



**Otieno v Attorney General & 2 others (Petition e002 of 2023)
[2024] KEHC 11903 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION E002 OF 2023
HI ONG'UDI, J
OCTOBER 2, 2024**

BETWEEN

MOSES DOLA OTIENO PETITIONER

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

KENYA PRISONS SERVICE 3RD RESPONDENT

JUDGMENT

1. The petitioner moved the court through an undated petition filed on 6th September 2023 against the respondents jointly and severally claiming damages as hereunder:
 - i. That the 1st and 2nd respondents have a duty and constitutional obligation deriving from Articles 22,23,27 and 50 of *the Constitution* of Kenya to grant the petitioner time spent in remand custody under section of the Criminal Procedure Code.
 - ii. That may it please the honorable court to order the 3rd respondent that the petitioner's sentence begins from 4th May 2011 through to 16th January 2013 (period served in remand custody before posting bail) and from 6th October 2018 to 29th September 2018 (period back in remand custody upon judgment awaiting sentencing) and also from 29th November 2018 to 29th January 2023; a cumulative period of six (6) years and eight (8) months commensurate to the ten (10) years sentence with remission as under Section 46 (3) of the *Prisons Act*' (CAP 90).
 - iii. That may it please the honorable court to Order the immediate release from prison custody, of the petitioner herein since he has already exhausted his sentence.
 - iv. That may it please the honorable court to order damages compensation of the petitioner for the number of days the Petitioner shall have spent in excessive, illegitimate prison custody as



a result of non-inclusion of the time spent in remand custody as per Section 333 (2) of the Criminal Procedure Code.

- v. That such other order(s) as this honourable Court shall deem just.
2. Concurrently, the petitioner filed an application but later abandoned it and urged the court to proceed and determine the petition.
 3. The petitioner claims that he was arrested on 3rd May 2011 for the offense of murder and arraigned in court on 4th May 2011. He remained in custody through to 16th January 2013, (twenty-one (21) months) before posting bail and a further two (2) months (from 06/10/2023 to 29/10/2023) upon judgment pending sentencing. That he therefore spent a total of twenty-three (23) months in remand custody.
 4. He went on to state that in his two applications Misc application No. 093 of 2019 and E 130 of 2022 which the court in Nairobi dismissed, he had sought for an inclusion of the time spent in remand custody to be factored in his sentence in terms of section 333(2) of the Criminal Procedure Code. Further, that he had not sought for a variation of the ten (10) years sentence and therefore the court not granting him his prayers in the said applications amounted to an unlawful frustration of his legitimate expectation.
 5. The petitioner stated that petition was brought under the provisions of Articles 2, 3(1), 10(1), 19(1) (3), 20(1) (2)(3)(4), 21(1)(3), 22(1), 24(1)(2), 27(1), 28, 47(1)(2), 51(1), 165(3), 232, 258 of the Constitution 2010 and section 333(2) of the Criminal Procedure Code.
 6. The 2nd respondent filed a replying affidavit dated 28th December 2023 in response to the petition. The prosecution counsel averred that no fundamental freedoms and rights had been violated by the office of the 2nd respondent. Further, that the right to have time spent in custody under section 333(2) of the CPC to be considered part of the sentence was prerogative of the learned Judge or the Judicial officer.
 7. He averred further that from the procedure, a court of similar stature could not review the Judgment or ruling of the same court or its own and the petitioner had no option but to make an application in the court of appeal. Additionally, that the petitioner had served his sentence well and above the stipulated time albeit the remand period had not been considered. That the petitioner commenced his sentence on the 29th of November 2018 and was expected to serve a term of 10 years, the time spent in custody was 23 months and in calculation by subtracting the duration the projected time of release should have been in November 2023. He urged the court to make an appropriate decision on the petition.
 8. The application was canvassed by way of written submissions.

Petitioner's submissions

9. The said submissions are dated 18th January 2024. The petitioner identified eight (8) issues for determination by this court.
10. The first issue is whether the petitioner was entitled to petition under article 27 of the Constitution and section 333(2) of the Criminal Procedure Code. The petitioner submitted in the affirmative and cited the decisions in Nubian Rights Forum & 2 Others v Attorney General & 6 Others: Child Welfare Society & 9 other (Interested parties) [2020] eKLR and Odeny v Republic (Criminal Appeal 124 of 2017 [2023] KECA 42 (KLR) (3 February 2023) (Judgment).
11. The second issue is whether the petitioner was discriminated upon or given different treatment by the trial court with regard to section 333 (2) of the Criminal Procedure Code. he submitted in the



- affirmative while relying on several judicial decisions most of which have no citations save for EG & 7 Others v Attorney General; DKM & 9 Others (Interested Parties); Katiba Institute & Another: Petition 150 & 234 of 2016(Consolidated).
12. The third issue is whether the petitioner's prayer for an order directing the 1st and 2nd respondents to take into account the time spent in remand custody as per section 333(2) of the Criminal Procedure Code infringes on the legitimate interests of his sentence. He submitted that it was the duty and responsibility of the 1st and 2nd respondents to see to it that he was credited with time spent in remand custody as per Section 333 (2) of the Criminal Procedure Code.
 13. Further, that the same ought to be in a way that reflected equality as an unequivocal and inherent right under Article 27 of *the Constitution* of Kenya which ought to be enjoyed by him. He placed reliance on the case of Saisi & 7 Others v *Director of Public Prosecutions & 2 Others (Petition 39 & 40 of 2019 (Consolidated) [2023] KESC 6 (KLR)*.
 14. The fourth issue is whether the petitioner's prayer for an order directing the 1st and 2nd respondents to take into account the time spent in remand custody as per Section 333 (2) of the Criminal Procedure Code is a fundamental right protected by *the Constitution* of the Republic of Kenya. He submitted that the previous applications were for sentence review whereas the present one was a petition seeking to find redress on inequality as under Article 27 of *the Constitution* 2010 and Section 333(2) of CPC.
 15. The fifth issue is whether the petitioner was credited with time spent in remand custody as per section 333(2) of the Criminal Procedure Code. He submitted in the negative and cited the decisions in Ahmad Abolfathi Mohammed & Another v Republic [2018] eKLR and Bethel Wilson v Republic [2009] eKLR.
 16. The sixth issue is whether the petitioner has earned remission of a third of his sentence as under section 46 of the *Prisons Act* (Cap 90). He submitted in the affirmative and cited the aforementioned provision of the law. On the seventh issue, on whether he had lost part of or the whole of his remission as a result of its forfeiture for an offense against prison discipline, he submitted in the negative.
 17. Lastly, on whether he had already exhausted his sentence, he submitted in the affirmative and urged the court to have him released from prison.
 18. The petitioner highlighted his submissions on 8th August 2024. He placed reliance on Articles 2, 10 and 27 of *the Constitution*, the Sentencing Policy 2023 and the decision in Ezekiel Ole Maiyon v Republic. Application No. 202/2024 (Nakuru). He thus submitted that he could not benefit from prison decongestion since he had already served his sentence. He urged the court to grant him the liberty to serve a lesser sentence.

1st and 3rd Respondent's submissions

19. These were filed by the office of the Attorney General and are dated 1st February 2024. Counsel identified three issues for determination.
20. The first issue is whether this court has jurisdiction to entertain this suit. Counsel submitted that the court was being asked to review the orders of another court with equal status. Further, that the petitioner ought to have filed an appeal against the decision of the High Court Judge and filling a petition should not be allowed to salvage the petitioner's mistake of not appealing against the said decision. She added that that this court lacked the prerequisite jurisdiction to determine this matter since the petitioner was asking this court to sit as an appellate court and not a constitutional court. He placed reliance on the cases of Phoenix of E. A Assurance Company Limited v S.M Thiga t/a



Newspaper Service [2019] eKLR and Owners of the Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd [1989].

21. The second issue is whether the 1st and 3rd respondents have violated the petitioner’s right to warrant compensation. Counsel while relying on the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, submitted that the petitioner had not demonstrated how the said respondents had violated his rights.
22. Lastly, on who should bear the costs of the suit, she urged the court to award costs to the 1st and 3rd respondents since the petitioner had failed to prove his case.
23. The 2nd respondent did not file any submissions.

Analysis and determination

24. Upon analyzing the facts of the case, affidavits, the parties submissions and cited cases, I find the issue arising for determination to be whether the petition herein is merited.
25. The petitioner seeks to have the respondents herein compelled by this court to factor in his sentence the time he spent in remand custody as per the provisions of section 333(2) of the Criminal Procedure Code. He contends that he had not sought for a variation of the ten (10) years sentence in his applications (Misc application No. 093 of 2019 and E 130 of 2022) filed in Nairobi. Thus, the courts failure to grant him the prayers sought in the applications amounted to an unlawful frustration of his legitimate expectation.
26. The 2nd respondent on its part argued that no fundamental freedoms and rights of the petitioner had been violated. Further, that the right to have time spent in custody under section 333(2) of the CPC be considered as part of the sentence was a prerogative of the learned Judge or the Judicial officer. It is also its contention that a court of similar jurisdiction could not review the Judgment or ruling of the same court or its own and that the petitioner had no option but to make his application in the court of appeal.
27. It is the 1st and 3rd respondents’ case that the petitioner ought to have filed an appeal against the decision of the High Court Judge and that filing a petition should not be allowed to salvage his mistake of not appealing against the said decision. They argued further that this court lacked the prerequisite jurisdiction to determine this matter since the petitioner was asking this court to sit as an appellate court and not a constitutional court. They added that petitioner had not demonstrated how they had violated his rights.
28. Section 333(2) of the Criminal Procedure Code provides as hereunder:
 - “(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.
 - (2) 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 subsection (1) has, prior to



such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

29. In *Bethwel Wilson Kibor v Republic* [2009] eKLR the Court of Appeal expressed itself as follows:

“By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take 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 ten 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.”

30. 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.”

31. The above provision of the Criminal Procedure Code and the cited case clearly express what needs to be considered in sentencing. From the record it is not disputed that the petitioner was charged with murder and later convicted of the offence of Manslaughter and sentenced to ten (10) years imprisonment, by the High Court in Nairobi on 29/11/2018 in HCCR No. 40 of 2011. Upon conviction and sentence he filed two applications seeking review of the sentence by inclusion of the period he was in remand custody prior to the conviction as provided for under Section 333(2) of the Criminal Procure Code.

32. The applications are:

- i. Miscellaneous Application No. 093 of 2019.
- ii. High Court Criminal Revision No. E130 of 2022

Both applications were dismissed on 7th May, 2021 and 21st February, 2023 respectively, by Lesiit J (as she then was) and the late Ogembo J.

33. After the 2nd dismissal the petitioner decided to file the present petition on 6th September, 2023. The gist of the petition is still the issue of section 333(2) of the Criminal Procedure Code, which had already been dealt with by Judges with the same jurisdiction as this one.

34. The petitioner having been dissatisfied with the decisions made by the honourable Judges in High Court Misc No. 093 of 2019 HCCR and Rev No. E130 of 2022 had only one recourse. This was for him to move to the Court of Appeal and challenge the said decisions. What the petitioner is doing while hiding behind the claim of violation of his constitutional rights is asking this court to sit on appeal over the decisions of two courts with equal jurisdiction to this one.



35. Jurisdiction is everything. Without it, a court has no power, to make one more step. This was the holding in the case of Owners of the Motor Vessel “Lilian S” V Caltex (Kenya) Ltd Civil Appeal No. 50 of 1989.
36. This habit of prisoners filing similar applications and petitions from court to court must be checked and stopped to avoid contradictory judgments and orders being issued over the same matter. I therefore find that this court lacks jurisdiction to entertain this petition which is hereby dismissed. There shall be no order as to costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 2ND DAY OF OCTOBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

