



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. 31 OF 2020

JAMES MUCHIRI TIBA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is a judgment in the petition dated 6/03/2020 brought under Section 333(2) of the Criminal Procedure Code and reliance made on **Abdul Aziz Oduor & Stephen Omondi Wanyama vs- Republic Criminal Appeal No. 18 & 102 of 2018** and **Peter Maweu & Another vs- Republic Cr. Case No. 3 of 2014 at Embu High Court** and wherein the petitioner pleaded that he was convicted of the offence of stealing motor vehicle contrary to Section 203 as read together with 204 of the Penal Code. However, the correct Sections for the offences are Section 278 of the Penal Code.

2. The record shows that the petitioner was convicted of three counts as follows: -

v **Count I** – of the offence of stealing a motor vehicle contrary to Section 278 of the Penal Code.

v **Count II** - of the offence of making a document without authority contrary to Section 357(a) of the Penal Code.

v **Count IV** – of the offence of uttering a document with intent to defraud contrary to Section 357(b) of the Penal Code.

3. The trial court sentenced him to serve seven (7) years on each count to run concurrently.

4. The petitioner further stated that he applied for sentence review in Embu High Court Misc. Application No. 16 of 2009 which was not successful. He thus sought for orders that the period he spent in custody by the petitioner be taken into account and hence his sentence imposes sentence of seven (7) years running concurrently be reduced. It was his contention that he spent the period from 20/06/2010 to 20/05/2011 in custody.

5. The petitioner filed written submissions in support of his case. Ms. Mati for the respondent submitted orally that she was not opposed to the application but invited the court to take note that the date of arrest was 25/09/2010. In rejoinder, the petitioner submitted that he was arrested on 20/06/2010 and remanded at Kasarani Police station but later transferred to Embu Police station and was subsequently arraigned in court on 22/06/2010 and that he was released on bond after spending eleven (11) months in lawful custody.

B. Analysis of the law

6. The applicable law in regards to the petition herein is section **333(2) of the Criminal Procedure Code** and the proviso whereof provides 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.* This was the holding in the case of **Bethwel Wilson Kibor vs. Republic [2009] eKLR** and is also included in the *Judiciary Sentencing Policy Guidelines, 2006.*

7. The petitioner averred that he was arrested on 20/06/2010. The trial court in meting out the sentence upon the petitioner noted thus: -

“I have considered the mitigation by the defense and the fact that he is a first offender. I shall sentence the accused person to seven (7) years..... The sentences (in the three counts) shall run concurrently.....”

8. From the proceedings of 31/01/2017, it is clear that the trial court did not take into account the period spent by the petitioner in custody. This was contrary to the provisions of Section 333(2) of the Criminal Procedure Code.

9. However, I note the parties herein were not in concurrence as to the date of arrest. The petitioner's position is that he was arrested on 20/06/2010 whereas the respondent's position is that the petitioner was arrested on 25/09/2010. The parties nonetheless are in agreement that the petitioner was admitted on bond on 20/05/2011.

10. In a previous application by the petitioner that is **Embu HC Criminal Revision Number 16 of 2019- James Muchiri Tiba –vs- Republic**, this court while addressing itself on the issue of the failure by the trial court to take into consideration the time spent in custody, noted that the trial court's records were not clear as to whether the petitioner herein was ever released on bail, and if so, the date he was released. The petitioner was directed by the court to file a fresh application under section 333(2) and attach evidence in support of the same. The said ruling was delivered on 19/12/2019.

11. I have personally perused the trial court's records and it is not clear as to the date of arrest. The filing of the documents therein is not in order and there is no evidence as to when the accused was arrested. The cause of these omissions is that the typists had a challenge in reading the hand writing of the trial magistrate who had gone on transfer and subsequently left the service after the disposal of the petitioner's case.

12. Article 159(2) provides for the principles to guide courts and tribunals in exercising judicial authority and which principles include that justice shall be administered without undue regard to procedural technicalities (Article 159(2)(d)). Article 165(3)(a) further bestows this court with unlimited original jurisdiction in criminal and civil matters.

13. I note that the petitioner herein was sentenced on 31/01/2017 and after which he filed the revision application which was not successful according to the ruling of 19/12/2019. The petitioner had raised the issue on the date from which the sentence ought to run but the said issue was not determined as the records were not clear as to the date of release on bond. The petitioner proceeded to obtain some evidence of the cash bail receipt showing that he was released from custody on 20/05/2011. It is my opinion that it would be unjust and not in the interest of justice to have the petitioner remain in prison just because the date of arrest cannot be established from the court record.

14. In determining the first revision application by the petitioner, this court observed: - *the proceedings were made by a magistrate who left the service and it appears the typists have a challenge in reading the handwriting of the said magistrate*. The proceedings have subsequently been typed but the dates of arrest are not clear from the record. Indeed, the records suggest that the accused might have been arrested earlier than the date he averred he was arrested. I further note that the petitioner herein has served almost half of his sentence.

15. It is my considered opinion that considering foregoing facts, this court invokes the provisions of Article 159 (2)(d) so as to avoid delay in justice delivery as it is the petitioner's entitlement to have the time remanded in custody be taken into account. With the varying evidence as for the date of arrest, it is my opinion that this court ought to rule in favour of the petitioner and find that the petitioner herein was arrested on 20/06/2010 as he stated and that he was released on 20/05/2011 having spent a period of eleven (11) months in custody.

16. As such the sentence of the trial court ought to have considered that period and having not done so, my considered view is that the sentence of seven (7) years ought to be revised to take into account the period in question.

17. This application for revision is hereby allowed. It is ordered that the sentence of seven (7) years imprisonment on each of the three counts I, II and IV be and is hereby reduced with one (1) year. The accused will therefore serve seven (7) years imprisonment from the date of arrest being 20/06/2010.

18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF JULY 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Petitioner through Video Link