

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HCCR. PETITION NO. 005 OF 2020

HENRY MULAMBA BWIRE.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The application before this court is the one dated 26th August 2020, made by **Henry Mulamba Bwire**, for an order that the period within which he remained in police custody pending hearing and determination of the criminal case facing him be taken into consideration and be included in the computation of the term of sentence imposed upon him by an appellate court.

The application is essentially made under provisions of the Constitution, and **S.333 (2)** of the **Criminal Procedure Code**, but is opposed by the State/respondent on the wrong notion that it is for re-hearing on sentence.

2. Having duly considered the application and the objection thereto, it is apparent and clear that the objection is misconceived and unsustainable as it is based on an issue not before this court. Therefore by dint of the provision in **S.333 (2)** of the **CPC**, the application would be for allowing without much ado. The provision states as follows:-

“Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, of the date on which it was pronounced except where otherwise provided in this code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

3. However, the circumstances of this case are different as deciphered from the supporting grounds contained in the application as confirmed by the court record in that, the applicant and another were convicted for the offence of murder contrary to **S.203** as read with **S.204** of the **Penal Code** and sentenced to suffer death by this court on the 20th November 2014. Thereafter, they appealed against the conviction and sentence but the appeal failed save for the sentence of death which was set aside and substituted for a term of twenty five (25) years imprisonment on the 21st November 2019. In so doing, the Court of Appeal sitting in Kisumu specifically stated that the sentence takes effect from the date of sentence by the trial court. It is instructive to note that this court which was the trial court, did not pass the sentence of twenty five (25) years imprisonment but the death sentence. Therefore, the present application should have been presented to the Court of Appeal which passed the impugned sentence. Otherwise, it would appear as if the applicant is attempting to appeal a sentence or apply for revision of a sentence imposed by a court superior to this one which would clearly lack the necessary jurisdiction.

4. This application is therefore defective and improper before this court and is hereby dismissed. The applicant should if necessary move the Court of Appeal for desirable Orders or appeal the decision of the Court of Appeal to the Supreme Court.

[READ AND SIGNED THIS 28TH DAY OF JULY 2021]

J.R. KARANJAH

J U D G E