



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**PETITION NO. 67 OF 2020**

SIMON GIKUNDA NDWIGA.....1<sup>ST</sup> PETITIONER

ABIDA WANJAGI NJERU.....2<sup>ND</sup> PETITIONER

NGONDI NDUNYA.....6<sup>TH</sup> PETITIONER

STEPHEN MURIITHI NGARI.....7<sup>TH</sup> PETITIONER

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The petitioners herein moved this court vide a petition dated 12.08.2020 wherein they have sought orders that the time spent in custody be taken into account. They invoke the provisions of Section 333(2) of the Criminal Procedure Code.

2. It is the petitioners' case that they were convicted of the offence of murder in Embu High Court's Criminal Case No. 6 of 2011 and sentenced to 6 years imprisonment. It is this sentence that they seek revision thereof. The petitioners filed written submissions.

3. Ms. Mati for the respondent opposed the application and submitted that the sentence meted upon the petitioners herein was lenient and that the trial court took into account the short period they were in custody as the petitioners were all on bond during trial.

4. I have considered the petition before me, the written submissions by the petitioners and further the response by the respondent.

5. As the petitioners rightfully highlighted in their written submissions and the petition as well, they were indeed sentenced to 6 years imprisonment for the offence of murder. The trial court F. Muchemi, J. in sentencing them (on 23.06.2020) noted that the court had considered the issues raised in mitigation and proceeded to mete the said sentence. It is obvious that the trial court must have taken into account the period, if any, the petitioners herein had stayed in custody. This is for obvious reasons that the sentence for murder is death by hanging. Anything short of the said sentence clearly means that the Learned Judge invoked the dictum in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**.

6. However, even if the petitioners feel that the said period was not considered, it is my view that this is not the right forum to seek redress. As I have already stated, the petitioners herein were sentenced by Hon. Muchemi, J. and which court is a court of concurrent jurisdiction with this court.

7. Despite the petitioners having deposed that the court did not take into consideration the period they spent in custody, it is my view that the issue ought to have been considered by Justice Muchemi as she was the sentencing court. Where the sentencing court fails to consider the time spent in custody that is an issue which can only be handled by the Court of Appeal. This court cannot review a decision of a court of concurrent jurisdiction. It's revision jurisdiction can only be invoked under Section 362 of the Criminal Procedure Code and which is only limited to proceedings of the subordinate courts.

8. The recourse available to the petitioners is to appeal against the judgment of the trial court 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.

9. 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**).

10. As such, the petition herein is hereby dismissed for want of jurisdiction.

11. 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