offence of robbery with violence and duly sentenced to 7 years imprisonment, the applicant is excluded from benefitting from remission and further that the power to grant remission is a preserve of the commissioner of prisons who is well versed with the applicant's conduct during his stay in prison. Further, it is stated that granting remission would amount to usurping the powers of the prisons that are the legally mandated implementing agency of remission.
7. The respondent further states that there are no justifiable reasons or special circumstances to warrant the grant of remission to the applicant as he has not exhibited exceptional merit, permanent ill health or any other special ground. The respondent further states that granting the applicant remission would be discriminatory to hi co-accused.

B. Analysis of Law

8. I have carefully considered the application herein, the response and the oral submissions made by both parties. It is important to note that whereas the applicant was charged with the offence of robbery with violence, he ended up being convicted of robbery and subsequently was sentenced to seven (7) years imprisonment.
9. As the applicant seeks remission of his aforementioned sentence, it is important for the purpose of this ruling to reproduce Section 46 of the Prisons Act which grants the power to the Commissioner to remit sentences. It states:

“46. Remission of sentence

(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.”

10. The said provision allows the Commissioner to grant remission of sentence to any prisoner on condition that he has served one calendar month and is not sentenced to imprisonment for life or for an offence under Section 296(1) of the Penal Code or is detained at the President's pleasure.

11. In the case of **Sammy Musembi Mbugua & 4 others v Attorney General & another [2019] eKLR**, the High Court sitting in Machakos declared unconstitutional Section 46(1)(ii) of the Prison Act. The Act did not provide for remission to murder and robbery with violence convicts and also those serving life imprisonments. The issue of constitutionality of Section 46(1)(ii) of the Act has been dealt with by a court of competent jurisdiction. In my considered view, the power to grant remission lies with the Commissioner of Prisons Act and not with the court as provided under Section 46 of the Prisons Act.

12. It is trite law that the applicant has a right to remission for any sentence imprisonment provided the requirements of Section 46(1) of the Prisons Act are complied with. In the case of **Sammy Musembi Mbugua (supra)**, *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.*

13. I have perused the court record and note that the learned trial magistrate did not take into account the period the applicant spent in custody despite him stating so. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order that the sentence do run from the date of the conviction. This is what the trial court did as it sentenced the applicant. In the Court of Appeal case of **Ahamad Abolfathi Mohammed** it was held that the period spent in custody during trial ought to be taken into consideration in sentencing.

14. It is my considered view that the trial court misdirected itself in that respect for omitting to comply with Section 333(2) of the Penal Code.

15. I find this application meritorious and hereby order that the sentence rendered by the trial magistrate is hereby set aside and replaced with the following: -

a) The applicant is hereby sentenced to serve seven (7) years commencing from the date of arrest 19th June 2012.

b) The applicant's prayer for remission fails for the foregoing reasons.

c) The application is only partially successful.

16. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Nandwa for State/Respondent

Applicant present