



**Nderi v Director of Public Prosecution (Petition E023 of 2022)
[2023] KEHC 721 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 721 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E023 OF 2022
TW CHERERE, J
FEBRUARY 2, 2023**

BETWEEN

HAMISI GEOVANNIE NDERI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. The petitioner (Hamisi Geovannie Nderi) was charged in High court Meru in criminal case No. 77 of 2009 with the offence of murder contrary to section 203 as read with section 204 of the Penal Code and after full trial he was found guilty, convicted and sentenced to death on October 11, 2012.
2. He lodged an appeal to the Court of Appeal sitting in Nyeri Criminal Appeal No.48 of 2014 challenging both the conviction and sentence which appeal was dismissed in entirety on the October 19, 2016.
3. Petitioner filed Meru Constitutional Petition No. 90 of 2018 for resentencing following the decision in the Francis Karioko Muruatetu & another v Republic which declared section 204 of the Penal Code unconstitutional and he was resentenced to 25 years imprisonment on the April 14, 2020 to commence from the date of conviction.
4. Petitioner claims that the court did not factor the period that he spent in custody while undergoing trial as provided for under section 333(2) of the Criminal Procedure Code and placed reliance on Abamad Abolfatbi Mohammed & another v Republic [2018] eKLR and Article 22(3)(d) of the Constitution of Kenya.

Analysis and determination

5. I have considered the Petition and the issues for determination are whether:-
 - a. This court has jurisdiction to entertain the instant application.



- b. The applicant is entitled to the orders for review of sentence under section 333(2) of the *Criminal Procedure Code*.

The Law

6. Section 333(2) of the *Criminal Procedure Code* provides:-

“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, the date on which it was pronounced, except where otherwise provided in this Code.

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

7. The same court in *Bethwel Wilson Kibor v Republic* [2009]eKLR expressed itself as follows:-

“By proviso to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at September 22, 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

8. According to The Judiciary Sentencing Policy Guidelines:

“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. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

9. I have perused the judgment of the High court on petition No. 90 of 2018 which was an application for re-sentencing and note that the learned Judge took into account the period the applicant has spent in custody. The Honourable court considered the decision in *Francis Karioko Muruatetu and another v Republic*, Petition No. 15 of 2015 and having noted the time Petitioner had been in custody resented the applicant to serve 25 years.

10. Article 50(2) of the *Constitution* gives the right to every accused person of a fair trial which includes:-
(a) “If convicted, to appeal to, or to apply for review by, a higher court as prescribed by law.”

11. The foregoing provision rules out the intervention of the High Court to review the orders of another judge in a criminal case. Since this court cannot sit on appeal in the judgments of another judge of equivalent jurisdiction, the orders sought in this Petition are declined.

DELIVERED AT MERU THIS 02ND DAY OF FEBRUARY 2023



WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Petitioner - Present in person

For the State - Ms. Mwaniki (PPC)

