



REPUBLIC OF KENYA



**Simpano v Republic (Criminal Appeal E015 of 2021)  
[2023] KEHC 20906 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20906 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL APPEAL E015 OF 2021**

**F GIKONYO, J**

**JULY 27, 2023**

**BETWEEN**

**BARMOTI SIMPANO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an appeal from the conviction and sentence of Hon. G.N. Wakabiu  
(CM) in Narok CMCR No. 552 of 2018 delivered on 13/07/2021))*

**JUDGMENT**

1. The appellant together with Nairoti Dobirr were charged with Robbery with violence contrary to Section 295 as read with Section 296(2) of the [Penal Code](#).
2. The particulars were that on May 7, 2018 at about 1.00 p.m. at Nkoswani trading centre in Narok West sub-county within Narok County while armed with dangerous weapons namely rungu, jointly robbed Julius Sang of a motorcycle registration number KMEH 291M make Bajaj Boxer 100CC, red in colour and cash of Kshs 4,100 all valued at Kshs 94,100 and immediately after such robbery used actual violence on the said Julius Sang.
3. They were also charged with an alternative charge of handling stolen goods contrary to section 322(1) and (2) of the [Penal Code](#).
4. The particulars were that on May 7, 2018 at about 1.00 p.m. at Nkininji trading centre in Narok west sub county otherwise than in the course of stealing dishonestly assisted in the retention of motorcycle registration number KMEH 291M make Bajaj boxer 100 CC red in colour valued at Kshs 90,000/= the property of the said Julius Sang knowing or having reasons to believe to be stolen goods.
5. The prosecution called 6 witnesses while the defense gave unsworn testimonies and did not call any witnesses.



6. The appellant was found guilty and sentenced to serve 10 years' imprisonment.
7. Being dissatisfied with the conviction and sentence he filed this appeal.

### **Grounds of appeal**

8. The appellant cited 7 grounds in his memorandum of appeal received in court on July 22, 2021. However, on May 29, 2023, the appellant stated to the court that he has abandoned all other grounds of appeal except one on time spent in custody. He urged this court to check the record and rule on his appeal.

### **DPP makes no or any useful submission**

9. DPP did not make any substantive argument except Ms. Mwaniki orally stated that in the circumstances she leaves it to the court to decide.

### **Analysis and Determination**

#### **Court's duty**

10. The duty of the first appellate court is to re-evaluate the evidence presented at trial and draw its own conclusions. Except, it must bear in mind that it neither saw nor heard the witnesses firsthand. Thus, demeanor is best observed by the trial court (*Okeno vs Republic* [1972] EA 32).

#### **Issue for determination**

11. The singular issue for determination here is: -
  - i. Whether in sentencing the appellant, the trial court took account of time spent in custody prior to sentence.

#### **Of time spent in custody**

12. Section 333(2) of the [CPC](#) may be argued; as a ground of appeal; or under article 23(1) and 165(3) of the [Constitution](#) in an application for a redress of violation of a right and fundamental freedom enshrined in the Bill of Rights. In most cases, the alleged violation is of the right to a less severe sentence or not to be detained arbitrarily.
13. '...Every sentence shall be deemed to commence from ... the date on which it was pronounced, except where otherwise provided in this Code.' Section 333(2) of the [Criminal Procedure Code](#)  
'...Provided that where the person sentenced... has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.' Ibid.

#### **Purport of s 333(2) of CPC**

14. The purport of the proviso to section 333(2) of the [CPC](#) is to avoid '...an excessive punishment that is not proportional to the offence committed.' [Judiciary Sentencing Policy Guidelines](#) (under clauses 7.10.
15. Therefore, the section pertains to fair trial and justice.
16. Thus, whereas the section does not state how time spent in custody should be taken into account, courts should give real effect- in most practical terms as possible- of Section 333(2) of the [Criminal Procedure Code](#) (*Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR, and *Bethwel Wilson Kibor v Republic* [2009] eKLR). Some suggest that, where a person had remained in custody



from arraignment in court, the most effective way to give the section real effect is for the sentence to commence from the date of arraignment in court. There are however, other scenarios where a person had been released on bond, but his bond was cancelled and was in custody for a considerable period; or where – albeit rare- there was a considerable period between conviction and sentence. Of importance, nevertheless, is that courts should take account of time spent in custody in accordance with the circumstances of each case. But, it is problematic to impose a lenient sentence in the hope that it takes account of time spent in custody unless it is clearly so demonstrated because that kind of approach- like is the case here- not only does it provoke applications under section 333(2) of the CPC, but also makes the work of appellate court difficult.

### **Application of s. 333(2) of CPC**

17. Accordingly, the court has perused the trial court's records. The appellant herein was convicted of the offence of Robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. And, he was sentenced to ten years' imprisonment.
18. The trial court noted that the charge attracts a death penalty. The trial court considered the appellant's mitigation and pre-sentence report. The trial court further noted that the appellant had been in custody since they were arrested on May 7, 2018.
19. In the circumstances and facts of this case, the court finds the sentence of ten years' imprisonment for robbery with violence to be too lenient. In light thereof, I find that time spent in custody prior to sentencing was taken account of by the trial court in arriving at the sentence of 10 years' imprisonment. For clarity, the sentence shall commence from the July 13, 2021- the date the sentence was pronounced. The appeal is accordingly dismissed. Orders accordingly.

**Dated, signed, and delivered at Narok through Teams Application, this 27<sup>th</sup> day of July, 2023**

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**F. Gikonyo M.**

**Judge**

**In the presence of:**

1. Ms. Mwaniki for DPP
2. The Appellant
3. Mr. Muraguri - CA

