



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kamau & 2 others v Republic (Criminal Appeal E031 of 2022)
[2023] KEHC 21287 (KLR) (9 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E031 OF 2022
SM GITHINJI, J
AUGUST 9, 2023**

BETWEEN

KENEDDY NGIGE KAMAU 1ST APPELLANT

SAMUEL KILAWA WAMBUA 2ND APPELLANT

YUSUF MWACHIRO MWAMBEYU 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction and sentence in Criminal Case No. 71 of the SPM's Court at Mariakani Law Court- Hon. S.K Ngii (PM) delivered on 7th May 2021)

JUDGMENT

Coram: Hon. Justice S. M. Githinji

Appellants in person

Ms Mutua for the State

1. The appellants were charged with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the [Penal Code](#). The particulars of the offence as per the charge sheet are that on 23rd January 2016 at about 0030hrs at Kadzonzo area of Mariakani Location in Kaloleni Sub County within Kilifi County, the appellants jointly while armed with a dangerous weapon namely wooden stick robbed Ian Zhorn Omondi cash of Kshs. 9,000, a mobile phone make Sony Experia (Z4), motor vehicle brake pads, a standard chartered bank ATM card, a shirt, a pair of trouser and a pair of shoes all valued at Kshs. 28,450 and before the time of such robbery used actual violence to the said Ian Zhorn Omondi.
2. The appellants were found guilty and sentenced to serve each 10 years' imprisonment.



3. Aggrieved by the sentence, the appellants lodged the instant appeal on the following amended grounds of appeal;
 1. That the trial court failed in law by omitting to take into account the period of time they had spent in custody pending the trial.
 2. That the trial court failed to observe the prevailing mitigating circumstances in their case to their detriment.

Evidence at Trial

4. PW1 Ian Zhorn Omondi the complainant testified that on 23/1/2016 he arrived at Mariakani from Nairobi and boarded a motor bike KMDU 332U to take him to Mariakani weighbridge where his vehicle had developed a problem. The rider of the motor bike spoke to other two riders and he was hit with a piece of wood by one of the riders. He fell down and lost consciousness and when he came to he found himself naked; his phone, Kshs. 9,000, ATM card and brake pads having been stolen. A good samaritan then gave him a trouser and directed him to the police station.
5. PW2 Peter Mwaura Njuguna told the court that he was the owner of motor bike KMDQ 966Z which he had given to the 2nd accused at the material time.
6. PW3 Sammy Majepe Kubando was the owner of motor bike KMDT 656J and had given it to PW6 who at the material time had given it to the 1st accused.
7. PW4 Martin Elijah Munzui was the owner of motor bike KMDU 332E which he had given to PW5 who gave it to the 3rd accused.
8. PW7 force number 235683 Insp. Job Oyagy who was the in charge crime at Mariakani police station told the court that on 24/1/2016 he was on duty when he was called by his supervisor and informed of an incidence of robbery with violence the previous day. The suspect had been arrested and the complainant was required to identify the suspect in an identification parade. He then organized for an identification parade involving nine people in the parade and the complainant positively identified the suspects.
9. DW1 Samuel Wambua Kilawa told the court that on 23/1/2016 he was at Mariakani when a police swoop was conducted. He was arrested and taken to a police station and was charged in court. He denied the charge against him.
10. DW2 Kennedy Ngige Kamau testified that on 23/1/2016 he was on his way from Mombasa to Mazaras and upon reaching Mazaras he hit a Matatu and fell down on the road. He was then taken to Mariakani Police station by the police and was charged with the offence which he knows nothing about.
11. DW3 Yusuf Mwararo Mwambeyu told the court that on 24/1/2016 he went to Mariakani police station to check on his friend who had been arrested. He was asked by the police to join an identification parade and thereafter he was arrested and charged with the offence that he knows nothing about.

Analysis and Determination

12. This being the first appellate court, my duty is well spelt out, namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.



13. Having considered the amended grounds of appeal, submissions thereon and evidence adduced before the trial court, I find that the issues for determination are whether the trial court failed to take into consideration the time the appellant spent in custody pending trial and whether the trial court took into consideration the mitigating factors.
14. From the sentencing record by the trial court, the court noted that the accused were liable to a death sentence which is the maximum sentence but proceeded to impose a sentence of 10 years' imprisonment in light of the Muruatetu decision. Further the court also noted the mitigation offered and the time spent in custody. The appellants issue is that the trial court did not consider the time spent in custody.
15. The *Judiciary Sentencing Policy Guidelines* are clear in respect to sentencing. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.
16. In the case of *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, the Court of Appeal held that:

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. ‘Taking into account’ the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.” See also *Bethwel Wilson Kibor v Republic* [2009] eKLR.”

17. Turning to the present case, I am satisfied that the trial court did consider the time spent in custody by the appellants pending the trial. The same is expressly stated in the sentencing record where the court stated that;- “...I shall while cognizant of the fact that the accused persons are first offenders, the mitigation offered and the time spent in custody pending trial sentence each one of them to imprisonment for ten (10) years with right of appeal within 14 days.” The lenient sentence took care of that.
18. In the end, I find that the appeal fails in its entirety for want of merit and the same is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF AUGUST, 2023.

.....



S.M.GITHINJI

JUDGE

In the Presence of; -

1. The Appellant in Person
2. Ms Mutua for the Prosecution

