IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISCELLANEOUS CRIMINAL APPLICATION NO. 26 OF 2021

(Arising from the judgment of the Primary Court of Magu at Kabila in Criminal Case No. 15 of 1996 and No. 16 of 1996)

SAMWEL S/O PHILEMON..... APPLICANT

VERSUS

THE REPUBLIC..... 1ST RESPONDENT

COMMISSIONER GENERAL OF PRISONS TANZANIA ..... 2ND RESPONDENT

RULING

22/9/2022 & 21/10/2022

ROBERT, J:-

Through the provisions of section 390(1)(b) and section 391 of the Criminal Procedure Act [Cap 20 R.E 2019] the applicant lodged this application before this court applying for the orders;

EX-PARTE: -

1. *That this Honourable Court be pleased to order that the applicant be released from the unlawful detention of the respondents forthwith.*
2. *That, this Honourable Court be pleased to order the appearance of the respondents before this court to show cause why the applicant who is unlawfully detained should not be set at liberty forthwith.*
3. *That this Honourable Court be pleased to issue an order compelling the respondents to discharge their duties in line with the applicable laws.*
4. *That the costs of this application be in the main cause.*

5. *That this Honourable Court be pleased to issue any other or further relief(s) as the Honourable Court shall deem fit.*

INTER PARTES: -

1. *That this Honourable Court be pleased to order that the applicant be released from the unlawful detention of the respondents forthwith.*
2. *That, in the alternative and without prejudice to paragraph a above, this Honourable Court be pleased to order the appearance of the respondents before this court to show cause why the applicant who is unlawfully detained should not be set at liberty forthwith.*
3. *That this Honourable Court be pleased to issue an order compelling the respondents to discharge their duties in line with the applicable laws.*
4. *That this Honourable Court be pleased to order the respondents or any other person act on their behalf to bring the applicant in court and give reasons why the same shall not be set at liberty or release on bail according to the laws of this good Country.*
5. *That the costs of this application be in the main cause.*
6. *That this Honourable Court be pleased to issue any other or further relief(s) as the Honourable Court shall deem fit.*

In support of the chamber summons is an affidavit dully sworn by the applicant above-named stating out facts leading up to the present application. The respondent through Ms. Maryasinta Lazaro, learned State Attorney, countered this application.

On 22/09/2022, this application was called for hearing. The applicant was represented by the learned Advocate, Mr. Beatus Linda whereas the respondent by Ms. Jaines Kihwelo, learned State Attorney.

Mr. Linda started his submissions by making a prayer to have the contents of the applicant's affidavit adopted by this court so as to form part of his submissions. He prayed also that the applicant should be released from unlawful custody on the grounds set out in the supporting affidavit. He averred that the applicant was convicted of armed robbery by the primary Court of Kabila in two cases i.e. Criminal case No. 15 and 16 of 1996 and was sentenced to 30 years imprisonment in each of the cases.

That immediately after starting to serve his sentence, the sentence was reduced by 1/3 as per prison procedures and in the same year, that is 1996, another 1/3 was reduced by the order of the then President Benjamin William Mkapa. He went on submitting that until 2011, only five years had remained, however, the applicant escaped from prison before he was re- captured, charged and sentenced to two years imprisonment for escaping from a lawful custody in 2013.

He argued further that, since in 2013 the applicant had remained with only two years of his previous sentence, plus the two other years

added for escaping lawful custody, he was remained with a prison sentence of four years which was supposed to end in 2017. However, until 2021 when he filed this application, he was still in prison serving a prison sentence which he believes he had already served. He therefore prayed that the applicant be released from custody.

In reply, the respondent through Ms. Kihwelo, learned State Attorney, objected the application. She stated that it is true that the applicant was given custodial sentence in the two cited cases before the Primary Court, which sentence was reduced by 1/3 twice according to prison procedures and by the order of the President. However, in 2011 the applicant escaped from prison but later recaptured and charged with the offence of escaping from lawful custody and sentenced to two years.

Referring to Order 444 of the Prisons Standing Orders of 2003, Ms. Kihwelo submitted that where an escaped prisoner has been recaptured and sentenced for the offence of escaping from lawful custody, the original sentence will be added to the sentence for escaping and the two sentences shall be served consecutively.

It was her further submission that remission of sentence is only given to a prisoner with good behaviour. An escaped prisoner is not a prisoner with good behaviour thus the remission given to him is being removed

upon being recaptured. Hence, she concluded that, the applicant is still in prison lawfully serving his sentence according to the law.

In a very short rejoinder, the learned Advocate for the applicant reiterated his earlier position in the submissions in chief and objected the argument that remission given to an escaped prisoner is removed upon being recaptured because that will amount to double punishment to a prisoner who is already sentenced for an offence of escaping from lawful custody.

From the rival submissions of both parties, the main question for determination is whether there is merit to this application.

As can be gleaned from the applicant's affidavit, the applicant's prayer is to be released from prison as he believes that he has served all his sentence and therefore he is being unlawfully held. The respondent on the other hand is of the view that the applicant is in prison lawfully and he is serving a lawful sentence.

It is undisputed by both parties that the applicant received remission in which 1/3 of his custodial sentence for two offences of armed robbery was reduced twice through normal prison procedures and through the presidential pardon. Hence, at the time of his escape in 2011, he had served fifteen years of his prison sentence and remained with only five

years. It is also undisputed that, the applicant having been recaptured, he was charged, convicted and finally sentenced to two years imprisonment for the offence of escaping from lawful custody in 2013.

What is disputed by parties is whether the applicant having been convicted and sentenced for escaping from lawful custody the remission that was granted to him was removed as the original sentence is being restored by adding the sentence removed by remission. The learned counsel for the applicant claims that doing that amounts to double punishment.

It should be noted that, remission of a sentence is provided for under Order 444 of the Prisons Standing Orders as a privilege introduced among other things, to encourage good conduct of the prisoners. The said order further provides that once a prisoner escapes and is recaptured, his original sentence will be added to the sentence awarded for escape and the sentences will run consecutively. As for remission, the order provides clearly that a prisoner who escapes from prison shall lose the whole of the remission to which he would otherwise be entitled in respect of that sentence.

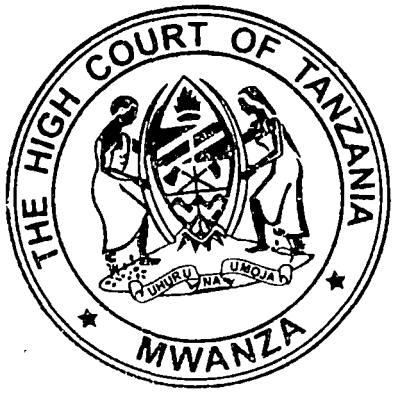
Apart from the above Order, the Prisons Act [Cap. 58 of 2002] under Part IX provides for privileges of criminals and remission of sentence. Section 49(4) of the Act provides that;

> *"a prisoner shall lose the whole of the remission to which he would otherwise be entitled under this section if a prisoner-*
>
> *a) N/A*
> *b) N/A*
> *c) Escapes or attempts to escape from prison."*

On the foregoing, it is clear that a prisoner who is eligible is entitled to remission of his/her sentence. However, the said remission shall be forfeited or removed for, among others, an offence of escaping or attempting to escape from prison. As the applicant was convicted and sentenced for escaping from prison, it follows therefore that he automatically lost the whole of the remission that he had earned in the previous sentences. It should be noted that, removal of the remission granted to the escaped prisoner does not amount to double punishment as alleged by the learned counsel for the applicant since there is no new sentence which is being imposed to the applicant apart from the original sentence imposed by the Court which convicted and sentenced him. What is taken away is the privilege which is reserved for prisoners with good behaviour.

That said, I find the applicant's claim that he is being unlawfully held in prison to have no merit as he has to serve all the years that were deducted from the original sentence. The application is thus dismissed.

It is so ordered.



K.N.ROBERT
JUDGE
21/10/2022