

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

MISCELLANEOUS CRIMINAL APPLICATION NO. E021 OF 2020

JAMES ABIERO MAKATA.....1ST APPLICANT

DAVID ONGAYI ALELA.....2ND APPLICANT

TOM ODHIAMBO OMWARE.....3RD APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. I have considered the application by the 3 applicants herein James Abiero Makata, David Ongayi Alela and Tom Odhiambo Omware, serving prison term at Siaya G.K. Prison. I note that the Petitioners have exhausted their right of appeal and were resented to serve 25 years, 30 years and 20 years imprisonment respectively for the offence of **Robbery with Violence** but the resentencing never took into account the period spend in remand custody contrary to **Section 333(2)** which provides that in sentencing, the trial court should take into account the period spend in remand custody where the accused was not on bond.

2. In this case, the offence of Capital Robbery was not bailable prior to 2010. The trial of the Petitioners took place in 2003, up to 2009 when the appeals were dismissed.

3. Under Article 50(2) (P) of the Constitution, an accused person/convict has a right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been charged between the time that the offence was committed and the time of sentencing ,and to apply for review by a higher court, as prescribed by law.

4. Considering that the term sentences as re-imposed on the petitioners did not take into account the period served in prison remand and as such period would accord the petitioners the benefit of the least served of the prescribed punishment for the offence of Robbery with Violence, I order that the respective prison sentences as imposed on the petitioners herein shall be calculated from the date of arrest of the petitioners before they were tried, taking into account the period they spent in prison custody prior to their convictions and sentences in the trial court.

5. The Petition is therefore allowed to the extend stated above.

6. This file is closed.

7. Orders accordingly.

Dated, Signed and Delivered at Siaya this 19th day of January, 2021

R.E. ABURILI

JUDGE