



**Chiteri v Director of Public Prosecution (Petition (Application)
E011 of 2022) [2023] KEHC 18368 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
PETITION (APPLICATION) E011 OF 2022
SC CHIRCHIR, J
MAY 31, 2023**

BETWEEN

JOSEPH CHITERI APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

JUDGMENT

1. The petitioner's undated petition filed on July 14, 2022 is seeking that this court considers and takes into account the period he spent in remand pursuant to the provisions of section 333(2) of the *criminal procedure code* (CPC). The petition is supported by an unequally undated affidavit filed with the application.
2. The petitioner states that he is currently serving a 30-year sentence handed down by the Court of Appeal. He brings his petition for consideration of the period that he spent in remand, and anchors his prayer on the provisions of section 333(2) of CPC.
3. The respondent supported the Application.

Determination

Background

4. The petitioner was charged jointly with others not before this court (Sitati J) with murder contrary to section 204 of the *penal code* on April 15, 2018 under Kakamega High Court Criminal Case No 19 of 2008
5. After trial, he was convicted and sentenced to death. He was dissatisfied with the outcome, and moved to the court of Appeal.



6. In criminal Appeal No 139 of 2016, at the Court of Appeal in Kisumu (Kiage, Mumbi Ngugi and Tuiyot JJA) the conviction was upheld. However the Court reduced the sentence to 30 years on the basis of the supreme court decision in *Francis Karioko Muruatetu & another vs Republic* (2017) eKLR

7. The petitioner has now come to this court by way of this petition seeking that the court should take into account the period he has spent in custody.

Section 333(2) of the CPCP provides as follows;- Subject to the provisions of section 38 of the penal code, every sentence shall be deemed to commence from, and to include the whole of the day of the date on which it was pronounced, except where otherwise provided in this code.

Provided that where the person sentenced under subsection (1) has prior to such sentence, been held in custody, the sentence shall take account of the period spend in custody”

8. The Kenya Judiciary sentencing policy guidelines also provides that the proviso to section 333(2) of the criminal Procedure code obligates the court to consider the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excess punishment that is not proportional to the offence committed.

9. Thus, in determining the period of imprisonment that should be served by the offender, the court must consider the period in which the offender was held in custody during the trial. I believe the petitioner’s petition is informed by the above provisions.

10. The sentence of 30 years was passed by the Court of Appeal. The pertinent question is whether this court has the jurisdiction to review a sentence which was passed by a higher court. It has been severally and variously stated that Jurisdiction is everything.

11. In the case of Samuel Macharia & another Kenya commercial Bank and 2 others (2012) eKLR the court stated “A court’s jurisdiction flows from the *Constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the *Constitution* or other within law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.....”

12. The Jurisdiction of the High court is set out in Article 165(3) of the *Constitution*. It has jurisdiction to, *interalia*, supervisory powers over the subordinate courts and over any persons, body or authority exercising judicial or quasi- judicial function, but not over a superior court. (Emphasis added)

And Article 162(1) defines a superior court as the “ the supreme court, the court of Appeal, the High court and courts referred to in clause (2)”. The courts in clause 162(2) refer to the Environment and Land Court and the Employment and Labour Relations Court.

13. The sentence of 30 years was passed by the Court of Appeal. Looking at the last few sentences of the last paragraph of that Judgment the court stated that the 30 years will run from the date of sentencing. The court stated as follows: “On our part we think that a sentence of 30 years is appropriate. The death sentence is hereby set aside and in its place the Appellant shall serve imprisonment of 30 years with effect from the date of the sentence by the trial court.....” The judges were very much conscious on when they wanted the sentence to run. The emphatic nature of that statement make me believe that it was a very deliberate move, made with the proviso of section 333(2) of the CPC in mind. This is not like a case where the court simply spelt out the sentence without indicating the effective date.

14. The Applicant has approached this court by way of a petition, yet what he is seeking is a revision. It is telling this court; look the court of Appeal failed to take into account the period spent in custody, can this court now factor in that.? This court has no supervisory powers over a superior court as aforesaid



and therefore can not change the period from when the sentence ought to run. If the Applicant is not satisfied with the Court of appeal's finding on the sentencing, the remedy lies elsewhere, not this court.

15. In conclusion, the petition is misconceived, it is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 31ST DAY OF MAY 2023

S CHIRCHIR.

JUDGE

In the presence of:

