REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO E039 OF 2021

GEDION OPICHA SICHENGA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein was tried and convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was sentenced to fourteen (14) years imprisonment on 28th May 2013.

2. Being dissatisfied with the said decision, he lodged an Appeal in the High Court being, **HCCRA No 38 of 2018** which was dismissed in its entirety. He did not appeal to the Court of Appeal.

3. On 3rd June 2021, he filed this Petition for review of the sentence pursuant to Section 333(2) of the Criminal Procedure Code. The said application was supported by his Affidavit in which he stated that at the time of his arrest he was still underage.

4. In his Written Submissions, he urged the court to invoke Section 333(2) of the Criminal Procedure Code and consider the time he spent in custody before conviction. He asserted that he was a first offender and urged the court to grant him a second chance to be a peace ambassador in the society.

5. In its Written Submissions dated 1st November 2021, the State had opposed the Petitioner's Petition on the ground that there had been overwhelming evidence against the Petitioner and that is why his sentence was not reviewed by the High Court. It termed the present Petition an abuse of the court process and was emphatic that the sentence of fourteen (14) years was lenient, sufficient and reasonable in the circumstances of the case herein.

6. On 10th February 2022, this court reserved the Judgment herein for 18th May 2022. However, the Petitioner informed the court that he had only three (3) months remaining for him to complete his sentence.

7. Having acknowledged that the present application was brought under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya), the State informed the court that it would not be opposing the present Petition and urged the court to consider the said period. This court thus set aside the orders reserving the Judgment to 18th May 2022 and preponed the same to avoid the Petitioner suffering a miscarriage of justice.

8. The State pointed out that the Petitioner was arrested on 13th March 2011 and that he was convicted on 28th May 2013. This meant that he had spent two (2) years two (2) months and fifteen (15) days in remand while awaiting trial. This period was not considered when the appeal was heard at the High Court.

9. Notably, Section 333(2) of the Criminal Procedure Code provides that: -

> **"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."** (emphasis court).

10. The Court of Appeal reiterated this provision in the case of **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.** The duty of the court in this regard is also contained in Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines where it is stipulated that: -

> **"The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account 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 excessive punishment that is not proportional to the offence committed…"**

DISPOSITION

11. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition for review of sentence that was lodged on 3rd June 2021 was merited and the same be and is hereby allowed.

12. It is hereby ordered that the time spent by the Petitioner in custody during trial be taken into consideration when computing his sentence as provided in Section 333(2) of the Criminal Procedure Code.

13. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF FEBRUARY 2022

J. KAMAU

JUDGE