

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. APPLICATION NO. E002 OF 2021

DANIEL MBEKE MWILU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before this court is an application dated 25.01.2021 and wherein the applicant seeks consideration of the time he spent in custody pursuant to Section 333(2) of the Criminal Procedure Code.

2. The petitioner's case is that he was convicted of the offence of murder contrary to section 203 as read together with section 204 of the Penal Code in Embu High Court Criminal Case No. 10 of 2016 and sentenced to 13 years imprisonment on 4.12.2019. That he was arrested and put in custody on 10.06.2016. He thus seeks the court's intervention in sentence computation in compliance with section 333(2) of the Criminal Procedure Code.

3. The applicant filed written submissions wherein he reiterated the contents of the application herein. He further submitted that the trial court did not positively show how it considered the time spent in custody so as to arrive at the sentence of 13 years imprisonment. Reliance was made on the case of **Stephen Mutuku & 2 others –vs- Republic in consolidated Criminal Appeal No. 23 of 2020 and No. 24 of 2020, Ahmed Abolfathi Mohammed & Another –vs- Republic (2018) eKLR** and **Bethwel Wilson Kibo –vs- Republic (2009) eKLR**.

4. At the hearing of the application, Ms. Mate for the respondent in opposing the application herein submitted that the applicant had been heard in a similar petition being Petition No. 24 of 2020. The applicant in response admitted having filed another application seeking similar orders.

5. I have considered the application herein, the oral submissions made before this court by the parties and the applicant's written submissions.

6. However, Ms. Mati submitted that the applicant had filed an earlier petition which was heard and determined. The applicant indeed confirmed the same. The prosecution as such appears to raise and seeks to rely on *res judicata* principle. The same being a jurisdictional issue, it ought to be determined *in limine* as a court of law can only exercise jurisdiction as conferred by the constitution or other written law and where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence.

7. I have perused the court record and I have noted that indeed the applicant herein filed a petition on 14.02.2020 being Petition No. 24 of 2020 and wherein he essentially sought review of his sentence so as the court takes into consideration the time he had spent in custody pursuant to section 333(2) of the Criminal Procedure Code. However, in a judgment delivered on 1.10.2020 by Hon. A Mshila J, dismissed the said petition.

8. The issue before this court having been an issue before another court and having been determined on merit by that court, it is my considered view that the same is *res judicata* and as such this court has no jurisdiction over the same. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and the court ought to down its tools in respect of the matter before it the moment it holds the view that it is without jurisdiction. (See **the owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**).

9. It is my considered view that this court being bereft of jurisdiction ought to down its tools. As such the application by the applicant herein is dismissed.

10. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF JUNE 2021

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent