REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION NO. E178 OF 2024

SHABAN WAMUKOYA MUKONGOLO ……

APPLICANT

VERSUS

REPUBLIC ……

RESPONDENT

RULING

1. The Applicant and his co-accused were both convicted for two counts of the offence of robbery with violence contrary to Section 296(2) of the Penal Code after a trial in Mumias Criminal Case No. 997 of 2019. He was sentenced to serve 30 years' imprisonment on each count.
2. Aggrieved with the conviction and sentence, the Applicant and his co-Accused lodged a petition of appeal vide

Kakamega HCCRA No. 145 of 2018. In a judgement delivered by Njagi J. on 18th September 2019, the court dismissed the Applicant's appeal against conviction but substituted the initial sentence with reduced sentences of 18 years on each of the two counts.

3. By an undated Notice of Motion, the Applicant now urges the court to invoke Section 333(2) of the Penal Code and factor in the time he spent in custody while awaiting trial, which he says was from 3rd October 2017 to 11th October 2018, which amounts to one year and eight days in his sentence. He argues that this court has jurisdiction by virtue of Article 163(b)*(sic)* of the Constitution to hear and determine his application. The Respondent is not opposed to the application.

4. Article 165(6) and (7) of the Constitution empowers the High Court to invoke its supervisory jurisdiction over subordinate courts. It imposes a duty on the court to call for the record of the subordinate court and to review and, if necessary, order or issue a review to ensure the fair administration of justice. It does not envisage a scenario in which the High Court reviews its own orders or the

orders of a court of concurrent jurisdiction. The Applicant can therefore not rely on Article 165(6) and (7) of the Constitution to fortify his application.

5. Be that as it may, it is trite law that the court has the power to recall and review its own orders if the review is in the interest of justice. These powers extend to correcting any errors apparent on the face of the record or making orders for any other sufficient reason necessary for the ends of justice. The power does not extend to issues that should be appealed against, however, as the court cannot sit on appeal of its own judgement.

6. Section 333(2) of the Criminal Procedure Code provides:-

"2)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."

7. It is well settled that jurisdiction is the pivotal power of the court. Without jurisdiction, the court has no authority to make any determination of a matter placed before it. Whereas this court has jurisdiction to review a sentence pursuant to Section 333(2) of the Penal Code, the same can only be done if it is demonstrated that the trial court did not apply the sentence as required by law.

8. It is clear from the record that, in reducing the sentence, Njagi J. reiterated that sentencing is a matter of trial court's discretion and noted that Section 333(2) of the Criminal Procedure Code requires a court to take into account the time spent in custody when sentencing. He then considered the mitigating and aggravating circumstances of the offence and concluded that 18 years was the most appropriate sentence. It is evident that, in considering the appeal against the sentence, the learned appellate judge was alive to the mandatory provisions of Section 333(2) of the Criminal Procedure Code and had them in mind throughout the determination of the appeal to the point he reduced the sentence. The reduced sentence was therefore arrived at after the court had

taken into consideration the time the Applicant had spent in custody during the trial, and, in its discretion, ordered that the reduced term commence from the date of the sentence by the trial court.

9. The application now seeks a review of the orders of a court of Njagi J. based on Section 333 (2) of the Criminal Procedure Code which we reiterate, was considered by the trial judge when he reduced the Applicant's sentence. This invites the court to review the orders of a peer court, which is not tenable. If the Applicant was of the view that the appellate court failed to credit the time spent in custody to his sentence, then his only recourse was to file an appeal, for it is well settled that the High Court does not have jurisdiction to review decisions of a court of concurrent jurisdiction.

10. In **Daniel Otieno Oracha v Republic [2019] KEHC 6242 (KLR)**, Aburili J. considered a similar application and rendered herself thus:-

"3. This court and the High Court at Kisumu are courts of concurrent jurisdiction. That being the case, this court is devoid of any jurisdiction in the

exercise of its judicial authority under* Article 159 of the Constitution*, to review a judgment of a court of concurrent jurisdiction. To do so would be tantamount to sitting as an Appellate court on the judgment of my sister Judge Hon. Abida Ali - Aroni, J.

14. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a judgment of the subordinate court or if the petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise.

15. This court's jurisdiction is derived from various statutes and* Article 165 of the Constitution*. In* Samuel Kamau Macharia & Another V. KCB & 2 Others App. No. 2/2011*, the Supreme Court of Kenya made it clear that a court cannot arrogate itself jurisdiction exceeding that which is conferred

upon it by law, and that a court cannot expand its jurisdiction through judicial craft."

11. The law dictates that there be order in the manner the court handles its matters. Allowing applications that would amount to the court sitting on appeal against its own decisions or those of courts of concurrent jurisdiction would be inimical to the administration of justice and a breach of the Constitution, which does not empower the High Court to supervise itself. The learned judge determined the appeal and applied the provisions of Section 333(2) of the Criminal Procedure Code to the reduced sentence. But even if he had not done so, his decision is sacred insofar as this court is concerned. The only court that can revisit the decision is the Court of Appeal.

12. Consequently, for the above reasons, the court finds that the application lacks merit and it is hereby dismissed.

Dated, signed, and delivered at Kakamega, this 27th day of January 2026.

A. C. BETT
JUDGE

In the presence of:

Applicant present in person

Ms. Chala for the Respondent/State

Court Assistant: Polycap