



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okello v Republic (Criminal Petition E002 of 2022)  
[2022] KEHC 16652 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16652 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL PETITION E002 OF 2022**

**JN KAMAU, J**

**DECEMBER 20, 2022**

**BETWEEN**

**BENARD OTIENO OKELLO ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The petitioner herein was tried and convicted for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. He was sentenced to death which was later commuted to life imprisonment on October 20, 2016.
2. Being dissatisfied with the said decision, he lodged an appeal at the Court of Appeal in CRA No 205 of 2014 wherein the court affirmed the conviction but reduced his sentence to thirty (30) years imprisonment from the date of conviction.
3. He filed this petition for review of the sentence on January 20, 2022. In his affidavit in support thereof, he contended that his application was premised on section 333(2) of the *Criminal Procedure Code*.
4. In his written submissions that were filed on January 20, 2022, he pleaded with court to consider that he was remorseful and grant him a second chance. He pointed out that he had so far spent nine (9) years in prison.
5. He contended that while in custody, he had been training and acquiring skills for personal development such as theological training, Diploma in ISOM, Certificate in Emmaus, Certificate in prisoners' journey, Certificate in Gospel faith messenger correspondence course, Level 1 and 2 Certificate in Lamp & Light correspondence course and Grade III Certificate in masonry. He believed that the skills he had acquired would enable him integrate well back to society.



6. He asserted that he was advancing in age and that at the time of arrest, he was the sole breadwinner of his family and his elderly parents. He sought the leniency of court. In this regard, he placed reliance on the case of *Sabastian Okwero Mrefu vs Republic* [2014] eKLR where the court held that the eleven years (11) spent in custody by the petitioner therein was enough punishment and set him at liberty.
7. The petitioner filed his written submissions and several documents in support of his case on May 25, 2022. On July 19, 2022, the court reserved its decision and directed the respondent to file and place its submissions in the court file by August 2, 2022. This is because the respondent had previously failed to file its written submissions by June 10, 2022. The respondent had not filed any written submissions as at the time the court was writing the decision herein. This judgment is therefore based on the petitioner's written submissions only.

### Legal Analysis

8. Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) 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.”
9. The requirement under Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
  1. 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. Having said so, this court noted that the Court of Appeal had pronounced itself on the date when the aforesaid sentence was to start running. It rendered itself as follows:-

“In conclusion this appeal therefore fails on conviction but the sentence is substituted to a term of (30) years imprisonment from the date of conviction (emphasis court).”
12. Notably, this court's hands were tied by the aforesaid pronouncement of when the petitioner's sentence was to commence. As the Court of Appeal was of a higher rank than that of this court, this court could not purport to review and/or vary and/or sit on appeal of its decision. If at all there was an error, the only option that was left to the petitioner herein was to seek for review at the court of appeal for consideration.



**Disposition**

13. 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 January 20, 2022 was not merited and the same be and is hereby dismissed.
14. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF DECEMBER 2022**

**J. KAMAU**

**JUDGE**

