



REPUBLIC OF KENYA



KENYA LAW
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**Pela v Republic (Criminal Revision E138 of 2024)
[2025] KEHC 1264 (KLR) (28 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 1264 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E138 OF 2024
DO CHEPKWONY, J
JANUARY 28, 2025**

BETWEEN

AHMED HAMISI PELA APPLICANT

AND

REPUBLIC STATE

RULING

1. Vide an undated Chamber Summons application, the Applicant is seeking review of the sentence with regard to the minimum mandatory sentence guidelines and for a consideration of the period of six (6) years nine (9) months spent in custody during his trial as per the provisions of Section 333 (2) of the *Penal Code*.
2. According to the Applicant, he was a first offender and the bread winner of his family. He states that he has been rehabilitated through various prison programs and thus urges the court to consider his application.
3. The court directed the application to be served upon the Respondent (State) and for the original record of proceedings in Kikuyu Criminal Case No.S.O. 01 of 2017, *Republic –vs- Ahmed Hamisi Pela* to be availed.
4. When the matter came before court on 9th December, 2024, the Applicant urged the court to consider application and allow it as prayed. The prosecution counsel indicated that they were not opposed to the request for time the Applicant spent in custody to be factored in his sentence.

Analysis and Determination

5. The court has considered the prayers the Applicant seeks and read through the original record of proceedings in Kikuyu Cr. Case No.S.O. 01 of 2017 and finds that basically the Applicant is seeking a revision of the orders of sentence passed by the trial court.



6. In criminal cases, the power for High Court to determine an application of this nature is made in exercise of its supervisory jurisdiction of the High Court as provided for under Sections 362 to 366 of the *Criminal Procedure Code*. Section 362 provides that:-

[362]. 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”

Section 364 states as follows:-

[364]. Powers of High Court on revision

- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

7. It is trite law that Section 333(2) of the *Criminal Procedure Code* provides as follows: -

“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.”



8. In giving effect to the above provision, The [Judiciary Sentencing Policy Guidelines](#) has outlined that:-
- “The proviso to Section 333(2) of the [Criminal Procedure Code](#) obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
9. In this case, the Applicant was charged with the following offences; in Count 1, the Applicant was charged with the offence of Rape contrary to section 3(1) (a) (b), and (3) of the [Sexual Offences Act](#), No.3 of 2006. The facts were that:-
- “On the 29th day of December, 2016 at Wangige area in Kabete Sub County of Kiambu County within central Region, intentionally and unlawfully caused his penis to penetrate the vagina of Purity Njoki without her consent”.
10. In the alternative Count, the Applicant was charged with the offence of Committing an Indecent Act with an Adult contrary to section 11(a) of the [Sexual Offences Act](#) No.3 of 2007(2006). The particulars were that:-
- “On the 29th day of December, 2016 at Wangige area in Kabete Sub County of Kiambu County, intentionally touched the vagina of Purity Njoki with his penis against her will”.
11. The Applicant was arraigned in court on 3rd January, 2017 whereby he pleaded “Not Guilty” to either of the offences and proceeded for trial which commenced on 14th December, 2017 and was finalised vide a Judgment delivered on 26th September, 2023 , which day the Applicant was sentenced to serve ten (10) years imprisonment for the offence of Rape contrary to Section 3(1)(a)(b) and (3) of the [sexual Offences Act](#).
12. The offence of Rape under Section 3(1)(a)(b) and 3 of the [Sexual Offences Act](#) is defined as:-
- [1]. A person commits the offence termed rape if—
- a. he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
 - b. the other person does not consent to the penetration; or
 - c. the consent is obtained by force or by means of threats or intimidation of any kind.
- (3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.
13. I have perused the record and confirm that since his arraignment in court from 3rd May, 2017 the Applicant remained in custody despite having been granted bond until his sentence on 26th September, 2023. This confirms that the Applicant spent six (6) years eight (8) months and twenty (20) days in



custody during this trial which period ought to have been considered by the trial court during the sentencing of the Applicant. I have read the sentencing statement and it states:

“Court – Considered the mitigation and the cast that an offence had been committed. Considering the sentence is mandatory minimum, the sentence of ten (10) years, the court therefore sentences the accused person to ten (10) years imprisonment. Right of appeal 14 days”.

14. From the statement, it is clearly confirmed that the provision of Section 333(2) of the *Criminal Procedure Code* were not taken into consideration by the lower court when sentencing the Applicant, which this Court finds incorrect and irregular.
15. Having found so. The undated Chamber Summons application is found meritable and allowed with an order that the six (6) years, eight (8) Months and twenty (20) days be and are hereby taken into account and order the same to be considered in computing the sentence period against Applicant passed on 26th September, 2023.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF JANUARY , 2025.

D. O. CHEPKWONY

JUDGE

