

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO.103 OF 2020

BENSON MURIITHI NJOKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This ruling relates to the applicant's petition filed in court on 24.02.2021 and wherein he seeks review of his sentence so as to take into account the time spent in custody. The applicant invokes the provisions of Section 333(2) of the Criminal Procedure Code.

2. The petitioner's case is that he was convicted of three counts of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006 and sentenced to ten years imprisonment in each of the said counts in Siakago - Criminal Case No. 181 of 2010. That he appealed to the High Court and to the Court of Appeal at Nyeri in Embu High Court Criminal Appeal No. 46 of 2011 and Nyeri Criminal Appeal No. 97 of 2013 respectively and which appeals were dismissed. He now comes to this court seeking review of the sentence affirmed by the Court of Appeal on the grounds that trial court did not take into account the time spent in custody.

3. The petitioner filed written submissions in canvassing the petition. On the part of the respondents, it was submitted by Ms. Mati that there has been an earlier application being **Petition No. 39 of 2020** and as such the petition is misconceived. The petitioner in rejoinder submitted that he was arrested on 13.05.2007 and that the same was not taken into account.

4. I have considered the petition herein and the submissions made both for and against the same. I have perused the court record and I note that indeed the petitioner herein had filed another petition being **Petition No. 39 of 2020** and wherein in the ruling of 18.08.2020 by Muchemi, J., the Court made a detailed ruling to the effect that the petitioner herein had filed an appeal to the High Court and which was dismissed by H.I. Ong'udi, J. and thus the Learned Judge did not have jurisdiction over the same. The court noted and indeed advised the petitioner to proceed and pursue his appeal which he had filed in the Court of Appeal. It appears that the petitioner herein failed to disclose to the court while handling the previous petition the status of the said appeal to the Court of Appeal. However, he now deposes that the same was heard and determined and the court dismissed the appeal. I have visited the Kenya Law website (<http://kenyalaw.org/caselaw/cases/view/104664>) and I note that the said appeal was determined on 16.12.2014 and is reported as **BMN -vs- Republic [2014] eKLR**.

5. What this means is that the sentence the petitioner is serving is that of the trial court as affirmed by the High Court and the Court of Appeal. The court of Appeal being a superior court to this court, it therefore means that the same cannot be reviewed by this court.

6. Further it is clear that in **Petition No. 39 of 2020**, the petitioner herein raised the issue on the failure by the trial court to consider the time spent in custody. The Learned Judge rightfully found that she could not review a judgment of a court of concurrent jurisdiction. As such, the issue having been determined by a court of concurrent jurisdiction to this court, the same is *res judicata* and thus this court does not have jurisdiction over the same.

7. The recourse available to the petitioner is to appeal against the ruling of Muchemi J of 18.08.2020 to the Court of Appeal. It is the one with jurisdiction under Article 164(3) of the Constitution and Section 379(1) of the Criminal Procedure Code and in appreciating the provisions of Article 50(2)(q) of the Constitution of Kenya 2010 which guarantees the right of a person if convicted, to appeal to, or apply for review by, a *higher court* as prescribed by law.

8. It is trite that a court of law can only exercise jurisdiction as conferred by the constitution or other written law and cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that a court cannot expand its jurisdiction through judicial craft. (See **Samuel Kamau Macharia & Another V. KCB & 2 Others App. No. 2/2011**). Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. (See **the owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**).

9. It is my considered view that this court being bereft of jurisdiction it ought to lay down its tools. As such the petition herein is hereby dismissed for want of jurisdiction.

10. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF MARCH, 2021.

L. NJUGUNA

JUDGE

.....for the Petitioner

.....for the Respondent