



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**PETITION NO. 61 OF 2020**

**ANDREW MUNYAO MUTUA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. Before me is a petition dated 20/05/2020 seeking orders that the period the petitioner spent in custody be considered. The petition is premised on Section 333(2) of the Criminal Procedure Code.
2. The petitioner's case is that he was arrested on 5/06/2019 and remained in custody until 30/12/2019 when he was sentenced to serve two (2) years imprisonment in Siakago SPM's Criminal Case 548/2019 - for the offence of manslaughter contrary to Sections 202 as read together with 204 of the Penal Code.
3. At the hearing of the application, the petitioner reiterated his prayer on the petition. Ms. Mati Learned State Counsel opposed the petition and submitted that the period spent in custody was taken into account and that the petitioner was a beneficiary of the least sentence doctrine.
4. The petitioner herein has cited Articles 25(c), 27(1)(2), 47, 50(2)(p), 23(1) and 165(3) as having been violated. It is trite law that a constitutional petition needs to meet some threshold for a court of law to entertain the same in that the same ought to set out with a reasonable degree of precision that which he complains of, the provisions said to be infringed, and the manner in which they are alleged to be infringed. (See **Anarita Karimi Njeru -vs- Republic (No.1)-[1979] KLR 154** and **Mumo Matemo -vs- Trusted Society of Human Rights alliance [2014] eKLR**).
5. However, from the perusal of the petition herein, it is clear that apart from citing the constitutional provisions and stating what he was complaining of, the manner in which the cited articles were allegedly infringed was never set out with a reasonable degree of precision. As such the same ought to fail.
6. However, the sentence subject of the said petition was passed by W. Ngumi PM in Siakago SPMC Criminal Case No. 548 of 2019 and which court is subordinate to this court. The crux of the said petition is the failure by the trial court, in sentencing, to take into account the period the petitioner spent in custody.
7. Section 362 of the Criminal Procedure Code (Cap.75) bestows this court with revisionary jurisdiction. In exercise of this jurisdiction, this court has the powers to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. This is aimed at ensuring that subordinate courts keep within their jurisdiction and that they observe the law. (See **Prosecutor -vs- Stephen Lesinko [2018] eKLR**).
8. Under section 364 of the Criminal Procedure Code, this court can exercise revisionary powers in the case of a proceeding in a subordinate court the record of which it has called for or which has been reported for orders, or which otherwise comes to its knowledge.
9. In my view, this court can exercise the powers under the above sections and examine the trial court's sentence notwithstanding that the petition herein is defective in form. This is because the complaint by the petitioner as appears on the petition touches on the correctness, legality or propriety of the said sentence.
10. As such, the question which needs to be answered is **whether the said sentence was correct, legal and/ or proper?**
11. Under section 333(2) of the *Criminal Procedure Code*, where the person sentenced to imprisonment and where such person has, prior to such sentence, been held in custody, the sentence shall take into account the period spent in custody. (See **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR**, **Bethwel Wilson Kibor vs. Republic [2009] eKLR** and page 20 of the **Judiciary Sentencing Policy Guidelines**).

12. As such, it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so. Where this is done, then the sentence becomes incorrect, illegal and improper and liable to review by this court in exercise of the reversionary jurisdiction.

13. In the instant case, the petitioner averred that he was arrested and placed on lawful custody on 05/06/2019 and was held in until 30/12/2019 when he was convicted. Ms. Mati on her part submitted that the petitioner was arrested on 05/06/2019 and released on bail on 26/08/2019.

15. From the court records, it is clear that the petitioner was arrested on 19/06/2019 and arraigned in court on 05/07/2019. There is no explanation as to where the petitioner was between the two dates. However, as Lesiit J observed in **Mohamed Salim v Republic [2020] eKLR**, the period which the law require to be taken into account is the period a person has been held in custody before the sentence and not the period of time when he was held under investigations as such period is outside the trial period. The petitioner was subsequently admitted to bond on 26/08/2019. As such, the petitioner spent about fifty (50) days in custody. This is almost one and a half (1½) months. There is nothing on record indicative of the said period having been taken into consideration by the trial court. As Odunga J observed in **JMK v Republic [2020] eKLR**, where the sentence does not indicate the date from which it ought to run the presumption must be in favour of the accused that the same will be computed inclusive of the period spent in custody.

16. It is my opinion therefore that the period of one and a half (1½) months which the petitioner spent in custody and which the trial court did not consider ought to be taken into account. The petition as such succeeds in that respect.

17. Orders accordingly.

**Delivered, dated and signed at Embu this 20<sup>th</sup> day of January, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent