



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL REVISION NO. E005 OF 2021**

**EVANS NDWIGA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant herein moved this court by way of an application filed in court on 11.01.2021 and wherein he basically seeks revision of his sentence so as to take into account the period he spent in custody. He invokes Section 333(2) of the Criminal Procedure Code.

2. His case is that he was convicted of the offence of defilement contrary to section 8(1) (2) in Runyenjes SRM's Criminal Case No. 392 of 2011 and sentenced to thirty (30) years. That he appealed against the said sentence vide Embu High Court Criminal Appeal No. 148 of 2011 and the 1<sup>st</sup> appellate court (Hon. H. I Ong'udi J) ordered for retrial. Pursuant to the said order, he was retried in Runyenjes SRM's Criminal Case No. 587 of 2013 and wherein he was sentenced to twenty (20) years' imprisonment and at the time of the said sentence the court did not take into consideration the period he had spent in custody (from 5.06.2011 to 26.03.2014). It is this period that he now seeks this court to take into consideration and in doing so, review his sentence.

3. At the hearing of the application, the applicant made oral submissions in support of the same and wherein he prayed that the period he had spent in custody be taken into account and further that he had chest pains and eye-aches. Ms. Mati the Learned Prosecution Counsel opposed the application as being unmerited as the prayers sought are similar to the ones which had been sought in an earlier application being Petition No. 12 of 2020 which had been heard and determined by Hon. Githua J. The applicant in a rejoinder submitted that he was old and prayed for leniency.

4. I have considered the petition herein, the written submissions by the petitioner and the oral submissions made on behalf of the respondent.

5. As I have observed above, the applicant prayed for the court to consider the period he spent in custody being the period from 5.06.2011 to 26.03.2011 as forming part of his sentence and invoked Section 333(2) of the Criminal Procedure Code. The said section provides that: -

***"Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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."***

6. This provision was reiterated by the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** where the Learned Judges of Appeal 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.

7. However, before venturing into considering the merits of the application and determining whether indeed the trial court took into account the said period, I note Ms. Mati's submissions to the effect that the prayers sought are similar to the ones which had been sought in an earlier application being Petition No. 12 of 2020 which had been heard and determined by Hon. Githua J. In my view, the Learned Prosecution Counsel's submissions raised the issue that the prayer being sought herein is *res judicata*.

8. Essentially under the doctrine of *res judicata* a court has no jurisdiction to determine an issue which has previously been **directly and substantially in issue in another and/ or previous suit/ case before a court of competent jurisdiction involving the same parties and the issue having been heard and finally determined in that former suit/ case**. As such the same being a jurisdictional issue it 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*.

9. I have perused the court records and I note that indeed the applicant herein filed a petition before this court being **Embu High Court Petition No. 12 of 2020** and wherein he basically sought that the time he spent in custody be taken into consideration. The said petition was heard and determined by Hon. C. W Githua J and in a judgment delivered on 10.09.2020, the same was dismissed and wherein the Learned Judge held that the trial court indeed took into consideration the period the applicant had spent in custody. That being the case therefore, it is my view that the issue before this court is *res judicata* and this court does not have jurisdiction to determine the instant petition. (See the persuasive authority in **Jackson Juma Kenga v Republic [2019] eKLR**).

10. Further, even if the said issue had not been conclusively handled by the Learned Judge while determining **Petition No. 12 of 2020**, it is my view that this court would be the wrong forum to determine the instant petition. The court which determined the said appeal and this court are courts of concurrent jurisdiction. This court cannot review a decision of a court of equal status as doing so would be tantamount to sitting as an Appellate court on the judgment of the Learned Judge. Good governance demands that cases be handled procedurally in the right forum. This is because the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves.

11. The right forum to determine the issue ought to have been the Court of Appeal as it is the one with jurisdiction under Article 164(3) of the Constitution and Section 379(1) of the Criminal Procedure Code to hear appeals from this court.

12. It is my considered view that I have said enough to demonstrate that this court does not have jurisdiction to entertain the instant petition. The court therefore ought to down its tools (See **the owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**).

13. The application is hereby dismissed.

14. It is so ordered.

**Delivered, dated and signed at Embu this 11<sup>th</sup> day of May, 2021.**

**L. NJUGUNA**

**JUDGE**

.....Applicant

.....for the Respondent