

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
MISC. CRIMINAL APPLICATION NO. E070 OF 2024

ERICK MUGENDI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The Applicant Erick Mugendi, filed the present undated Application seeking an order that the sentence he is serving be reduced by the period he spent in pre-trial custody.
2. The Application is based on grounds that he was charged and convicted with the offence of Robbery with violence contrary to section 296(2) of the Penal Code and sentenced to 10 years' imprisonment with effect from 28th February 2024. That the court did

not take into consideration the one year and 4 months that he had spent in pre-trial custody; and that he would serve an excessive sentence if the period was not reduced.

3. The Application is supported by the Applicant's unsworn and undated affidavit whose averments mirror the grounds aforesaid.

4. The Application was opposed by the Respondents through submissions dated 28th April, 2025. They submitted that the Application lacked merit as the sentence was significantly lenient. That the failure by the court to explicitly state that it had taken into consideration the pre-trial custody did not vitiate the sentence.

5. At the hearing of the Application on 29th April, 2025 the Applicant made oral submissions in which he

asked the court to reduce his sentence by the period he had spent in pre-trial custody.

Analysis and determination

6. This court's revisionary jurisdiction is provided by Section 362 of the Criminal Procedure Code which provides:-

“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.”

7. In the case of **Joseph Nduvi Mbuvi vs Republic (2019) eKLR**, Odunga J. (as he then was) held that:-

“ In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in PUBLIC PROSECUTOR vs. MUHARI BIN MOHD JANI AND NOTHER [1996] 4 LRC 728 at 734, 735:-

“The powers of the High Court in revision are amply provided under Section 325 of the Criminal Procedure Code subject only to subsection (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice..... If we have been entrusted with the responsibility of a wide discretion, we should be the

last to attempt to fetter that discretion..... This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case."

8. I called for and examined the trial record. The record shows that the Applicant was charged with 2 counts. The first one was a charge of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code, while count 2 was preparation to committ a felony contrary to section 308 (i) of the Penal Code.

9. In a judgement dated 12th March 2024, Chief Magistrate Gandani found the charges proven and convicted the Applicant on both counts.

10. In sentencing the Applicant, the trial court stated:-

“The pre-sentence report that is filed here is not favourable. The accused is depicted as known criminal and social misfit. He has a criminal record and is facing other criminal charges.

His mitigation is noted. I now sentence him to ten (10) years imprisonment in count 1 and one (1) year imprisonment in count 2.

Sentence will run concurrently. Right of Appeal explained.”

11. I have considered the record and found nothing irregular in the proceedings. With respect to the sentence, it is instructive that once convicted under section 296(2), the Applicant was liable to a death sentence in count 1. The trial court however meted a lenient sentence of 10 years. It did not state specifically that it had factored in a pre-trial custody period.

12. A closer look at the proceedings however show that the Applicant was presented for plea on 5th September 2022 and was immediately granted a bond of Kshs.200,000. The record further shows bond approval proceedings recorded on 7th September, 2022 meaning that the Applicant must have been released immediately. The Applicant's (then Accused) bond was cancelled on 15th November, 2022 when the Prosecutor informed the

court that he had been arrested for another offence. The same bond was reinstated on 20th June, 2023 and the surety approved on 31st August, 2023. A new development arose on 1st September 2023 when the surety withdrew citing threats by the Accused. The bond was consequently cancelled on 4th September 2023 when the court ordered that he remains in custody till finalization of the case. The same bond was subsequently reinstated on 7th September 2023.

13. The record above shows that the Applicant was granted bond and was only in custody when he was arrested for a different offence. He cannot seek that such period be included in the sentence in this specific case.

14. Considering further that he was a repeat offender, the sentence of 10 years imprisonment

was lenient and this court would have enhanced it if the Prosecution had given the Applicant notice of enhancement.

16. The Application has no merit and is dismissed.

Ruling delivered, dated and signed at Chuka

this 29th day of October, 2025.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant acting in person, Ms Rukunga for the Respondent. Muriuki (Court Assistant).