



**Noor v Republic (Criminal Appeal E063 of 2023)
[2023] KEHC 27361 (KLR) (28 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27361 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E063 OF 2023
JN ONYIEGO, J
DECEMBER 28, 2023**

BETWEEN

MOHAMMED NOOR APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. E194 of 2022 in the Principal Magistrate's Court at Wajir delivered on 05.10.2022 by Hon. Aganyo R.)

JUDGMENT

1. The appellant herein together with two others were arraigned before Wajir PM's court on 12th May 2022 jointly charged of committing various offences;
2. CountI: Harret Yusuf Mohamed, Abdinoor Mohamed Issack and Mohamed Noor Ahmed were charged with the offence of Stealing contrary to section 268(2) as read with section 275 of the Penal Code. Particulars were that Harret Yussuf Mohamed, Abdinoor Mohamed Isaack and Mohamed Noor Ahmed on 08.05.2022 at Wagberi location, in Wajir East Sub-county within Wajir County jointly stole a mobile phone make Samsung J.T. Imei No. xxxx valued at Twenty-Seven Thousand Kenya Shillings, the property of Noor Moulit Hujale.
3. The appellant also faced an alternative charge of Handling stolen property contrary to section 322(2) of the Penal Code with particulars being that on 11.05.2022 at Halane Location in Wajir East Sub-county otherwise than in the course of stealing, dishonestly retained one mobile phone valued at twenty-seven thousand (Kes. 27,000/-), the property of Noor Moulit Hujale knowing or having a reason to be stolen property.
4. CountII: Harret Yusuf Mohamed and Mohamed Noor Ahmed were accused of the offence of Stealing contrary to section 268(2) as read with section 275 of the Penal Code. The particulars were that on 08.05.2022 at Wajir Township location in Wajir East Sub – County within Wajir County jointly stole



- a mobile phone make Techno 1cammon 15 of IMEI No. xxxx valued at Kes. 20,000/-, the property of George Ochieng' Onyango.
5. In respect to count II, the appellant also faced an alternative charge being that of Handling stolen property contrary to section 322(2) of the Penal Code. Particulars were that on 11.05.2022 at Halane Location in Wajir East Sub-County within the Wajir County otherwise than in the course of stealing dishonestly retained one mobile phone make Techno Cammon 15 of IMEI No. xxxx valued at Kes. 20,000/-, the property of George Ochieng Onyango knowing or having reason to be stolen property.
 6. CountIII: Harret Yusuf Mohamed and Mohamed Noor Ahmed were charged of the offence of House breaking contrary to section 304(1) (b) and stealing contrary to section 279(b) of the Penal Code. Particulars were that on 09.05.2022 at Barwaqo Location in Wajir East Sub County within Wajir County jointly stole one mobile phone make Samsung A025F ofIMEI No. xxxx valued at Kes. 12,500, the property of Hussein Ibrahim Adan.
 7. The appellant was in respect of count III charged with the alternative charge of Handling stolen property contrary to section 322(2) of the Penal Code. Particulars were that on 11.05.2022 at Halane Location in Wajir East Sub-County within Wajir County otherwise than in the course of stealing dishonestly retained one mobile phone make Samsung A025F ofIMEI No. xxxx valued at Kes. 12,500, the property of Hussein Ibrahim Adan knowing or having reason to be stolen property.
 8. CountIV: Harret Yussuf Mohamed and the appellant were charged with the offence of Burglary and stealing contrary to section 304(1) (b) as read with section 304 (2) of the Penal Code. Particulars were that on 06.05.2022 at Got Ade location in Wajir East Sub-County within the Wajir County jointly broke and entered into a dwelling house of Jimaale Mohamed Rashid with intent to commit a felony therein namely stealing and did steal one mobile phone make Samsung A-12 IMEI No. xxxx valued at Kes. 18,000/-, the property of Jimaale Mohamed Rashid.
 9. The appellant was in respect of count iv charged with the alternative charge of Handling stolen property contrary to section 322(2) of the Penal Code. Particulars were that on 11.05.2022 at Halane Location in Wajir East Sub-County within the Wajir County otherwise than in the course of stealing dishonestly retained one mobile phone make SamsungA-12 IMEI No. xxxx valued at Kes. 18,000/-, the property of Jimaale Mohamed Rashid knowing or having reason to be stolen property.
 10. CountV: Abdinasir Mohammed Isaack and the appellant were charged with stealing contrary to Section 268(2) as read with section 275 of the penal code. Particulars were that on 08 05.2022 at Wajir Township in Wajir East Sub County within Wajir County jointly stole one Samsung A-12 valued at Kes. 25,000/-, the property of Stephen Mbukuku Kangoria.
 11. The appellant was in respect of count V charged with the alternative count of Handling stolen property contrary to section 322(2) of the Penal Code. Particulars were that on 11.05.2022 at Halane Location in Wajir East Sub-County within Wajir County otherwise than in the course of stealing dishonestly retained one mobile phone make SamsungA-12 IMEI No. xxxx valued at 25,000/-, knowing or having reason to be stolen property.
 12. Having returned a plea of not guilty, prosecution lined up a total of 6 witnesses to prove their case. Upon conclusion of the trial, judgment was delivered on 05.10.2022, finding the appellant guilty. He was consequently sentenced to; counts I,II and v to serve 3 years imprisonment; counts III and IV to serve 4 years imprisonment. The court ordered for the Sentences to run concurrently.
 13. It is the said conviction and sentences that precipitated the filing of the instant appeal. The grounds of appeal as per the petition of appeal filed in court on 24.11.2022 were listed as follows:



- i. That the trial court erred in law and fact by starting the hearing process without ensuring that the appellant had been furnished with all the necessary documents that the prosecution was willing to rely on during the hearing.
 - ii. That the trial court convicted and thereafter sentenced him despite the fact that the prosecution did not shift the burden.
 - iii. That the trial magistrate relied on extraneous evidence not presented before the court in arriving at his determination.
 - iv. That the prosecution's evidence was riddled with inconsistencies that were material hence his conviction remained unsafe.
14. When the matter came up for directions, parties expressed their desire to canvass the application by way of written submissions.

Appellant's submissions

15. The appellant in his oral submissions denied committing the alleged offences. He argued that his name was not mentioned during the trial process and therefore, the court acted on wrong information to convict and thereafter sentence him. He contended that he was not served with witness statements during the trial and the same therefore infringed into his rights. It was his case that the time that he spent in lawful custody was not factored at the time of his sentencing and therefore urged this court to consider the same.

Respondent's submissions

16. Mr. Bidan Kihara, the learned prosecutor in his submissions dated 25.09.2023, urged the court to uphold the conviction. According to counsel, prosecution did prove its case beyond any reasonable doubt against the appellant and his accomplices. That the sentence meted out by the trial court was not only legal but also appropriate bearing in mind the circumstances of the case.
17. On the question that the appellant was not supplied with witnesses' statements, the learned prosecutor submitted to the contrary. That for the appellant to claim at this stage that he was not served with the same is simply an afterthought. It was his contention that the appellant participated in the hearing process and further cross examined the witnesses appropriately. In regards to the time already spent in lawful custody, the learned prosecutor urged the court to consider the same.

Analysis

18. This being a first appeal, I am mandated to analyse and re-evaluate the evidence afresh in line with the holding of the Court of Appeal in *Okeno v Republic* [1972] E.A. 32 and re-stated in *Kiilu and another v R* (2005) 1 KLR 174 where it was held that the evidence as a whole is to be exposed to a fresh and exhaustive examination by the court and thereby weigh conflicting evidence and thereafter draw its own conclusions. In doing so, it should make due allowance to the fact that the trial court had the advantage of hearing and seeing the witnesses.
19. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it is based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong legal principles [See *Gunga Baya & another v Republic* [2015] eKLR].
20. Brief facts of the case are that, on 08.05.2022 at around 8.30 p.m., PW1, Noor Mowlid Hujali was on his way from work, when he was accosted by two people. That he saw a motor cycle which had two



pillion passengers who alighted and snatched his phone away. It was his evidence that the two persons who snatched his phone were the 1st and 3rd accused persons.

21. He further stated that he reported the matter to the police station where his statement was recorded. It was his case that his stolen phone was Samsung by make with IMEI No. xxx which was produced as Pex 1. It was his evidence that he knew it was his phone as the same still had a notification message confirming his Covid -19 vaccination. On cross examination, he stated that he did not see the persons who snatched his phone as it was dark and he could not therefore see properly. He further stated that it was the police who told him that the second accused person was the person found with his phone.
22. PW2, Jimale Mohamed Rashid testified that on 06.05.2022, he was asleep at his house but upon waking up, he realized that his phone was lost. That he made a report to the police on the following day. He stated that the phone that got lost was make Samsung and that he had kept Kes. 5,000 on the cover of the phone at the time the said phone was stolen.
23. He testified that the police called him on 09.05.2022 when he was told to go to the station and upon reaching there, he was shown several phones and thereafter told to pick his. That he positively identified his phone as the same had his photo and stocks of mattress as screen saver. The said phone was produced as Pex 2. On cross examination, he stated that it was the police who informed him that the said phone was found with the 2nd and the 3rd accused persons.
24. PW3, Hussein Ibrahim Adan stated that on 09.05.2020, while in his house, he realized that his phone had been stolen. That on 10.05.2022, he reported the same to the police who called him back after a period of one day. He stated that he was told to go to the police station to identify his phone of which he did. That his phone was Samsung A02S of IMEI No. xxxx, black in colour. It was recorded that the witness positively identified his phone as he had the box for the phone as well as the receipt issued during the purchase. That the box of the phone bore his KRA Pin and therefore, the same was produced as Pex.4.
25. PW4, Steven Mburuko testified that on 08.05.2022 at around 9.30. p.m., while heading home from work, he was talking on his phone when a motor cycle passed by and the pillion passenger grabbed his phone. He stated that he was able to see the person who snatched his phone as the 2nd accused person. He was categorical that he easily identified him as the accused was short, his beard while before the court was the same as at the time when he snatched his phone, he had a 'kipara' and that he was light skinned.
26. It was his evidence that he tried to call his line but realized that the same had already been switched off. That he reported the loss of Samsung A12 black in colour and on 11.05.202, he was called by the DCI informing him to visit the station to help identify his phone. He stated that he managed to identify his phone as he had a box of the said phone; that the phone had his photo. It was his case that his phone was Samsung Galaxy A12 black and the same was identified as Pex 7. On cross examination, he stated that he saw the 2nd accused person as the place where the incident happened was lit with security lights.
27. PW5, George Ochieng' Onyango told the court that on 08.05.2022 at around 9.45 A.M, he realized that a phone that he used to run his business was missing. It was his case that he reviewed the CCTV camera where he was able to identify the face of a person who was responsible for the theft. He further stated that he shared the said photo with a friend in order to help him track the person responsible. That a friend later called informing him that his phone had been found and upon interrogating the person who was in possession of the same, the said person agreed to take them to a friend's place who was running phone business.
28. That upon going to the said house, together with police officers, his phone was amongst the ones received. He testified that his phone was of Techno make and serial number xxxx. On cross



- examination, he told the court that he knew the 1st accused person from appearance but that it was the 3rd accused person who took them to the house where his lost phone was found.
29. PW6, David Mutua stated that he was the investigating officer in the matter. It was his evidence that on 11.05.2022, they had remandees at the station when someone arrived and reported that they had locked a man who had tried to steal from them. That the man that had been arrested and locked was the 1st accused person. It was his evidence that he had previously arrested the said accused person on different occasions of having committed different offence. He stated that upon interrogation, the 1st accused person opened up by stating that he had colluded with the 2nd accused person, who was also a known thief in carrying out such criminal acts. The witness testified that the two accused persons later took them to the house of the 3rd accused person (appellant) whom they allegedly used to take stolen phones to.
 30. He went further to state that they used the 1st accused to call the 3rd accused person (appellant) informing him that he had some phones. That he wanted to meet him and so, the 3rd accused person agreed to meet with the 1st accused. That later on, when they visited the house of the 3rd accused person, they forced it open and found a bag and in it were six phones. He listed the same as: Samsung A7, IMEI No. xxx, Techno Camon 15 IMEI No. xxx, Samsung A02 IMEI No. xxx, iPhone 5 Model A1687, Samsung A12 IMEI No. xxxx and Samsung A12 IMEI No. xxx.
 31. That upon further search, they found in the said house, three Kenyan IDs with one belonging to Mohamed Noor Ahmed Osman the appellant herein and one Ethiopian ID that had the photo of the 3rd accused person. That the Kenyan ID also had the photo of the 3rd accused person as well. He reiterated that he knew all the three accused persons as responsible for stealing people's phones and that previously, he had charged the 1st and 2nd accused. On cross examination, he was categorical that the said phones were recovered from the 3rd accused person's house.
 32. Upon considering the evidence by the prosecution, the trial magistrate placed the accused persons on their defence.
 33. DW1, Haret Yusuf Mohamed gave unsworn evidence in which he stated that on 11.05.2022, he had taken firewood to Wajir High School when he was arrested and thereafter accused of wanting to steal phones. He denied knowing the 2nd and 3rd accused persons. He claimed that he was framed up.
 34. DW2, Abdinasir Mohamed Issack in his unsworn testimony testified that on 10.05.2021, he woke up and went to visit his mother who operated a shop within. That he stayed there till 0600 pm when he suffered asthma attack and as a result, was rushed to the hospital. He denied being involved in the commission of the offences herein.
 35. DW3, Mohamed Ahmed Osman (appellant) in his sworn evidence testified that he operated a tuk tuk business. That on either 09 or 10th of May, someone called him seeking for transport and upon reaching the agreed pick up point, he was arrested. He denied the charges herein. On cross examination, the appellant stated that he knew why he was presented before the court in as much the police did not tell him anything. He stated that the police took him to his home but denied that the alleged phones were found there. He stated that the 2nd accused did not sell him any phone. He conceded that the six other phones allegedly recovered from him did not belong to him.



Determination

36. I have considered the appellant's grounds of appeal, the response by the prosecution and submissions on record. The only issue for determination is whether the prosecution had proved beyond reasonable doubt that the appellant was responsible for the offences he was charged with and convicted?
37. It is trite law that in criminal proceedings, the burden of proof always lie with the prosecution and that the same does not change.
38. On Counts I, II and V, the appellant was charged with the offence of stealing contrary to section 268(2) as read with section 275 of the Penal Code. Section 268 provides that:
- (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say -
- (a) a) an intent permanently to deprive the general or special owner of the thing of it;
 - (b) b) an intent to use the thing as a pledge or security;
 - (c) c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
 - (d) d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - (e) e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;
- and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.
39. Section 275 of the Penal Code sets out the penalty for stealing as follows:
- Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.
40. Regarding count I, the appellant was accused of stealing a mobile phone worth KES 27,000 the property of Noor Maulit Hujale. Although Pw1 the complainant in respect of that phone claimed to have seen the 1st and 2nd accused(appellant) as the people who attacked him that night, he disowned that statement on cross examination when he stated that he did not see the people who attacked him. This is clear also from the fact that when Pw1 reported the incident, he not did give any physical description of the person/s who attacked him.
41. In the absence of any other eye witness, I would safely find that there was no direct evidence to connect the appellant with the offence. However, the appellant was said to have been found in possession of the stolen phone by police officers among them pw6 and members of the public one of them being pw5. To that extent the court would have to venture into circumstantial evidence based on the doctrine of recent possession.
42. Pw5 explained how he lost his phone and on reviewing his CCTV camera images, he was able to capture the images of the 1st accused who upon arrest by members of the public revealed that he was with the second accused when the theft occurred.



43. Consequently, the two led the police to the house of the appellant from where several phones were recovered and people who had lost phones called upon to go and identify them. Among the phones positively identified were those belonging to the complainants herein. The appellant had no explanation as to how those phones found their way into his house. He did not claim ownership over the same phones. The question begging for an answer is whether the doctrine of recent possession is applicable in the circumstances.
44. The principles for application of the doctrine of recent possession are well known, and were set out in *Arum v. R* (2006) 1 KLR 233 as follows:
- “1. The property was found on the suspect;
 2. The property was positively identified by the complainant;
 3. The property was stolen from the complainant; and
 4. The property was recently stolen from the complainant.”
45. The principle is emphatic that if recently stolen goods are found in possession of an accused who cannot explain his possession, there is a presumption that the person is the thief or handler of the stolen goods. In *Chaama Hassan Hasa v. Republic* (1976) KLR 6, 10, the Court (Trevelyan & Hancox, JJ.) put the matter as follows:
- “[W]hat is generally referred to as the doctrine of recent possession, often expressed in this way: that where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (through not by way of retaining). But this doctrine does not apply to all the cases. What has been laid down is that, where it is proved that property has been stolen and very soon after the stealing the accused has been found in possession of it, it is open to the tribunal of fact to find him guilty of stealing, or of handling it by way of receiving: see *R v Seymour* (1954) 38 Cr App Rep. 68;
46. PW6 stated that they used the 1st accused to call the 3rd accused person informing him that he had other phones and that he wanted to meet him and so the 3rd accused person agreed to meet with the 1st accused. That later on, when they visited the 3rd accused person’s house, they forced it open and found a bag and in it were six phones as produced before the court.
47. The trial court in its judgment noted that in the 1st count, PW1 testified that he saw and identified the 2nd accused person as the one who stole his phone. Of importance to note is the fact that the said phone was found in the appellant’s house. The trial court thus proceeded to acquit the appellant herein on the main count which was not proven.
48. On Count II, PW5 testified that upon his phone being stolen, the same was found in the house of the appellant herein. The trial court thus convicted the appellant of the main charge in count II.
49. On Count IV, the trial court acquitted the appellant herein of the main charge but proceeded to find him guilty of the alternative charge as the said phone was found in his possession.
50. On Counts III, the trial court stated that PW3 testified that he could not identify the person who stole his phone in as much as the same was amongst the phones recovered from the appellant herein. The trial court thus acquitted the appellant herein of the main count but found him guilty of the alternative charge.



51. On Counts V, the trial court in the same breadth acquitted the appellant herein of the main count but found him guilty of the alternative charge.
52. The appellant urged that nobody identified him as the person who stole from them save for the fact that the listed phones were recovered from his house. In the case of *Mungai v Republic*, (2006) 2 KLR 262 the ingredient of the offence of handling was considered as follows:
 1. Under section 322(1) of the Penal Code (cap 63), a person handles stolen goods if (otherwise than in the course of stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.
53. As the appellant did not offer any explanation as to his possession of the stolen phones, the court in my view properly inferred guilty knowledge on the appellant based on the doctrine of recent possession. [See *R. v. Aves* (1950) 34 Cr. App Rep 159]. The appellant's defence in view of the overwhelming evidence of the prosecution witnesses ought to be dismissed.
54. The court, therefore, finds that the appellant had handled the phones otherwise than in the process of stealing knowing them to be stolen and assisted in keeping them for whatever reason(s).
55. I would, accordingly, find the appellant guilty of the alternative charge of handling stolen property contrary to section 322 (2) of the Penal Code. Considering the large number of the stolen phones suggest an organized crime in the theft and sale of phones, which as observed by the trial court is rampant in the region, and therefore a deterrent sentence is appropriate. [See *Kaspan Lokitowial v Republic* [2018] eKLR].
56. On the grounds that the prosecution's evidence was riddled with inconsistencies and further, that the court employed extraneous evidence to convict and thereafter sentence the appellant, the same was not proved by the appellant and that notwithstanding, the court has independently reviewed the evidence on record and notes that there were no material inconsistencies in the evidence herein.
57. On the ground that the appellant was not furnished with all the necessary documents that the prosecution relied on in prosecuting the matter herein, the same was not proven. The respondent urged that the matter was mentioned several times without the appellant raising the said issue. That at no point did he raise the issue that he required the said documents.
58. On this ground, I wish to associate myself with Justice Mativo's observation in *Joseph Ndungu Kagiri v. Republic* [2016] eKLR, where the Judge held as follows;

“The next issue for determination is whether failure by the prosecution to provide the accused persons with witness statements amounted to a violation of their constitutional rights to a fair trial. It is not disputed that the accused persons were not provided with witness statements prior to the trial or during the trial yet all the four prosecution witnesses testified and the trial magistrate never addressed himself to this issue. Counsel for DPP Mr. Njue submitted that no prejudice was occasioned to the accused persons because the record shows that they ably cross-examined all the prosecution witnesses.

The Constitution of Kenya 2010 is highly valued for its articulation. Some such astute drafting includes but not limited to Article 50 which provides for the fundamental right to a fair hearing. Article 50 (2) (j) provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access



to that evidence while sub-article (c) provides for the right of the accused to have adequate time and facilities to prepare his defence.

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[13] The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article 25 (c) of our constitution, it is among the fundamental rights and freedoms that may not be limited.

The right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence is expressly provided for in our constitution. In *Thomas Patrick Gilbert Cholmondeley Vs. Republic*, [14] (decided before the promulgation of the 2010 constitution) the Court of Appeal stated categorically that:-

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under... our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.” In arriving at this holding, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda: respectively *R. V. Ward* [1993] 2 ALL ER 557; *R. V. Stinchcombe* [1992] LRC (Cri) 68; *Olum & Another V Attorney General* [2002] 2 E.A. 508; and, the Kenyan Case of *George Ngodhe Juma & two others Vs. The Attorney General Nairobi High Court*, (Misc. Criminal Application No. 345 of 2001).”

Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution’s evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-Article 2(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence.

The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling *the Constitution* and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated”.

59. While I so associate myself, it must be noted that rights go hand in hand with responsibilities. Nowhere in the court record is it revealed that the appellant asked for provision of the documents and was denied. It is unclear why the appellant did not raise the issue at the earliest instance. He fully participated in the proceedings without raising any complaint.



60. In the circumstances, I find that the appellant's right as alleged were not in any way violated. That ground too fails.
61. In view of the above holding, I hold the view that the finding and thereafter sentencing by the trial court was not only legal but also appropriate in the given circumstances.
62. However, there is the question of whether the court took into consideration the period spent in remand custody. The learned prosecution counsel conceded that the period spent in remand custody was not considered.
63. A perusal of the court record reveals that the trial court did not take into consideration section 333(2) of the CPC which provides that when imposing sentence a trial court is duty bound to take into account the period spent in remand custody. See *Boniface Mugo Maingi v Republic (2021) e KLR* where the court held that under section 33(2) of the law requires courts to take into account the period the convict spent in custody. The appellant was arrested on 10th May 2022 and remained in custody till 5th October 2022 translating to 4months and 25 days which period should be taken into account when computing sentence.
64. In a nutshell, it is my finding that the appeal on conviction is dismissed and that sentence partially succeeds to the extent that the period spent in remand custody shall be taken into account when computing sentence.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF DECEMBER 2023

J. N. ONYIEGO

JUDGE

