



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**PETITION NO. 94 OF 2020**

**GERALD KINYUA WAMBUA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The petitioner herein has moved this court by way of the petition dated the 2<sup>nd</sup> day of November, 2020 under the provisions of Section 333(1)(2) of the Criminal Procedure Code and under Article 27(1)(2); 50(2) and 51(1) of the Constitution.
2. The petitioner has sought revision of his sentence so as to take into account the period he spent in custody. He has also asked the court to declare that failure by the court to comply with Section 333(1)(2) of the Criminal Procedure Code denied him his rights to a fair trial under Articles 50 and 27 of the Constitution.
3. He averred that the trial court did not take into account the period he was in custody and that the court ought to have ordered that the sentence runs from 25/08/2018 and not from 19<sup>th</sup> July, 2019 when he was convicted.
4. In her response to the petition, counsel for the respondent submitted that the trial court in its judgment took into account the period that the petitioner herein spent in custody, at the time of passing the sentence. She asked the court to dismiss the petition.
5. The court has considered the petition and the submissions by the applicant and by counsel for the respondent. As already stated, the applicant prayed that the time he spent in custody be taken into account; as forming part of the sentence and he invoked Section 333(2) of the Criminal Procedure Code which provides thus;

***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.***

6. The Court of Appeal in the case of **Ahamad Abolfathi Mohammed & Another Vs Republic [2018] eKLR** held that the courts during sentencing ought to take into account the period spent in custody before they sentence.
7. In regard to the instant application, the court has perused the judgment delivered by the trial court in Criminal Case No. 38 of 2018 in the initial trial. On page 11 of the same, the learned magistrate indicated that he considered the mitigation by the accused person, all the circumstances of the case and the relevant factors. This was done before he meted out the sentence of four (4) years imprisonment. The trial court further indicated that it had taken into account the recent development in the law regarding the constitutionality of minimum mandatory sentences after the **Muruatetu case**.
8. In view of the foregoing, the court finds that the petition has no merits and it is hereby dismissed.
9. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF MAY, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Petitioner

.....for the Respondent