



**Makaa v Republic (Criminal Petition E057 of 2021)
[2022] KEHC 14182 (KLR) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL PETITION E057 OF 2021
JN KAMAU, J
OCTOBER 24, 2022**

BETWEEN

DALMAS MABWA MAKAA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner herein was tried and convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was sentenced to death which was later commuted to life imprisonment.
2. Being dissatisfied with the said decision, he lodged an appeal at the High Court where the court dismissed his appeal in its entirety. This record was not presented before this court.
3. Being dissatisfied with the aforesaid decision, he filed petition for review of sentence Criminal Petition No 54 of 2019 where Cherere J re-sentenced him to thirty (30) years imprisonment and ordered that the sentence runs from September 3, 2004 when he was convicted and sentenced.
4. On November 3, 2021, he filed this petition for review of sentence which application was premised on section 333(2) of the Criminal Procedure Code as was evidenced in his supporting affidavit.
5. In his written submissions that were filed on September 27, 2022, he pleaded with court to consider that he was arrested on October 13, 2001 and was incarcerated twice as the court on hearing his appeal ordered for a re-trial. He averred that the courts that handled his case did not consider section 333 (2) of the Criminal Procedure Code while sentencing him. He added that this court had jurisdiction to grant the orders sought under article 165 (3)(b) of the Constitution of Kenya 2010.
6. He contended that every person was equal before the law and had the right to equal protection of the law as provided in the Constitution.



7. The respondent did not oppose his prayer. In its written submissions that were filed on July 26, 2022, it urged this court to consider the period the petitioner spent in custody though it noted that he ought to have appealed to the Court of Appeal if aggrieved by the decision of Cherere J.

Legal analysis

8. The petitioner's prayer was based on section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya). The aforesaid section provides as follows:-

' 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.'

1. The requirement under section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in [Ahmad Abolfathi Mohammed & Another vs Republic \[2018\] eKLR](#).
2. Further, clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines (under) provide 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. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.'

11. According to the petitioner herein, his co-accused in Kisumu Criminal Case No 201 of 2004 namely Joseph Musostsi Opana was sentenced to thirty (30) years and had since gone home. A perusal of the judgment of Ochieng J (as he then was) in [Joseph Mutsosti Opana vs Republic \[2021\] eKLR](#) showed that he re-sentenced the applicant therein to thirty (30) years and directed that the period the said applicant stayed in custody while his trial was on going be taken into account. In his judgment, the learned judge indicated that from his calculations, the applicant therein had stayed in custody for one (1) month shy of three (3) years.

12. Notably, Cherere J pronounced herself on the date when the aforesaid sentence was to start running. She rendered herself as follows:-

' Consequently, the petitioner is resentenced to serve 30 years' imprisonment from September 3, 2004 when he was convicted and sentenced.' (emphasis court)'

13. Under normal circumstances, this court's hands would have been tied by Cherere J's pronouncement of when the petitioner's sentence was to commence. Indeed, as she was of equal and competent jurisdiction as this court, this court could not purport to review and/or vary and/or sit on appeal on her decision. As she had since left the jurisdiction of this court and could not therefore review her orders, if at all there was an error, the only option that was left to the petitioner herein would have been to appeal to the Court of Appeal if he was dissatisfied with her decision.



14. Bearing in mind the period the petitioner's co-accused stayed in prison and taking into consideration the remission period, the calculation of this court was that he was released from prison in 2021. Caught in the dilemma between the pronouncement of Cherere J and the provisions of article 27(1) of the Constitution of Kenya, 2010 that provides that every person is equal before the law and has the right to equal protection and equal benefit of the law, this court opted to deviate from the norm and give the petitioner the benefit of the same period Ochieng J, (as he then) considered in the petitioner's co-accused's petition as there was nothing that was placed before this court to suggest that the petitioner herein was more guilty or more culpable of the offence he committed with his co-accused. In addition, a lot of injustice would be occasioned to the petitioner if he was to appeal at the Court of Appeal due to the time to be taken before his appeal is heard and determined.
15. Notably, the respondent acknowledged that the petitioner ought to have appealed the decision of Cherere J at the Court of Appeal but conceded that this court could allow the petitioner's petition due to the aforesaid reasons.

Disposition

16. 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 November 3, 2021 was merited and the same be and is hereby allowed.
17. As the petitioner would have been released in 2021 taking into account the period of two (2) years eleven (11) months being the period between his arrest on October 13, 2001 and his sentence on September 3, 2004, it is hereby directed that the petitioner be and is hereby set free forthwith unless he be held in custody for any other lawful cause.
18. It is so ordered.

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

J KAMAU

JUDGE

