



**Kibuthania v Republic (Petition E003 of 2021)
[2022] KEHC 10904 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10904 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E003 OF 2021**

PJO OTIENO, J

MAY 31, 2022

**IN THE MATTER OF THE ENFORCEMENT OF BILL OF RIGHTS UNDER
ARTICLES 22(1), 23(1), 25(D), 50(1) AND 51(2) OF THE CONSTITUTION**

AND

IN THE MATTER OF ARTICLES 20(1),(2), 21(1), 48, 25(1) OF THE CONSTITUTION

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHT AND FREEDOMS UNDER ARTICLES 25(C), 27(1), 24,
47, 50(1)(P), 51(1), 23(1) AND 165(3) OF THE CONSTITUTION**

AND

MATTERS ARISING FROM SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE

BETWEEN

TONY KINYUA KIBUTHANIA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner herein was jointly charged with another, tried and convicted with the offence of Robbery with violence contrary to Section 296 in Tigania Cr. Case No. 2314/15. On conviction, the trial court sentenced him to suffer death.
2. He appealed against the said conviction in Meru High Court Cr. Appeal No.93/18, where the said conviction was upheld but the sentence was substituted with a prison term of eight (8) years.



3. He then moved this court through a petition dated April 2021 seeking that the period he spent in lawful custody from October 14, 2015 be deducted from the imposed 8 years sentence.
4. In the petition he contends that he was in lawful custody for a period of 3 years before he was sentenced on 3/5/2018 to serve 8 years imprisonment, and therefore that period ought to have been taken into account in view of the provisions of Section 333(2) of the *Criminal Procedure Code*. He contends that his right to equal protection and equal benefit under Article 27(1) and 8(4) of the *Constitution* was violated, since the time he spent in remand was not taken into consideration during sentencing.
5. He thus seeks a declaration that his pre-trial period be deducted from his 8 years sentence; a declaration that the failure to comply with Section 333(2) of the *Criminal Procedure Code* offends Articles 27(1), 21, 50(2) and 51(2) of the Constitution; and lastly that an order be made directing his sentence to commence from 24/8/2015 which is the date of arrest and not the date of conviction.
6. In his written submissions, the petitioner contended that the failure by the High court to consider the time he spent in custody violated his right to equal protection and equal benefit of the law as enshrined under Article 27(1) and 8(4) of the *Constitution*. He faulted the High court for its failure to take into account the 3 years period he had been in lawful custody prior to his sentencing. He relied on *Abmad Abolfathi Mohammed & anor v Republic*(2018)eKLR, *Bethwel Wison Kibor v R*(2009)eKLR, *Wilson v R*(2016)eKLR, *James Murithi Marete & anor v R*(2019)eKLR and *Henry Mugendi Igoki v R*(2020)eKLR, on the need to consider the time spent in remand during sentencing. He submitted that the High court has jurisdiction to hear and determine the issues raised herein.
7. In opposition to the petition the respondent did not file any replies but written submissions where it is contended that the High court could not review a decision made by a court of concurrent jurisdiction. The prosecution/respondent cited the decision in *James Waweru Ndikaa v R*(2021)eKLR, for the proposition of the law that reviewing a decision of a court of concurrent jurisdiction would be tantamount to sitting as an appellate court. According to the prosecution, this court does not have the power to entertain the present petition, because the decision sought to be reviewed was rendered by a court of concurrent jurisdiction adding that the petitioner had the right to appeal being a point of law if he was genuinely dissatisfied with the decision of the High court.
8. It further submitted that the High court afforded the petitioner an opportunity to mitigate before sentencing and duly considered the same then cited *Geoffrey Mwiti Gikunda & 3 others v R*(2020)eKLR where it was:-

“the court was alive of its of obligation under the proviso to Section 333 of the Code. It must have considered the same in reducing the applicants’ sentence from that of death to 25 years.”

9. The respondent therefore urged the court to dismiss the petition in its entirety for lack of jurisdiction and for being meritless.

Analysis and determination

10. This petition presents the important question as to when the high court would set on the journey to entertain an application and prayer for re-sentencing. In it the petitioner contends that having succeeded on his appeal against sentence and the court having reduced his sentence from that of death to a jail term of 8 years, the court failed to take into account the period he had been in custody while undergoing trial. He considers that a failure on the court and considers such failure a violation of his



right to equal treatment before the law under article 27 of the Constitution and thus prays that the error be corrected by the sentence being ordered to be computed from the date of arrest.

11. The first issue for the court to determine is whether it is clothed with jurisdiction to entertain a request to tinker with sentence passed on appeal by a court of concurrent jurisdiction. While I appreciate the petition to be informed by the jurisprudence in Francis Karioko Muruatetu vs Republic (2017) eKLR, it must be remembered that that jurisprudence becomes applicable where one has exhausted his right of appeal. Here, the applicant had a right to appeal to the Court of Appeal but did not. That alone would dis entitle the petitioner to the remedies sought.
12. The other prerequisite is that there must be demonstration that the petition was denied an aspect of the right to fair hearing by say a denial to present his mitigation before sentence.
13. In the judgment on appeal, it is clear that before the court reports were filed and duly considered. That was in satisfaction Sections 216 and 329 Criminal Procedure Code and therefore no denial to mitigate was occasioned to merit the court revisiting the question of the sentence.
14. On the basis of the two findings above, the court hold that it has no jurisdiction to entertain the petition questioning the appreciation and application of the law by a court of concurrent jurisdiction. On that score the petition must fail and is therefore dismissed.
15. On the merit, even if the court had the jurisdiction to answer to the petitioner's invitation, the provisions of section 333(2) of the Criminal Procedure Code and the Court of Appeal decision in Abamad Abolfathi Mohammed v Republic (2018) eKLR interpreting that provision to make it mandatory for the period of incarceration before conviction to be taken into account are not difficult to understand.
16. The expression, take into account, is not to say must be subtracted from. It only means that the court gives regard and bears in mind that the convict was in custody and therefore lost his liberty before the conviction and sentence.
17. I have read the judgment of the High court in light of the binding decision of the court of appeal. The High court in setting aside the death sentence appreciated that the second appellant, Tony Kinyua Kibuthania shall serve eight (8) years imprisonment from the date of conviction. In coming to that verdict, the trial court considered extensively the happenings at trial including the antecedents of the other appellant who was in fact admitted to bail, and gave different sentences for the two. I consider that in giving different terms of jail, the court took into account the circumstances of the appellant including the period served post conviction.
18. In the end, I find the petition not to lie and to be devoid of any merit and dismiss it in entirety.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 31ST DAY OF MAY 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Petitioner in person

Miss Mwaniki for the Respondent

Court Assistant: Mwenda

