



**Wambura v Republic (Petition E003 of 2022)
[2023] KEHC 3392 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3392 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
PETITION E003 OF 2022
RPV WENDOH, J
APRIL 20, 2023**

BETWEEN

MAURICE WEGESA WAMBURA APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Maurice Wegesa Wambura brought this Petition under Article 25 (c) and 50 (2) of *the Constitution* and Section 333 (2) of the *Criminal Procedure Code*. He prays that the court do consider the one year and four months and 18 days that he was in remand in accordance with Section 333 (2) of the *Criminal Procedure Code*. The Petitioner did not file submissions.
2. The Office of Director of Public Prosecutions (ODDP) filed grounds of opposition to the application to the effect that the application is misconceived, incompetent and bad in law because the petitioner challenged the judgment of the trial court on conviction and sentence; that J. Mrima upheld the trial court's decision on 17/3/2016; that he proceeded to the Court of Appeal and on 17/8/2020, the Court of Appeal dismissed the appeal and upheld the decision of the High Court; that the issues raised by the Petitioner were considered and dealt with by the appellate courts; and that the petitioner had an opportunity to raise the said issues but he did not and hence this petition is an afterthought and should be dismissed.
3. I totally agree with the ODDP's submissions. As regards allegations of breach of Article 25 (c) and 50 (2) of *the Constitution* the Petitioner did not elaborate how the said Articles were breached. It is settled law that when one alleges breach of his fundamental rights, he must plead with specificity the Article breached, the manner of breach and nature of breach. It is not enough to just allege or just list the Articles of *the Constitution*. See *Anarita Karimi Njeru vs. AG* (1979) KLR 154.



4. As regards Section 333 (2) of the Criminal Procedure Code, it provides that when sentencing, the Court should take into account the period of the time the appellant spent in remand. In this case, the trial court in sentencing indicated that the court had “.....perused through the entire file ... in regard to the offence as charged”. The trial court must have considered the issue of the remand period before sentence. The Petitioner did not raise the issue before J. Mrima when he heard the first appeal.
5. The Petitioner cannot litigate piecemeal. This court being of concurrent jurisdiction as J. Mrima, this court is functus officio. The doctrine of functus officio was considered by the court of Appeal in *Telcom Kenya Ltd vs. John Ochanda (Suing on behalf of employees of Telkom (K) Ltd* (2014) eKLR where the court held:-

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”
6. In the circumstances, the High Court rendered a final decision in this matter and no wonder the petitioner proceeded to the Court of Appeal when the High Court dismissed his appeal.

The Court of Appeal in its judgment stated;

“On sentence we find that the appellant was lucky to escape with fifteen (15) years imprisonment which was based on presumption that the child was seventeen (17) years of age. The learned judge acknowledged that fact and quipped that he could not enhance the sentence as he had not been moved by the State to do so.”
7. From the foregoing, it is clear that the appellant deserved a longer sentence than he got. Even if the court did not specifically mention the period he was in remand, it was taken into account and he got off on a lenient sentence.
8. I find that this petition is an afterthought, and an abuse of the court process. The Petition lacks merit and is hereby dismissed.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 20TH DAY OF APRIL, 2023

R. WENDOH

JUDGE

Judgment delivered in the presence of

Ms. Kosegei for the State.

Present Petitioner (virtual) .

Evelyne Nyauke – Court Assistant

