



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. 38 OF 2020

MARK KARIUKI NTHIA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. The petitioner herein moved this court vide the petition dated 18/02/2020 and filed in court on 14/05/2020 wherein he prayed that the time he spent in custody be taken into consideration as part of his sentence. The application was filed contemporaneously with a notice of motion also dated 18/02/2020.

2. It was his case that he was serving twenty-five (25) years imprisonment for the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act of 2006 in Criminal Case 757 of 2008 at SRM's Court in Runyenjes. That he has been in custody from 23/10/2008 when the plea was taken. He thus sought that the period spent in custody be considered as part of his sentence.

3. At the hearing of the petition, the parties elected to canvas the same through oral submissions. The petitioner reiterated the content of his petition and submitted that he was arrested on 21/12/2008 and convicted on 23/06/2010 and that his appeals to the High Court and the Court of Appeal were dismissed. Ms. Mati for the respondent submitted that she was not opposed to the petition.

B. Issues for determination

4. I have considered the petition herein and the submissions by the parties and it is my opinion that the main issue which ought to be decided is whether this petition is merited.

C. Analysis of the law and determination

5. The petitioner seeks for orders that this court do consider the eleven months he spent in custody as forming part of his sentence. The proviso to section 333(2) of the Criminal Procedure Code provides 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.* (See **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** and **Bethwel Wilson Kibor vs. Republic [2009] eKLR**). As such, pursuant to these authorities, the court in sentencing should consider the period spent in custody by the accused.

6. However, at the hearing of the petition, the petitioner submitted that his appeals to the High Court and Court of Appeal were dismissed. I have perused the court records and indeed it is true that the petitioner herein appealed against the judgment and conviction of the trial court to the High Court vide Embu High Court Criminal Appeal No. 97 of 2010. The said appeal was heard and vide the judgment of 13/02/2014 by H.I. Ong'udi J. against the same was dismissed. Further it is clear from the record that the petitioner herein appealed the High Court judgment to the Court of Appeal vide Nyeri Court of Appeal Criminal Appeal No. 57 of 2014. The appeal was dismissed on 27/05/2015 by a bench of P.N. Waki, R. N. Nambuye and P.O. Kiage JJAs.

7. As such, the operating decision is that of the Court of Appeal and which is a superior court to this one. The petitioner seeks revision of the decision of the Court of Appeal in other words which did not interfere with the sentence the issue that arises herein is whether this court can review the sentence by the Court of Appeal.

8. The Constitution of Kenya provides for the hierarchy of courts in Kenya. At the helm of the hierarchy in courts it's the Supreme Court followed by the Court of Appeal then the High Court then the subordinate courts. The Court of Appeal being higher than the High court in

hierarchy means that it is more superior to the High court. That being the case, it therefore means the issue of jurisdiction in this petition ought to be addressed. The decision of the Court of Appeal binds the High Court as an inferior court to it under the said hierarchy.

9. In my opinion, 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. (**Samuel Kamau Macharia & Another V. KCB & 2 Others App. No. 2/2011**).

10. In the instant case, the Court of Appeal considered the appeal by the petitioner and dismissed it. The petitioner had earlier appealed to the High Court against the conviction and sentence and wherein the High Court affirmed the decision of the trial court. The Court of Appeal having dismissed the appeal means that it affirmed the decision of the High Court. As such it is my opinion that this court cannot review the decision of the Court of Appeal which is superior court to this court as it has no jurisdiction to do so.

11. It is my considered opinion that this court lacks jurisdiction to deal with this petition. Consequently, the petition is hereby struck out for want of jurisdiction.

12. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF AUGUST 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Petitioner through video link