



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. E001 OF 2021

ANTONY NDEGWA NGARI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This court is invited to consider an application by the petitioner herein. The same was filed on 11.01.2021 and the petitioner seeks review of the sentence he is serving and in doing so, the court is asked to take into consideration the time spent in custody.
2. The petitioner averred that he was convicted of the offence of murder contrary to Section 204 of the Penal Code and sentenced to serve forty (40) years imprisonment in Embu High Court Criminal Case No. 16 of 2009. That the said sentence was substituted with a fifteen (15) years imprisonment by the Court of Appeal at Nyeri in Nyeri Court of Appeal Criminal Appeal No. 352 of 2012 and that he filed a Misc. Application No. 20 of 2019 which was dismissed by this Court. He averred that he was arrested and placed in lawful custody on 18.07.2009 and prayed this court to take the period he spent in custody into consideration and the same be deducted from the sentence of fifteen (15) years. Further that, this court do make an order that the imposed sentence does run from the date of arrest (18.07.2009) and not from 27.06.2012 when he was convicted.
3. When the petition came up for hearing, the petitioner made oral submissions and wherein he prayed that the time he spent in custody from 18.07.2009 to 27.06.2012 be taken into account. Ms. Mati for the respondent opposed the application on the basis that the same is *res judicata* as a similar petition (Petition No. 20 of 2019) was heard and determined by this court.
4. I have considered the petition herein, and the rival submissions by the parties. As I have observed above, the petitioner prayed for the court to consider the period he spent in custody and the sentence be re-computed. The petition is premised on the provisions of Section 333(2) of the Criminal Procedure Code whose proviso mandates the sentencing court to take into consideration the time spent in custody in computing the sentence where the person being sentenced has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody. (See *clauses 7.10 and 7.11 and the Court of Appeal's decisions in Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR and Bethwel Wilson Kibor vs. Republic [2009] eKLR).*
5. However, before considering the merits of the petition, I take note of the submissions by Ms. Mati to the effect that the petition herein is *res judicata* as a similar petition (Petition No.20 of 2019) was heard and determined by this court.
6. It is trite that a court of law cannot proceed and adjudicate on an issue which is *res judicata*. As such the same being a jurisdictional issue ought to be determined *in limine*. The question which needs to be determined at the inception, therefore, is whether the application herein is *res judicata*.
7. I have certainly perused the court record and I note that the petitioner herein filed a chamber summons in this court on 20.08.2019 being Misc. Criminal Application No. 20 of 2019 and wherein he sought similar orders as the ones sought in the instant petition. The said application was heard on merit by Hon. Muchemi, J. and a ruling thereto delivered on 8.06.2020 wherein the Learned Judge found that the application was unmerited as she did not have powers to review the decisions of the Court of Appeal.
8. It is therefore clear that the Learned Judge in his judgment conclusively adjudicated on the issue as to taking into account the time spent in custody. That being the case, it is my view that the issue is *res judicata* and this court does not have jurisdiction to determine the instant petition.
9. I note that the petitioner has come to court by way of a petition whereas the earlier application was a chamber summons. However, the form of pleadings before me notwithstanding, the issue at hand herein was heard and determined by a court of competent jurisdiction and as such the same is *res judicata*.

10. In the end, I find that this court does not have jurisdiction to entertain the instant petition. (See **the owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**). The petition is hereby dismissed.

11. It is so ordered

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF MAY, 2021

L. NJUGUNA

JUDGE

.....for the Petitioner

.....for the Respondent