



**Wasike v Republic (Miscellaneous Application E014 of 2024)
[2024] KEHC 9187 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E014 OF 2024**

DK KEMEL, J

JULY 29, 2024

**IN THE MATTER OF ARTICLE 22 (1), 50 (2) (Q)
AND 65 (3) (A) OF THE CONSTITUTION OF KENYA**

– 2010

AND

**IN THE MATTER OF PERIOD SPENT IN REMAND CUSTODY
UNDER SEC. 333 (2) OF THE C. P. C CAP V75 LAWS OF KENYA**

BETWEEN

ALBERT WAFULA WASIKE APPLICANT

AND

REPUBLIC PROSECUTION

RULING

1. The application before me is a notice of motion brought under certificate of urgency pursuant to Article 22 (1), 50 (2) (q) and 165 (3) (a) of the *Constitution* of Kenya seeking principally that the period spent in remand custody before conviction and sentence be considered.
2. The application is supported by a petition and an affidavit sworn by the Applicant who averred inter alia; that he is a convict serving 15 years imprisonment for the offence of murder contrary to section 203 as read with section 204 of the Penal Code vide HCCR No. 20 of 2013 at Bungoma High Court; that pursuant to Article 50 (1), (2).(q) of the *Constitution*, he has a right to have his case heard before this court and further entitled to a fair trial; that pursuant to article 165 (3) (b) of the Constitution, the High Court has jurisdiction to handle applications and matters of this nature and to bring clarity and determination as to the period spent in custody; that under section 333(2) of the *Criminal Procedure Code*, the court is entitled to consider the period spent in custody when imposing sentence.



3. Learned counsel for the Respondent indicated that she had no objection brought under the provisions of section 333(2) of the *Criminal Procedure Code*.
4. I have considered the Applicant's application and the affidavit in support as well as the sentiments of counsel for the Respondent. It is not in dispute that the Applicant was convicted and sentenced to 15 years' imprisonment vide Bungoma HCCR No.20 of 2013. It is also not in dispute that an accused person is entitled to have the period spent in custody factored during sentencing under section 333(2) of the *Criminal Procedure Code*. The Applicant has vehemently denied ever lodging an appeal to the Court of Appeal. That being the position, the only issue for determination is whether the application has merit.
5. It is trite law that a court of law can only exercise jurisdiction as conferred upon it by the constitution and other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. As noted above, this court did sentence the Applicant to 15 years' imprisonment on the 19.7.2018 and that thereafter he was to proceed to the Court of Appeal if aggrieved by the conviction and sentence. The Applicant has vehemently denied lodging any appeal to the Court of Appeal and informed the court that he was only interested in having the period spent in custody considered. However, it has transpired that the Applicant together with his co-accused have since filed an appeal to the Court of Appeal being Criminal Appeal No. E028 of 2023 Albert Wafula Wasike and Wilnex Wakoli Wanyama. That being the position, I find the conduct of the Applicant in filing the present application while being aware of the existence of the appeal at the Court of Appeal as one engaging in lottery with the courts. As this court has already determined the murder case and imposed the appropriate sentence, it is functus officio. The only recourse available to the Applicant is to proceed to the Court of Appeal for redress. As the applicant has already filed the requisite appeal, he should gear to prosecute his said appeal at the Court of Appeal.
6. In view of the foregoing observations, it is my finding that the application lacks merit. The same is dismissed.

DATED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF JULY 2024.

D.KEMEI

JUDGE

**In the presence of :

Albert Wajala Wasike Applicant

Miss Kibet for Respondent

Kizito Court Assistant

