



**REPUBLIC OF KENYA**

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

**PETITION NO. 39 OF 2020**

**BMN.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This opinion is in relation to the petition by the petitioner herein dated 3/03/2020 and filed in court on 14/05/2020 and contemporaneously with a notice of motion also dated 13/03/2020. The petitioner seeks for orders that the time he spent in custody be taken into consideration as part of his sentence.

2. It was his case that he was charged of the offence of incest contrary to Section 20(1) of the Sexual Offences Act of 2006 in Criminal Case 777 of 2007 at SRM's Court in Siakago but that the case was ordered for retrial by High Court on 2/03/2010. That all through from 15/05/2007 when he took plea, he had been in custody. It was this period which he prayed that it be considered.

3. The petition was canvassed orally and wherein the petitioner reiterated the content of his petition and submitted that he was convicted on 05/04/2011 in Criminal Case No. 181 of 2010 and sentenced to thirty (30) years imprisonment and that he spent eleven (11) months in custody. Ms. Mati for the Respondent on her part submitted that he 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. This petition seeks for orders that the period spent in custody during the pendency of the trial be considered part of the petitioner's sentence. The relevant law in this regard is section 333(2) of the Criminal Procedure Code. The said section provides that: -

***“Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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. 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.”***

6. However, I have perused the court records and I have noted that the petitioner appealed against the conviction and sentence *vide* Embu High Court Criminal Appeal No. 46 of 2011. The said appeal was heard and determined *vide* the judgment of 11/10/2013 (H.I Ong'udi J) and wherein it was dismissed and conviction and the sentence of the trial court affirmed.

7. The appellate court herein was a court of concurrent jurisdiction with this court. What the petitioner is seeking therefore is for this court to review the decision of a court of concurrent jurisdiction. As such, it is my opinion that the question which ought to be answered at the preliminary is whether in the circumstances, this court has jurisdiction over the subject herein. It is trite that issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost (See **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR**).

8. In **Samuel Kamau Macharia & Another V. KCB & 2 Others App. No. 2/2011**, the Supreme Court of Kenya made it clear 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. The jurisdiction of the High

Court stems from article 165(3) of the Constitution. It includes *unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction, supervisory jurisdiction and **any other jurisdiction, original or appellate, conferred on it by legislation.*** An example of jurisdiction bestowed upon the High Court by a statute is the revision jurisdiction under section 362- 364 of the Criminal Procedure Code.

9. As I have indicated above, the petitioner's appeal on both conviction and sentence was heard and determined by H.I Ong'udi J in Criminal Appeal 46 of 2011. The said judge was a judge of the High Court who possessed concurrent jurisdiction with that of this court.

10. It is my opinion that this court and the court which heard the appeal being courts of concurrent jurisdiction, this court is devoid of any jurisdiction to review the said decision. Doing so would be tantamount to sitting as an Appellate court on the judgment of Hon. H.I Ong'udi J. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. Good governance demands that cases be handled procedurally in the right forum. This is because the rule of the thumb that superior courts cannot sit in review over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves.

11. I further note from the record that the petitioner filed a notice of appeal to the Court of Appeal. However, there is nothing on record to show that the appeal was heard and determined. The petitioner ought to pursue the said appeal. And if at all the same was heard and determined, it is my opinion that this court is not the right forum to handle the instant issue.

12. As such it is my opinion that this court is bereft of jurisdiction to entertain the petition as the same is tantamount to review its own judgment and sentence. By reviewing the said sentence, this court would have abrogated itself the appellate jurisdiction to entertain an appeal from its own decision. The only time this court can review its own decision is in exercise of the resentencing jurisdiction pursuant to **Muruatetu's decision** (and which is not the case herein).

13. I note that the applicant cited article 22(1) (3)(2)(4), 19(3), 25, 26(1), 50(2)(p), 51(2), 159(1), 261, 160(1), 165(3)(B) of the Constitution. These articles provide for matters relating to rights and freedoms. Article 165 of the Constitution bestows this court with enforcement jurisdiction (jurisdiction to enforce rights and freedoms). However, considering the petition herein *vis-a- viz*, it is my opinion that the same does not meet the threshold of a constitutional petition as was laid down in the *locus classicus* case of **Anarita Karimi (Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154)** and reaffirmed by the Court of Appeal in **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR**. The petitioner did not set out with a reasonable degree of precision that of which he complained of, the provisions said to be infringed, and the manner in which they are alleged to be infringed. As such the same is deemed to fail even considering it on the grounds of it being a constitutional petition.

14. It is my considered opinion that this court lacks jurisdiction to entertain this petition. Further the petition has not met the threshold of a constitutional petition.

15. The petition is accordingly struck out.

16. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 18<sup>TH</sup> DAY OF AUGUST 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Respondent**

**Petitioner through video link**