Case Number:	Petition 103 of 2020
Date Delivered:	27 May 2021
Case Class:	Civil
Court:	High Court at Eldoret
Case Action:	Judgment
Judge:	Hellen Amolo Omondi
Citation:	Benjamin Kipkogei Keter v Republic [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Uasin Gishu
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO.103 OF 2020

BENJAMIN KIPKOGEI KETER.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction and Background

1. BENJAMIN KIPKOGEI KETER (the petitioner) moved this court by an undated petition seeking reduction on the term of sentence, urging this court to take into consideration the period he has spent in custody. He prays for orders that sentence imposed upon him be revised downwards and in particular by taking into account the 2 ½ years spent in custody at the time of sentence.

2. The background to the application is that the applicant was convicted for the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code in Eldoret High Court Criminal Case No. 49 of 2017** and was sentenced to 10 years imprisonment on the 3rd of December 2019.

3. The applicant's case is that he is the only surviving member of his family and that he has children and his wife is old. Moreover, the petitioner submitted that he has acquired skills in mechanical work and has been prison since 2017 when he was first charged and request court to reduce his sentence by 2 ½ years spent in custody.

4. In response, Miss Okok for the respondent opposed the petition noting that the petitioner was given fair trial and the court in pronouncing its sentence took into account the time spent in custody thus his sentence was proper. She further submitted that the only recourse for the petitioner is to move the Court of Appeal against the sentence given.

5. The application was canvassed orally.

Analysis and Determination

6. There is only one issue for determination and that is whether the petition is merited. The prayer by the applicant is that the time he spent in custody be taken into account pursuant to the provisions of ***Section 333(2) of the Criminal Procedure Code***. The said section provides that: -

"Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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 (emphasis mine)."

7. This duty is further buttressed under clauses ***7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines*** which provides: -

"Time Served in Custody Prior to Conviction

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.

7.11 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."

8. In ***Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR***, the court expounded on this issue in the following terms: -

"The appellants have been in custody from the date of their arrest on 19th June 2012. 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. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to Section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

9. It is therefore clear from the foregoing that it is imperative for the court to take into account the period which an accused has been held in custody prior to being sentenced ought to be taken into account by the trial court in meting out sentence unless it is hindered by other provisions of the law.

10. Having perused the court record, it is clear that on the 3rd of December 2019 at the time of sentencing, the court did in fact take into account the fact that the accused person (as he was then) was a first offender and had been in custody for 2 years. Moreover, the court did consider that the deceased was killed in a physical struggle and therefore the offence may not have been planned. Infact, the court being mindful of the Muruatetu decision did not impose the mandatory death sentence.

11. Flowing from **Article 165, the Criminal Procedure Code** effects the court's supervisory jurisdiction (otherwise referred to as revision jurisdiction) over sentence handed down by subordinate courts. In this regard, **Sections 362 to 366 of the Criminal Procedure Code are instructive**. For example, **Section 362** states that:

"The High Court may 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."

12. ***Sections 362-364*** are therefore inapplicable where a petitioner seeks to review the decision of the High Court as

is the case herein. However, this is not a revision application

13. The court may also exercise re-sentencing jurisdiction pursuant to the Supreme Court decision in ***Francis Karioko Muruatetu & another v Republic [2017] eKLR famously referred to as Muruatetu.***

14. It must be pointed out that this sentence was as a consequence of a plea bargain agreement, and it was explained to the petitioner that he only reserved the right to challenge the legality of the sentence**. He does not allege that the sentence was illegal.** The upshot is that the application is incompetent and is dismissed.

Virtually delivered and dated this 27th day of May 2021

H. A. OMONDI

JUDGE