



**Shah v Republic (Miscellaneous Criminal Application E022 of 2024)
[2024] KEHC 15066 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CRIMINAL APPLICATION E022 OF 2024
DO CHEPKWONY, J
NOVEMBER 22, 2024**

BETWEEN

MEHTAB AHMEDALI HUSSEIN SHAH APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The matter before this court is an application by way of Notice of Motion dated 12th March, 2024 seeking a revision of the sentence that was imposed on the Applicant, Mehtab Ahmedali Hussein Shah. The application specifically requests the court to review the starting point of the sentence and take into account the period the Applicant spent in custody before his conviction.
2. The application is supported by an affidavit sworn by the Applicant and is based on the following grounds:-
 - a. The Applicant was initially charged before the Chief Magistrate's Court at Kiambu in Criminal Case No. 2396 of 2015 for the offence of Robbery with Violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. He was sentenced to death upon conviction.
 - b. Dissatisfied with both the conviction and sentence, the Applicant lodged an appeal before the High Court at Kiambu in Criminal Appeal No. 146 of 2017, which was dismissed by Kamau J, who upheld the conviction and the death sentence.
 - c. Subsequently, the Applicant filed a second appeal before the Court of Appeal at Nairobi in Criminal Appeal No. 85 of 2019. The Court of Appeal dismissed the appeal on 18th December, 2020, upholding the conviction and sentence.
 - d. The Applicant thereafter applied for sentence revision at the High Court of Kiambu in Criminal Revision No. E058 of 2023, where Mulwa J. set aside the death sentence and



resentenced the Applicant to thirty (30) years imprisonment, starting from the date of conviction.

- e. The Applicant now contends that the High Court failed to take into account the period he spent in custody before his conviction, contrary to the requirements of Section 333(2) of the Criminal Procedure Code. He seeks a revision for the sentence to be computed from the date of arrest, being 4th October, 2015, and not from the date of conviction on 18th October, 2016.

Response by the State

3. The Respondent (State) indicated that it has no objection to the application and is amenable to the revision sought by the Applicant.

Analysis and Determination

4. In considering the prayer sought by the Applicant, it is important to appreciate that the court has the power to review the sentence imposed by subordinate courts under its supervisory jurisdiction, as provided under Sections 362 to 366 of the [Criminal Procedure Code](#). Section 362 states:-

“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.”

5. The Applicant contends that in this case, the court failed to take into account the period spent in custody prior to conviction, as mandated by Section 333(2) of the [Criminal Procedure Code](#), which provides:-

“Subject to the provisions of Section 38 of the [Penal Code](#), every sentence shall be deemed to commence from and 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 been in custody prior to such sentence, the court shall take into account the period already spent in custody.”

6. The [Judiciary Sentencing Policy Guidelines](#) further clarify the application of Section 333(2), noting:-

“The proviso to Section 333(2) obligates the court to take into account the time already served in custody if the convicted person was in custody during the trial. Failure to do so may result in an excessive sentence that is disproportionate to the seriousness of the offence.”

Evaluation of the Evidence and Legal Provisions

7. In the instant case, the court record shows that the Applicant was arrested on 4th October, 2015, convicted on 18th October, 2016, and initially sentenced to death on 21st November, 2016. The Applicant’s appeal was dismissed by the Court of Appeal, and the matter was remitted to the trial court for resentencing. However, the trial court declined jurisdiction, prompting the Applicant to seek revision before the High Court.
8. In its ruling, the High Court commuted the death sentence to a term of thirty (30) years imprisonment, starting from the date of conviction. It is therefore evident that the High Court did not consider the 7 years and 9 months the Applicant had already spent in custody during the trial, contrary to the legal requirements under Section 333(2) of the [Criminal Procedure Code](#).



9. The Court of Appeal in the case of *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, emphasized that:-

“The failure to take into account the period an accused person spends in custody before conviction infringes on the accused’s constitutional right to a fair trial and may result in an excessive and disproportionate sentence.”

10. Based on the foregoing analysis, the court finds merit in the Applicant’s request for revision. The sentence imposed should be recalculated to commence from the date of the Applicant’s arraignment in court, being 4th October 2015, in compliance with Section 333(2) of the *Criminal Procedure Code*.

Orders

11. The upshot of the ruling is as follows:-

- a. The sentence revision application filed by the Applicant on 12th March, 2024 is hereby allowed.
- b. The ruling by the High Court on 3rd August, 2023, which directed the computation of the sentence from the date of conviction, is hereby set aside.
- c. The Applicant’s sentence shall be recalculated to commence from the date of arraignment in court, being 4th October, 2015.
- d. The prison authorities are directed to adjust the Applicant’s sentence accordingly, factoring in the period spent in custody.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 22ND DAY OF NOVEMBER, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

Applicant in person – present

Mr. Gacharia counsel for Respondent/State

Court Assistant – Kinyua/Martin

