



REPUBLIC OF KENYA



KENYA LAW
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**Kana v Republic (Criminal Appeal E020 of 2021)
[2023] KEHC 21708 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E020 OF 2021
JN ONYIEGO, J
JULY 28, 2023**

BETWEEN

HUSSEIN MAHAT KANA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the sentence and conviction by Hon. T.L. Ole Tanchu(SRM)
in CM's Court in Garissa Criminal Case No. 703 of 2019 delivered on 18.05.2021)*

JUDGMENT

1. The appellant was arraigned before Garissa Chief Magistrate's court on February 26, 2020 charged with the offence of robbery with violence contrary to section 296 (2) of the [Penal code](#). Particulars were that on the night of July 11, 2019 at about 2000 hours in Adhele area, Tana – north sub-county within Tana River county jointly with others not before court while armed with a panga and rungus robbed Jacob Musya Joel off his mobile phone make ITEL, spectacle and cash Kshs; 30,000/= all valued at Kshs; 46,200/= and at or immediately after the time of such robbery used actual violence to the said Jacob Musya Joel.
2. He was further charged with the alternative count of handling stolen property contrary to section 322 (2) of The [Penal code](#). Particulars were that on the September 2, 2019 at around 1550 hours at Madogo Trading Centre, Tana North Sub-county within Tana River County otherwise than in the course of stealing dishonestly received or retained one mobile phone make ITEL knowing or having reason to believe it to be a stolen good.
3. Having returned a plea of not guilty, the matter proceeded to full trial. Upon conclusion of the hearing, he was convicted and sentenced to serve 12 years' imprisonment. Consequently, he moved to this court vide what is referred to as mitigation of appeal seeking the court to review the sentence under section



333 (2) of the *Criminal Procedure Code* by taking into account the period spent in remand custody. In response, the respondent did not have any objection.

4. I have considered the application herein and the response thereof. It is trite law that sentencing is at the discretion of the court and an appellate court will only interfere if the sentence is excessive, or the trial court applied wrong principles or took into consideration irrelevant factors. See *Shadrack Kipchoge Kogo –vs- Republic* criminal appeal 253 of 2003 Court of appeal Eldoret. The appellant is seeking review of sentence under section 333(2) of the *Criminal Procedure code*. A perusal of the court record is clear that the trial Magistrate did not consider the period spent in remand custody.
5. The significance of the proviso under section 333 (2) of the *Criminal Procedure code* providing for consideration of the period spent in remand custody when passing sentence cannot be ignored. See *Ahamad Abolfathi Mohammed & Another -vs- Republic* (2018) eKLR where the court stated that by dint of section 333 (2) of the *Criminal Procedure code* the trial court was bound to consider the period spent in remand custody.
6. From the record, the appellant was charged on September 9, 2019 and remanded in custody up to May 18, 2021 when he was sentenced translating to 20 months. To that extent, the sentence of 12 years shall be served less 20 months. Therefore, that period shall be taken into account when computing sentence.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 28TH DAY OF JULY, 2023

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J.N. ONYIEGO

JUDGE

