



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

MISC. CRIMINAL APPLICATION NO. 35 OF 2018

IN THE MATTER OF ARTICLE 22 (1); 23 AND 159 (2) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

HEZRON OGOLLA ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The applicant has moved the court on the ground that Section 46 of the Prisons Act, Cap 90 (hereinafter referred to as *the Act*) discriminates offenders in the enjoyment of the remission of the one third of the sentence.
2. The power to remit sentence as provided by Section 46 of *the Act* 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].”

3. The applicant herein is entitled to the rights under Article 50(2) (p) of the Constitution states that:

“(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.”

Disposition

4. Section 46 of *the Act* is clear that remission of sentence is available to all convicted criminal prisoners. The Applicant was a convicted criminal prisoner when remission of sentence was reintroduced in 2015 and he is entitled to benefit from remission, if he meets the conditions for remission of sentence. It is so ordered.

DATED AND DELIVERED IN KISUMU THIS..18th...DAY OF..October..2018

T.W. CHERERE

JUDGE

Delivered in open court in the presence of-

Court Assistants - Arua

For the Petitioner - N/A

For the Respondent - Mr Muia