

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO. E028 OF 2021

ALBERT BARASA MUKOMESI PETITIONER

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

The Petition before me sought two reliefs, namely;

(a) An order that the period which the petitioner spent in custody whilst he was still on trial, be taken into account when the prison authorities were computing the actual duration of the sentence;

(b) An order that the petitioner serves the remainder of the sentence on Probation.

1. The learned State Counsel, Ms M. Odumba conceded that the Petitioner was entitled to the benefit of **Section 333 (2)** of the **Criminal Procedure Code**.
2. The Respondent was right to have made that concession, as the proviso to **Section 333 (2)** obligates the Court to take into account the time which a person had spent in custody, when he was still on trial.
3. In this case, the Petitioner spent **5 Months** and **23 Days** in custody, during the time when he was still undergoing trial. Therefore, I do now order that when the Prison authorities were computing the actual duration of the sentence which the Petitioner should serve in jail, the said authorities must give credit for the said **5 Months** and **23 Days**.
4. Meanwhile, the request that the Petitioner be allowed to serve the remainder of the sentence on Probation, I find that that is not a legal right bestowed by statute. My finding is based upon the contrast between the 2 reliefs sought herein. On the one hand, the rights under **Section 333 (2)** of the **Criminal Procedure Code** are spelt out in express and mandatory terms.
5. On the other hand, the question as to whether or not the Petitioner would be entitled to demand that he be allowed to serve the balance of the sentence, on Probation, cannot be demanded as a justiciable right. The fact that the Petitioner may have less than 3 years left, out of the sentence of 20 years imprisonment, cannot as a matter of right give rise to an entitlement that he should serve the balance of the sentence on probation.
6. In this case, the Petitioner failed to provide the Court with sufficient information and justification to warrant the issuance of an order that the balance of the sentence be served on Probation.
7. However, as already stated earlier, the period of **5 Months** and **23 Days** are to be taken into account when calculating the actual duration to be spent in prison, whilst serving the sentence.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF FEBRUARY 2022

FRED A. OCHIENG

JUDGE