



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. 42 OF 2019

JOHN MUGENDI NJERU.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before me is a petition filed by the petitioner herein on 7.11.2019 and wherein the petitioner seeks to review the sentence he is serving and in doing so, the court to take into consideration the time spent in custody.

2. The petitioner's case is that he was convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code in Runyenjes SRM Criminal Case No. 444 of 2016 and sentenced to death but which sentence was substituted to 15 years' imprisonment vide Embu High Court Criminal Appeal No. 12 of 2018. That however, the court ordered the sentence to run from the date of conviction as opposed to from the date of arrest and which was against the provisions of Section 333(2) of the Criminal Procedure Code. Having been arrested on 11.09.2016 and sentenced on 28.02.2018, he now prays that the time spent in custody be considered and the sentence be reviewed.

3. The petitioner proceeded to file his written submissions which he entirely relied on in canvassing the petition when the same came up for hearing. Ms. Mati, the Learned State Counsel made oral submissions in opposition to the petition and wherein she submitted that in Criminal Appeal No. 12 of 2018, the court made reference to the prayers sought by the petitioner herein and ordered that the sentence run from the date of arrest.

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 petitioner prayed for the court to consider the time he spent in custody as forming part of his sentence. The relevant law in this regard is 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.”**

(See **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** where the Court 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).

6. I take note of the submissions by Ms. Mati to the effect that the appellate court in Criminal Appeal No. 12 of 2018 dealt with the issue subject of the instant petition. In my view, the Learned State Counsel's submissions in effect, raised the issue of the petition herein being *res judicata*.

7. The effect of the doctrine of *res judicata* is to deny a court jurisdiction to determine an issue which has previously been **directly and substantially in issue in the former suit/case; that former suit/case was between the same parties or parties under whom they or any of them claim; those parties were litigating under the same title; the issue was heard and finally determined in the former suit/case; and the court that formerly heard and determined the issue was competent to try the subsequent suit/case or the suit/case in which the issue is raised.** As such the same being a jurisdictional issue it ought to be determined *in limine*. The question which need to be determined at the inception therefore is whether the application herein is *res judicata*.

8. I have perused the court records and I note that indeed J.M Bwonwonga, J. in a judgment dated 18.09.2018 in Embu Criminal Appeal No. 12 of 2018 considered the issue as to the time the petitioner herein spent in custody. The Learned Judge held as thus (paragraph 14); -

**“.....I find that the appellant has been in custody since 13<sup>th</sup> September, 2016 until his being sentenced on 14<sup>th</sup> March, 2018, which now is a period of two years. I have taken into account that period in sentencing the appellant to fifteen (15) years imprisonment”**

9. It is therefore clear that the Learned Judge in his judgment conclusively adjudicated on the issue raised by the petitioner herein. 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.

10. Further, even if the said issue had not been conclusively handled by the Learned Judge while determining on the appeal before him, 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 and this court does not have jurisdiction to review a decision of a court of equal status and thus it cannot review the judgment and/or orders made by the Learned J.M. Bwonwonga, J. as doing so would be tantamount to sitting as an Appellate court on the judgment of the Learned Judge. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. 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). The petition is hereby dismissed.

13. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 11<sup>TH</sup> DAY OF MAY, 2021**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent