



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 32 OF 2020

ELIAS NJERU JOHN.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This ruling relates to the petition dated 7.05.2020. Despite the petitioner citing a myriad of constitutional provisions allegedly contravened, and further seeking various orders and/or declarations, it is clear from the reading of the petition that the petitioner seeks for the orders that the time he spent in custody be taken into consideration.

2. The petitioner deposed and averred that he was convicted of the offence of house breaking and stealing contrary to section 303 and 268 of the Criminal Procedure Code in Criminal Case No. 769 of 2016 and was sentenced to three years imprisonment. That he was satisfied with the conviction but the time he spent in custody from the date of arrest being 3.07.2016 till when he was released on bail 12.04.2017 and from the time the bond was cancelled on 26.09.2018 till the date of conviction 21.08.2019 was not taken into account in sentencing. It is this time which the petitioner wants this court to take into account.

3. At the hearing of the petition, the petitioner made oral submissions that he seeks the time he spent in remand be taken into account. In rebuttal, Ms. Mati for the respondent submitted that the prayers sought are not merited as the sentence imposed was lenient for the charges the petitioner was facing.

4. I have considered the petition herein and the response by the respondent and it is my view that the main issue for determination is whether the same is merited.

5. At the preliminary I note that the petitioner herein moved this court by way of a constitutional petition seeking declarations pegged on violation of constitutional rights as enshrined in the constitution. This court definitely has jurisdiction to determine issues touching on violation of rights and freedoms under Article 165(3)(b) of the Constitution of Kenya 2010. However, it must be properly moved. Under Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules), the court ought to be moved by way of a petition. The said petition must indicate the facts relied upon, the provision of the Constitution alleged to be infringed or violated and the nature of the injuries caused and the manner in which the right was infringed. This has been the position even before the Constitution of Kenya 2010. (See the case of **Anarita Karimi Njeru –vs- Republic [1979] eKLR**). In demonstrating the manner in which there has been a violation, a petitioner should present before the court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation. (See **Stephen Nyarangi Onsuma and Another –vs- George Magoha & 7others (2014) eKLR**).

6. In the instant case, apart from the petitioner having cited the provisions of the constitution which he alleges to have been contravened, he did not plead as to the manner in which the same provisions were infringed. As such the petition before this court ought to fail.

7. I note that the petitioner challenges the sentence of the trial court in that the court did not take into account the period he spent in custody. The jurisdiction of this court is provided for under Article 165 of the Constitution. The matter before me is not an appeal and thus this court cannot determine on the same on that basis.

8. However, Article 165(6) bestows this court with supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. This supervisory jurisdiction in criminal proceedings has been made possible by Sections 362 to 365 of the Criminal Procedure Code. Under this jurisdiction, this court has the powers to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the *correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court*. Under Section 364, this court can exercise the revisionary jurisdiction in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or *which otherwise comes to its knowledge*. As such, despite the matter herein being a constitutional petition, this court has the jurisdiction to determine the issue raised in the petition in exercise of its

supervisory jurisdiction, the form notwithstanding.

9. The petitioner having raised the issue of the trial court not having taken into consideration the time he spent in custody, it is my view that if the same is true, then the sentence can only be held to be incorrect, illegal and improper. This is since under Section 333(2) of the Criminal Procedure Code, the time spent in custody where the person sentenced has prior to such sentence been held in custody should be taken into account at the time of sentencing. (See Bethwel Wilson Kibor –vs- Republic [2009] eKLR and Ahamad Abolfathi Mohammed & Another –vs- Republic [2018] eKLR). The Judiciary Sentencing Policy Guidelines, also recognizes the duty of the trial court to take into account the time spent in custody under clauses 7.10, 7.11 and 7.12. Clause 7.10 provides that; -

“7.10 The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed...”

10. Any sentence which fails to take into account the said period cannot be said, in my view, to be correct, legal or proper. The same is a candidate for revision under section 362 of the Criminal Procedure Code.

11. The petitioner was arrested on 4.07.2016 and on 19.07.2016 he was admitted to bail. However, he was not released until 11.04.2017 when someone stood surety for him. As such, he spent nine (9) months in custody before he was released on bond. However, the petitioner’s bond was cancelled on 11.09.2018 due to the petitioner’s failure to attend court and he was taken in custody and remained therein until he was sentenced on 21.08.2019. As such, the petitioner spent further eleven (11) months in custody. In total, the petitioner spent a period of 20 months in custody. However, the trial court failed to take into account that period. By dint of Section 333(2) of the Criminal Procedure Code, this period ought to have been taken into account by the trial court during sentencing and as such the sentence should be revised.

12. Section 365 of the Criminal Procedure Code provides for the powers of this court in revision and in case of a conviction (as was the case herein), this court in revision has the discretion to exercise any of the powers conferred on it as a court of appeal by Sections 354, 357 and 358, and in so doing the court may enhance the sentence. However, this court ought not to make any order to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence [Section 365(2)]. Further, this court ought not to inflict a greater punishment for the offence which in the opinion of this court the accused has committed than might have been inflicted by the court which imposed the sentence.

13. Under Section 354, in exercise of its appellate jurisdiction, upon hearing an appeal before it and in an appeal against sentence, this court has the power to increase or reduce the sentence or alter the nature of the sentence. Since this power is also exercisable in revision, it is my considered view that the same ought to be invoked and the three (3) years imprisonment ought to be reduced to take into account the twenty (20) months the petitioner spent in custody.

14. The petitioner was sentenced on 21.08.2019 for three years. Deducting the twenty months (and which is equivalent to one year and eight months) from the said three years, the petitioner ought to serve a net sentence of one year and four months.

15. Going by the foregoing and since the date of his conviction which was on 21.09.2019, the petitioner has served his sentence.

16. The court orders that he be set free forthwith unless otherwise lawfully held.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF JULY, 2021.

L. NJUGUNA

JUDGE

.....for the Petitioner

.....for the Respondent