



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Gekonge v Republic (Criminal Petition 8 of 2022)
[2023] KEHC 19517 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19517 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL PETITION 8 OF 2022
PN GICHOHI, J
JUNE 29, 2023**

BETWEEN

GEOFFREY NYARUNDA GEKONGE APPLICANT

AND

REPUBLIC RESPONDENT

*(From Kisii High Court Criminal Case No. 112 of 2012 - judgment
at Kisii delivered by R.E. Ougo J on 13th December 2018)*

RULING

1. The background of this ruling is that the Applicant herein was on 1December 3, 2018 convicted of the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). He was then sentenced to serve 10 years imprisonment.
2. He then filed this petition on October 13, 2012 seeking that the period of 3 years and 5 months spent in custody be considered under section 333 (2) of the [Criminal Procedure Code](#). He states that he has reformed during the period he has been in custody and he is ready to re-integrate with his family. In support of his petition , he cites the case of [Bethwel Wilson Kibor v Republic](#) Eldoret Criminal Appeal No 78 of 2009.
3. On May 2, 2023, the Respondent filed his opposition to this petition on the grounds that this Court lacks jurisdiction .

Determination

4. After hearing the parties, the issue for determination here is whether this Court has jurisdiction to consider the period the Petitioner spent in custody and which the trial Court failed to consider when passing the sentence on January 15, 2019.



5. It is correct for the Petitioner to emphasise that during sentencing, the court did comply with Section 333 (1) and (2) of the *Criminal Procedure Code* which provides as follows:

“(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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 spent in custody.”

6. Indeed, the Court of Appeal in *Bethwel Wilson Kibor v Republic* [2009] eKLR held on the failure by the trial Court to comply with Section 333 (2) of the Criminal Procedure Code:

“Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody.

The appellant told us that as at September 22, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

7. That is what the Petitioner herein craves for. However, the issue of jurisdiction comes between him and desire to re-integrate with his family. It is settled law that jurisdiction is everything and without it, the Court must down its tools. I have perused the Court record and it is apparent that the Petitioner was arrested on August 28, 2012 and took plea on October 11, 2012 in High Court Criminal Case No 112 of 2012. He remained in custody until he was released on bond on vide ruling dated January 20, 2016.

8. There is no indication however, that the trial Court referred to Section 333 (2) of the *Criminal Procedure Code* during sentencing. That could have been inadvertent but I am satisfied that unlike a scenario where the application is in regard to sentence by the lower court, this Court lacks jurisdiction to correct omissions, inadvertent or otherwise purportedly done by a Court of concurrent jurisdiction. His recourse would only be sought from a higher Court.

9. In the circumstances, the Petition herein filed on October 13, 2022 is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 29TH DAY OF JUNE, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Petitioner



Mr. Ochengo for Respondent
Kevin Isindu, Court Assistant

