



Mushee v Republic (Miscellaneous Criminal Application E091 of 2021 & E064 of 2022 (Consolidated)) [2023] KEHC 3071 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEHC 3071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION
E091 OF 2021 & E064 OF 2022 (CONSOLIDATED)**

A. ONG'INJO, J

MARCH 28, 2023

BETWEEN

LUQMAN KHATIB MUSHEE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein has filed notice of motion applications in reference to Mombasa Criminal Case No 2180 of 2015 and 2334 of 2014 where he was convicted and sentenced to jail terms for the following offences: -
2. In Criminal Case No 2180 of 2015, he was convicted for the offence of assaulting a police officer in execution of his duty and sentenced to serve 5 years imprisonment in Count I. In Count II, he was convicted of being in possession of 8 big rolls and 4 small rolls of bhang and sentenced to serve 18 months imprisonment. In Count III and IV, he was convicted of being in possession of government stores and being armed in a public place and was sentenced to serve 2 years in each of the counts. The sentences herein were to run concurrently.
3. The sentences in Criminal Case No 2180 of 2015 were kept in abeyance by the trial magistrate for the reason that the applicant was serving a life sentence for the offence of robbery with violence in Criminal Case No 2334 of 2014.
4. Appeal No 86 of 2019 was filed by the Applicant and his co-accused Hashim Khalifa Said and Mohamed Ahemed Sharif but the same was dismissed for lack of merit. However, the judge found that it was on record that the 2nd Appellant, Mohamed Ahemed Sharif was 17 years at the time that he committed the offence and having been in custody since July 1, 2019, he had been punished enough and was therefore released.



5. For the Applicant and Hashim Khalifa Said, their sentence of life imprisonment was substituted with a definite sentence of 20 years imprisonment.
6. At the time the appeal was being prosecuted, this court was not aware of any other criminal charges involving the applicant until he filed Misc Criminal Application E091 of 2021 seeking that this court makes orders that he was a minor of 17 years at the time that he committed the offence and that pursuant to the Children Act, he was not supposed to be committed to jail.
7. The charge sheets in both Criminal cases indicate that the accused persons were juvenile. The age assessment report also establishes that the applicant was about 22 years of age in November 2021. That would mean that in 2015 at the time of committing the offence, he was about 16 or 17 years of age and should not have been tried as an adult as he was a child as envisaged under the Children's Act. However, by the time of conviction in 2009, the applicant had attained the age of majority and was around 20 years of age and could not have possibly been sentenced under Section 191 of the Children's Act or detained under the president's pleasure.
8. The applicant may have been a child by the time he committed the offence but the fact that he was convicted for the offence of robbery with violence where a night guard was murdered and the fact that he subsequently assaulted a police officer and was found in possession of cannabis sativa as well as being in possession of government stores and being armed in a public place, makes this court find that he cannot be treated as a child as he is a danger to himself and to the society. The applicant involved himself in a series of serious crimes and thus the trial court gave stiff penalties relating to both criminal cases. The sentences were legal and this court cannot vary the same.
9. The applicant herein also avers that in respect to Criminal Case No 2180 of 2015, time spent in custody was not put into account when sentencing. However, from evidence on record, the applicant was placed in a remand home at Shimo la Tewa on October 21, 2015 and released on bond on January 11, 2018. In total, he spent a period of 2 years 2 months and 21 days in custody. This court finds that it is trite law that time spent in custody ought to be factored in when sentencing and the trial court never pronounced themselves on the issue.
10. The applicant's sentences in Criminal Case No 2180 of 2018 and 2334 of 2014 namely 5 years, 18 months, 2 years, 2 years and 20 years respectively will run concurrently. The period of 2 years, 2 months and 21 days when the applicant was put in custody should be factored in the said sentences that are to run concurrently. That would leave the applicant to serve to serve 17 years, 9 months and 9 days. Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 28TH DAY OF MARCH 2023**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for Respondent

Applicant present in person

