



**REPUBLIC OF KENYA**

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

**PETITION NO. 220 OF 2019**

**NYAMAI WAMBUA.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT ON RESENTENCING**

1. The Petitioner herein **NYAMAI WAMBUA** was charged with the Offence of attempted robbery with violence contrary to Section 389 as read with Section 297 (2) of the Penal Code.

2. The particulars of the offence were that;-

*“On 17<sup>th</sup> March, 2014 at Jomvu gas station in Changamwe District within Mombasa County, jointly with others not before court while armed with dangerous weapon namely Baretta pistol s/n NO87441Z, he and others attempted to rob one Mohamed Hafiz of his money, and immediately before or immediately after the time of such attempted robbery threatened to use actual violence to the said Mohamed Hafiz.*

3. On counts III and IV he was charged with being in possession of firearm and ammunitions contrary to section 89(1) of the Penal Code. Particulars of the offence are that *“on 17<sup>th</sup> March 2014 at Jomvu gas station in Changamwe District within Mombasa County without reasonable cause, he had in his possession firearm, namely Baretta pistol serial number 87441Z and 14 rounds of 9mm ammunition in circumstances which raised reasonable presumption that they were intended to be used in a manner prejudicial to public order.”*

4. He was convicted and sentenced to five (5) years on the first count, and eight (8) years on the third count. The sentences were to run concurrently.

5. His appeal to the High Court did not succeed.

6. The Petitioner is now in this court pursuant to Section 333(2) of the Criminal Procedure Code, seeking for his conviction to be calculated from date of his arrest.

7. Ms. Moke, learned counsel for the State submitted that the Petitioner is seeking for inclusion of the time spent in remand in his sentence. Counsel submitted that the Petitioner was arrested on 21/3/2014 and convicted on 1/12/2014, those are about 9 months and should be the time to be taken into consideration.

8. The Petitioner on his part submitted that this court does consider the time he spent in remand be part of his sentence as a right under the Constitution and Section 333(2) of the Criminal Procedure Code.

**9. I have considered the application, the relevant law herein as well as the submissions by both the Applicants and the Respondent. Section 333(2) of the Criminal Procedure Code provides that:**

*“(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.”*

**10. It is therefore lawful for a sentence to include the period during which a convict was held in custody before Judgment and sentence. The Court of Appeal in **Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR** stated that: -**

***“The court while applying this provision held that by dint of section 333(2) of the Criminal Procedure Code, the courts during sentencing ought to take into account the period that they had spent in custody before they were sentenced.”***

11. The Petitioner was arrested on 21/3/2014 and convicted on 1/12/014. Therefore, the computation of his sentence shall run from 21/3/2014.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF MARCH, 2021.**

**E. K. OGOLA**

**JUDGE**

**Judgment delivered via MS Teams in the presence of:**

**Petitioner in person**

**Mr. Fedha for the DPP**

**Mr. Josephat Court Assistant**