



**REPUBLIC OF KENYA**

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

**PETITION NO. E023 OF 2021**

*(From Original from HCCR Case NO. 25 of 2014 at Mombasa)*

**IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF THE ARTICLES 23 (1), AND 165(3) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ARTICLES 19,20,24,27 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTION 333 (2) OF THE CRIMINAL PROCEDURE CODE**

**SALIM TSOFA MKALA.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**CORAM: Hon. Justice R. Nyakundi**

**Salim Tsofa Mkala – Petitioner**

**Mr Mwangi for the state**

**R U L I N G**

The Petition seeks an order of review of his sentence of twenty-five years imprisonment for the offence of murder contrary to section 203 as read with 204 of the Penal Code. The grounds in support of the petition is that during the trial and subsequent appeals the two (2) year pretrial detention was never credited to the overall cumulative sentence.

**Determination**

I found useful to examine the provisions of section 333 (2) of the Criminal Procedure Code which provides as follows; -

***“Subject to the provisions of section 36 of the Penal Code 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. Further provided that where the person sentence under subsection (1) has prior to such sentence, been held in custody, the sentence shall take into account of the period spent in custody.”***

A clear reading of the above provisions, gives the Courts power of granting credit to convicted offenders underpinned on the period spent in pretrial detention. From the record, the petitioner spent two years in remand custody pending the hearing and determination of the charge. Borrowing a leaf from principles in *Nyamogo & Nyamogo V Kogo [2001] EA 170*. There is an error apparent on the face of the record, precisely that the two-year remand custody was never credited in the final order of 25(twenty-five) years imprisonment. In terms of section 382 of the Criminal Procedure Code and the jurisdiction donated by the Constitution to this Court pursuant to Article 50 (1) 50 (2) (P) & (Q) as conjunctionally read with subsection 6 (a) & (b) of the Constitution, new and compelling of evidence has become available to the Court to

warrant variation of the sentence reduced to its supposed period under the provisions of the statute.

The central issue in the present case is that section 333(2) of the Criminal Procedure Code was never brought to the attention of the trial court and more particularly, on inclusion of it to influence the sentence.

Ultimately, a balancing exercise is called for which the Court weighs the provisions of section 382 of the Criminal Procedure Code when it comes to the depriving of the petitioner his or her rights based on the provisions of section 333 (2) of the same code. The policy rationale behind crediting the pre-trial detention period of an accused person to the final order is to do justice with such issues. What the provisions seeks to preserve is the infringement of the accused persons who largely failed to meet the conditions of bail under Article 49 (1) (h) of the Constitution.

The principle to credit pretrial detention period can be seen as to recognize a benefit accruing to accused persons who spend long periods in remand before the conclusions of their respective cases. The fact of the matter is sentencing Courts ought to take judicial notice of section 333 (2) of the code and on its own initiative regardless of whether or not either party has pleaded it render a decision factoring in the requirements of the law. Therefore, any custodial sentences in which an accused person was on pretrial detention should take into account the degree of that period already on record toward the final deterrence punishment.

The main purpose of the review is to ensure that the petitioner does not suffer prejudice or injustice to serve sentence incompatible with the statute and constitutional provisions which stipulates that accused person has a right to a benefit of a lesser sentence.

Consequently, the petition succeeds to that extent it is therefore necessary for an order to issue in terms of section 333(2) of the Criminal Procedure Code for the committal warrant to be amended by factoring in the two-year pretrial detention. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF JULY, 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mr Mwangi for the state
2. Salim Tsofa Mkala - Petitioner