



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**PETITION NO. 14 OF 2020**

**PETER KARANJA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**A. Introduction**

1. The petitioner herein moved this court vide a petition dated 7.01.2020 and wherein he basically prayed that this court do issue orders that the sentence of twenty (20) years imprisonment do commence from the date of arrest thus to comply with Section 333(2) of the Criminal Procedure Code. Reliance was made on the High Court's decision in **Abdul Aziz Oduor & Stephen Omondi Wanyama vs- Republic Criminal Appeal No. 18 & 102 of 2018.**

2. The background of the petition was that the petitioner was convicted by this court of ten (10) counts of murder in Embu High Court Criminal Case No. 39 of 2010 and subsequently sentenced to twenty (20) years imprisonment for each count which sentences were to run concurrently. He stated that he did not appeal to the Court of Appeal. He contended that the trial court failed to comply with Section 333(2) of the Criminal Procedure Code by not taking into account the period he spent in custody and this amounted to infringement of his rights under Articles 27(1)(2)(4) and 50(2)(p) of the Constitution.

3. At the hearing of the petition, the parties elected to argue the petition by way of written submissions and wherein the petitioner reiterated his position as pleaded on the petition. He submitted that he was arrested on 6/11/2010 and thus spent nine years in custody. Ms. Mati for the respondent on her part submitted that despite the petitioner having been in custody from 7/11/2010, however taking into account the circumstances of the case, the serious nature of the offence and the fact that the petitioner took away ten innocent lives without any provocation, the petitioner deserved a deterrence sentence as was observed by the trial court during sentencing. The counsel relied on the case of **Alex Wamagu Waititu -vs- Republic (2020) eKLR** to buttress the point.

**B. Analysis of the law**

4. I have considered the petition herein and the submissions by the parties and it is my opinion that the main issues for determination is are twofold: -

*i. Whether this court has jurisdiction to entertain this petition.*

*ii. Whether the petition meets the threshold of a Constitutional petition.*

5. The proviso to section **333(2) of the Criminal Procedure Code** obligates the court while sentencing to take into consideration the time a person has spent in custody. This provision was reiterated by the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs. Republic (supra)** where the court 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. This position is also supported by *the Judiciary Sentencing Policy Guidelines 2006.*

6. The jurisdiction of the High court is provided for under article 165(3) of the Constitution. Under the said article, the High court has *unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; and any other jurisdiction, original or appellate, conferred on it by legislation.*

7. Section 362 and 364 of the Criminal Procedure Code confers upon this court revisionary jurisdiction that 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.**  
In my opinion the High Court can only exercise the jurisdiction as provided by the law.

8. It was held by the Supreme Court held in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, that a Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

9. It is clear from the record that the court considered the petitioner's mitigation and the Victim Assessment Report and found him not fit for non-custodial sentence. The issue that arises here is whether this court has jurisdiction to hear this petition having meted out the sentence upon the petitioner.

10. From the record it is clear that this court in sentencing the petitioner to twenty (20) years imprisonment considered all the factors that were before it. However, the petition has a right to ventilate any other issues which he considers having been left out and which remedies he is entitled to under the laws of the land.

11. It is my considered opinion that this court having sentenced the petitioner to the said term of imprisonment, became *factus officio* and cannot review its own decision. In my view, the failure by the court if any, to consider the time spent in custody is an issue which would form a ground of appeal in a higher court. For this court to engage in determining this petition, this would amount to reviewing its own orders because the effect of such an order would alter the sentence in the event that the petition is successful.

12. It is trite law that court should not review its own orders in a criminal case. For this reason, the Court of Appeal in my considered opinion is the right forum to deal with the issues herein.

13. The petitioner has raised constitutional issues in that he states that this court infringed his constitutional rights contrary to Articles 27(1)(2)(4) and 50(2) of the Constitution. The issue that arises herein is whether this petition amounts to a constitutional petition.

14. This court is possessed of jurisdiction to enforce bill of rights under Article 165(3) of the Constitution. However, as it was held in *locus classicus* case of **Anarita Karimi (Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154)**

***“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”***

15. The principle in this decision was reaffirmed by the Court of Appeal in **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR**, where it found the petition which was the subject of the Appeal fell short of the threshold established in **Anarita Njeru's case**. As such the million dollar question is whether the petition indeed met the set threshold that is whether the petition did set out with a reasonable degree of precision that of which the petitioner complained of, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

16. The petitioner has not set out with a reasonable degree of precision the violations which he complained of, the provisions of the law and the manner in which the said rights were allegedly infringed.

17. It is my considered view that the petition before me does not meet the threshold of a constitutional petition as was decided in the foregoing decisions.

18. For the reasons given above, I find that this petition is misconceived and incompetent and this court lacks jurisdiction to review its own orders and the petition must therefore fail.

19. The petition is hereby struck out.

20. It is hereby so ordered.

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

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for the Respondent**

**Petitioner though Video Link**