



**Mwendwa v Republic (Miscellaneous Application  
E011 of 2024) [2024] KEHC 8227 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8227 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
MISCELLANEOUS APPLICATION E011 OF 2024**

**JN ONYIEGO, J**

**JULY 5, 2024**

**BETWEEN**

**SIMON KANUI MWENDWA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant herein was tried and convicted of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars were on 18.03.2013 at Mutwang'ombe market, Endui location in Mwingi Central District within Kitui County, jointly with another not before the court they robbed Ardan Mohamed Ali of his mobile phone make Nokia C2 S/No. 3516xxxxxxxxxx valued at Kes. 8,400/- and cash money Kes. 16,200/- all valued at Kes. 24,600 and immediately before the time of such robbery threatened to use actual violence to the said Ardan Mohamed Ali.
2. The matter proceeded to full trial wherein the applicant was convicted and sentenced to suffer death. Aggrieved by the said decision, he preferred an appeal against the conviction and sentence and by a judgment delivered on 18.09.2014, this court dismissed the same.
3. Undeterred, the applicant preferred a second appeal before the Court of Appeal *vide* Criminal Appeal No. 150 of 2015. *Vide* a judgment delivered on 07.08.2020, his conviction was upheld while the death sentence was set aside and instead, a 20-year sentence was meted out. The said sentence was to run from the date of conviction.
4. He has now filed the current application dated 09.05.2024 seeking for orders that this Honourable Court be pleased to consider the time already spent in lawful custody and thus review his sentence in the same manner.
5. The application in a nutshell was hinged on section 333(2) of the Criminal Procedure Code urging that the court considers the time spent by the applicant in lawful custody.



6. The application was canvassed orally and in support of his case, the applicant urged that the one-year period spent in custody during trial be considered as he remained with 10 years for him to be set free in light of the Court of Appeal's finding. That this court therefore ought to allow the application herein in furtherance of his fundamental rights.
7. Mr. Owuor, the learned counsel for the prosecution urged that the application was underserved as the same had already been determined by a court of equal jurisdiction to this court. Additionally, that the applicant challenged the High Court's finding at the Court of Appeal wherein conviction was upheld and the death sentence substituted with a 20-year imprisonment term to commence from the date of conviction. As a consequence, this court was urged to dismiss the application as it was functus official.
8. I have considered the application herein together with the submissions by both parties. The only issue for determination is whether the applicant is entitled to review of sentence under Section 333(2) of the Criminal Procedure Code.
9. The court is alive to the provisions of 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 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.”
10. From the record, it is outright that the applicant apart from preferring the said appeal before this court, he further preferred a second appeal before the Court of Appeal *vide* Criminal Appeal No. 150 of 2015. *Vide* a judgment delivered on 07.08.2020, conviction was upheld and the death sentence set aside and substituted with a 20-year imprisonment term. The said sentence was to run from the date of conviction.
11. As already noted, the Court of Appeal having set aside the death sentence and in its place substituted with a 20-year sentence to run from the date of conviction, it is my finding that this application is devoid of merit and that this court is functus official. In fact, it amounts to asking this court to clothe itself with the jurisdiction of an appellate court over the court of Appeal's decision. See Republic vs Ongaro & another (Criminal Case 62 of 2013) [2023] KEHC 2309 (KLR)].
12. As such, I am in agreement with the prosecution that in reducing the said sentence, the Court of Appeal rightly considered the time already spent by the applicant in lawful custody. That there was nothing to demonstrate that the Court of Appeal was oblivious of the period of time spent in custody. In the premises, the application fails and therefore dismissed.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF JULY 2024**

**J. N. ONYIEGO**

**JUDGE**

