**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**PETITION NO. 101 OF 2020**

**HENRY NJIRU VANDIRI.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**1.** The petitioner moved this court by way of a petition dated 30.11.2020 and filed in court on 1.12.2020 and essentially seeks this court's intervention and in so doing review the sentence he is serving taking into consideration the period the petitioner spent in custody. He invokes Section 333(2) of the Criminal Procedure Code and the dictum in **Abdul Aziz Odour & Stephen Omondi Wanyama –vs- republic Criminal Appeal No. 18 & 102 of 2018.**

**2.** The petitioner deposed and averred that he was convicted of the offence of grievous harm contrary to section 234 of the Penal Code in Siakago SPM's Criminal Case No. 534 of 2019 and sentenced to serve 5 years' imprisonment on 15.10.2020 and he did not appeal against the said conviction and sentence. That he was arrested on 26.06.2019 and placed in lawful custody until his sentence. He now prays that this court do take into consideration the said period (which he spent in custody).

**3.** Ms. Mati for the respondent opposed the petition by way of oral submissions and wherein she submitted that the petitioner was arrested on 27.06.2019 and released on 29.07.2019 and that although the period was not taken into account, the sentence was modest considering that the offence the petitioner committed was serious.

**4.** I have considered the petition herein and the response by the respondent and it is my view that the main issue for determination is whether the same is merited.

**5.** At the preliminary, I note that the petitioner herein moved this court by way of a constitutional petition seeking declarations pegged on violation of constitutional rights as enshrined in the constitution. This court definitely has jurisdiction to determine issues touching on violation of rights and freedoms under Article 165(3)(b) of the Constitution of Kenya 2010. However, it must be properly moved. Under Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules), the court ought to be moved by way of a petition. The said petition must indicate the facts relied upon, the provision of the Constitution alleged to be infringed or violated and the nature of the injuries caused and the manner in which the right was infringed. This position has been so even pre-Constitution of Kenya 2010. (See the case of **Anarita Karimi Njeru –vs- Republic [1979] eKLR)**. In demonstrating the manner in which there has been a violation, a petitioner should present before the court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation. (See **Stephen Nyarangi Onsuma and Another –vs-George Magoha & 7 Others (2014) eKLR**).

**6.** In the instant case, apart from the petitioner having cited the provisions of the constitution which he alleges to have been contravened, he did not plead as to the manner in which the same provisions were infringed. As such the petition before this court ought to fail.

**7.** I note that the petitioner challenges the sentence of the trial court in that the trail court did not take into account the period he spent in custody. The jurisdiction of this court is provided for under Article 165 of the Constitution. The matter before me is not an appeal and thus this court cannot determine on the same on that basis.

**8.** However, article 165(6) bestows this court with supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. This supervisory jurisdiction in criminal proceedings has been made possible by Sections 362 to 365 of the Criminal Procedure Code. Under this jurisdiction, this court has the powers to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the *correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.* Under Section 364, this court can exercise the revisionary jurisdiction in the case of a proceeding in a subordinate court the record of which

has been called for or which has been reported for orders, or *which otherwise comes to its knowledge.* As such, despite the matter herein being a constitutional petition, this court has the jurisdiction to determine the issue raised in the petition in exercise of its supervisory jurisdiction the form notwithstanding.

**9.** The petitioner having raised the issue of the trial court not having taken into consideration the time he spent in custody, it is my view that if the same is true, then the sentence can only be held to be incorrect, illegal and improper. This is since under Section 333(2) of the Criminal Procedure Code, the time spent in custody where the person sentenced has prior to such sentence been held in custody should be taken into account at the time of sentencing. (See **Bethwel Wilson Kibor –vs- Republic [2009] eKLR** and **Ahamad Abolfathi Mohammed & Another –vs- Republic [2018] eKLR).** The **Judiciary Sentencing Policy Guidelines**, also recognizes the duty of the trial court to take into account the time spent in custody under clauses 7.10, 7.11 and 7.12. Clause 7.10 provides that; -

> ***"7.10 The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed..."***

**10.** Any sentence which fails to take into account the said period cannot be said, in my view, to be correct, legal or proper. The same is as such, a candidate for revision under Section 362 of the Criminal Procedure Code.

**11.** I have perused the trial court's record and noted that the petitioner herein was arraigned on 28.06.2019 and wherein he pleaded not guilty. He was admitted to bail and on 29.07.2019, he was released after paying the cash bail of Kshs. 40,000/-. The petitioner was convicted on 15.10.2020 and the trial court proceeded to sentence him to the five years' imprisonment. The record is clear that the trial court did not take into consideration the 30 days the petitioner spent in custody (from 28.06.2019 to 29.07.2019). By dint of Section 333(2) of the Criminal Procedure Code, this period ought to have been taken into account by the trial court during sentencing and as such the sentence should be revised.

**12.** Section 365 of the Criminal Procedure Code provides for the powers of this court in revision and in case of a conviction (as was the case herein), this court in revision has the discretion to exercise any of the powers conferred on it by Sections 354, 357 and 358, and in doing so, the court may enhance the sentence. However, this court ought not to make any order to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence [section 365(2)]. Further, this court ought not to inflict a greater punishment for the offence which in the opinion of the court the accused has committed than might have been inflicted by the court which imposed the sentence.

**13.** Under section 354, in exercise of its appellate jurisdiction, upon hearing an appeal before it and in an appeal against sentence, this court has the power to increase or reduce the sentence or alter the nature of the sentence.

**14.** Since this power is also exercisable in revision, I hereby invoke the same and do hereby order that the 30 days period that the petitioner was in custody be deducted from the sentence of 5 years that was imposed by the trial court.

**15.** It is so ordered.

**Delivered, dated** and **signed** at **Embu** this **4th** day of **August, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Petitioner

.....for the Respondent