



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**PETITION NO. 48 OF 2019**

**HENRY MUGENDI IGOKI.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. This petition dated 15<sup>th</sup> November 2019 seeks for orders that the court considers the period spent in remand during his trial in computation of the ten (10) year sentence imposed on the petitioner on 5/10/2018. It is the petitioner's case that he was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code, convicted and sentenced to ten (10) years imprisonment. He further states that he moves the court only in regard to the issue of sentence not complying with Section 333 (1) (2) of the Criminal Procedure Code.
2. The petitioner relies on the cases of **Abdul Aziz Oduor & Another v Republic Criminal Appeal No. 18 & 102 of 2018** as well as that of **Ahmed Abolfathi Mohammed & Another v Republic [2018] eKLR**.
3. In rejoinder, Ms. Mati for the respondent did not oppose the application and stated that the petitioner was arrested on 5/9/2012 and released from custody on 12/03/2018.

**B. Analysis & Determination**

4. I have considered the petition, the submissions by both parties and the relevant provisions of the law.
5. The petitioner was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code but convicted of the lesser offence of manslaughter contrary to Section 205 of the Penal Code for which they were sentenced to serve ten (10) years imprisonment.
6. **Section 333(2) of the Criminal Procedure Code** provides that:

***“(2) Subject to the provisions of section 38 of the Penal Code 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.”***

7. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. Should the petitioner satisfy the court that he spent some period in custody pending trial, he will be entitled to have the said period considered as part of his sentence.

8. I rely on the case of **Ahamad Abolfathi Mohammed [supra]** where the Court of Appeal held that:

***“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced.”***

9. The same Court in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** expressed itself as follows:

***“By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody.”***

**10. According to The Judiciary Sentencing Policy Guidelines:**

***“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. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”***

**11.** The record shows that the petitioner was remanded in custody on 5/9/2012 and released on bond of Kshs. 300,000/= on 12/03/2015. This is a period of 1 year 6 months. The petitioner has therefore satisfied this court that part of the trial period was spent in custody ought to have been taken in to consideration during his sentencing.

**12.** This petition is meritorious and is hereby allowed.

**13.** It is hereby ordered that the ten (10) year imprisonment sentence do run from the date of arrest being 5/09/2012. Considering that the petitioner must have benefited from remission and that he has served a period of nine (9) years, the said sentence is hereby deemed to be adequate.

**14.** I hereby order that he be released forthwith unless otherwise lawfully held.

**15.** It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7<sup>TH</sup> DAY OF APRIL, 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Respondent**

**Petitioner through video link**