Kouro v Republic (Criminal Appeal E145 & E015 of 2024 (Consolidated)) [2025] KEHC 6139 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6139 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL E145 & E015 OF 2024 (CONSOLIDATED)

CJ KENDAGOR, J

MAY 9, 2025

BETWEEN

ABDOULAYE TAMBA KOURO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against Sentence passed by Hon. B. Ekhubi, SPM, in Chief Magistrates Court Milimani Criminal Case No. 1946 of 2018)

JUDGMENT

1. The Applicant was charged with four Counts. On Count I, he was charged with being in possession of papers intended to Resemble and Pass as Currency notes Contrary to Section 367 (a) of the *Penal Code*. The particulars of the charge are that on the 1st day of October 2018, at Sandalwood Apartment, along Brookside Drive, Westlands, within Nairobi County, with others not before Court, without lawful authority or excuse, had in his possession 54,000 pieces of forged US Dollars in denomination of 100, 19,000 pieces of EURO in denomination of 100, and 3,400 pieces of EURO in denomination of 500 knowing them to be forged all valued at approximately Kshs.960,120,000/=.

2. On Count II, he was charged with Forgery contrary to Section 349 of the *Penal Code*. The particulars of this second count was that on the 1st day of October, 2018, at Sandalwood Apartment, alongside Brookside Drive, in Westlands, within Nairobi County, jointly with others not before Court, with intent to defraud, forged 54,000 pieces of US Dollars in denomination of 100; 19,000 pieces of EURO in denomination of 100, and 3,400 pieces of EURO in denomination of 500 knowing them to be forged all valued at approximately Kshs.960,120,000/=.

3. On Count III, he was charged with Obtaining Money by False Pretence Contrary to Section 313 of the *Penal Code*. The particulars of this charge was that on diverse dates between 20th April, 2011 and 29th April, 2013, at Hurlingham area, in Kilimani, within Nairobi County, jointly with others not before

Court, with intent to defraud, obtained from Danson Mungatana sum of USD 1,000,000 which is approximately Kshs.76,000,000 by falsely pretending that he was in a position to invest for him in oil industry, a fact he knew to be false.

4. On Count IV, he was charged with Obtaining Money by False Pretence Contrary to Section 313 of the *Penal Code*. The particulars of this charge was that on the 9th day of March, 2017, at Sandalwood Apartment, along Brookside drive in Westlands within Nairobi County, jointly with others not before Court, with intent to defraud, obtained from Makau Muteke a sum of USD 6,796 which was approximately Kshs.700,000/= by falsely pretending that he was in a position to invest for him in a business, a fact he know to be false.

5. The trial Court delivered the judgment on 26th October, 2023 in which it found him guilty of Count I, II, and Count IV and convicted him. It however, acquitted him of Count III. He was sentenced to 4 years imprisonment for Count I and 2 years imprisonment for Count II. For Count IV, he was sentenced to pay Kshs.400,000/= in default serve 2 years imprisonment. The sentences were to run concurrently.

6. He was dissatisfied with the conviction and the sentence and approached this court through several applications/channels. He first came to this Court with an appeal which he filed to this Court on 20th February, 2024. In the appeal, he sought to have both the conviction and the sentence set aside, and he listed the following Grounds of Appeal;

    1. That the learned trial magistrate erred in both facts and law by convicting the [Applicant] on a defective charge sheet.

    2. That the learned trial magistrate erred in law and fact by convicting and sentencing the [Applicant] without considering the [Applicant] Pre-conviction Period/Time spent in Custody

    3. That the learned trial magistrate erred in law and facts by convicting and sentencing the [Applicant] without offering him an alternative option of Payment of Fine on the 1st Count hence prejudicing him to right of a fair trial.

    4. That the learned trial magistrate erred in law and facts by shifting the burden of proof to the [Applicant] as key material witness were never called to corroborate the Prosecution case.

    5. That the learned trial Magistrate erred in law and facts by ignoring the [Applicant's] mitigation.

    6. That the learned trial magistrate erred in law and fact by subscribing to the wrong principles during sentences hence occasioning a miscarriage of justice.

7. He asked the Court to allow the appeal and set aside the conviction and sentence. He also prayed that in the alternative, the Court should give a favourable and lenient fine for Count I. This appeal was registered as HCCR Appeal No. E015 of 2024.

8. The Applicant later filed a similar appeal to this Court on 19th April 2024, although this time round he filed through the firm of Kihima & Koech Advocates. He sought to have both the conviction and the sentence set aside. This second appeal was registered as Criminal Appeal No. HCCRA E019 of 2024.

9. He later filed an application for sentence review before this court on 7th October, 2024 in which he asked the court to review his sentence downwards, reduce the sentence to the time spent in custody, or allow him to serve in community service. The application was registered as Criminal Appeal No. E145 of 2024.

10. The parties appeared before this court on 18th December 2024 concerning the three related matters. On that day, the Applicant made an oral application seeking to have Criminal Appeal No. E015 of 2024 and Criminal Appeal No. E145 of 2024 consolidated, and Criminal Appeal E145 of 2024 declared as the lead file. He also sought to withdraw Criminal Appeal No. HCCRA E019 of 2024.

11. The application was allowed and Criminal Appeal No. HCCRA E019 of 2024 was marked as withdrawn. Criminal Appeal No. E015 of 2024 and Criminal Appeal E145 of 2024 were consolidated, and Criminal Appeal E145 of 2024 was declared the lead file.

12. The consolidated matters were canvassed by way of written submissions.

The Applicant's written submissions

13. The Applicant submitted that the sentence imposed on him should be reviewed because the lower Court did not consider the time he had spent in custody. He argued that the trial magistrate was supposed to reduce sentence proportionately to the time spent in custody. He argued that it was not enough for the trial Court to state that it had considered the period already spent in custody and still order the sentence to run from the date of the conviction. He submitted that this amounted to ignoring altogether the period already spent in custody. He argued that he spent at least 183 days in custody.

14. In addition, he also submitted that he is remorseful for his actions and prayed for a second chance at life. He relied on the case of Ahamad Abolfathi Mohammed & Sayed Mansour Mousavi v Republic [2018] KECA 855 (KLR) and Jonah & 87 others v Kenya Prisons Service (2021) KEHC.

Issues for determination

15. On perusal of the Notice of Motion application dated 5th October, 2024 and the Applicant's submissions, the only issue for determination is whether the Applicant is entitled to the orders for review of sentence.

16. The Kenyan law requires Courts, while sentencing, to take into account the period the accused spent in custody. Section 333(2) of the *Criminal Procedure Code* provides as follows;

> " Subject to the provisions of Section 38 of the *Penal Code* (Cap.63) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

17. In addition, The Judiciary Sentencing Policy Guidelines provides as follows;

> " 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 trail. 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."

18. Courts have also interpreted Section 333(2) of the *Criminal Procedure Code* and have offered guidance on how the trial Court should treat the period spent in custody before the sentencing. In Bethwel Wilson Kibor vs Republic [2009]eKLR, the Court stated as follows:

> " By proviso to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

19. I have carefully perused the proceedings in the trial record and I note that the Applicant was arrested on 1st October, 2018 and presented before the Court for plea taking on 16th October, 2018. He was released on bond on 23rd October, 2018. The surety withdrew his security on 26th April, 2021, and he was remanded in custody as he looked for an alternative surety. He obtained an alternative surety which was approved 6th May, 2021. The bond was later suspended on 24th March, 2022 and reinstated on 12th July, 2022. The bond was later cancelled on 4th September, 2023. He stayed in custody for the reminder of the trial period and was sentenced on 21st November, 2023.

20. From the above facts, it is clear that the Applicant was in custody for 22 days before being released on bond. He was also in custody for 10 days from 26th April, 2021 to 6th May, 2021 when his first surety withdrew his security and sought a replacement. He was also in custody for 110 days from 24th March, 2022 to 12th July, 2022. He was also in custody for 77 days from 4th September, 2023 to the date of sentence on 21st November, 2023. In this Court's calculation, the total days spent in custody are 219 days.

21. The Applicant argued that the trial Court did not consider these 219 days during the sentencing. I have perused the record of the trial Court and particularly what transpired on the sentencing date. I have confirmed that the trial magistrate did not comply with the provisions of Section 333 (2) of the *Criminal Procedure Code* in that it did not take into account of the period spent in custody. I find that, to that extent, the trial Court erred. It should have considered the period that the Applicant had spent in custody during sentencing.

22. The Applicant also requested to have his sentence converted into non-custodial sentence. He swore an affidavit dated 5th October, 2024 in which he explained his current predicament and gave reasons why this Court should consider giving him a non-custodial sentence. He averred that his health is deteriorating due to a terminal illness that require full time attention and proper medical attention which cannot be obtained while in custody. However, he did not attach any documentary evidence as proof of the terminal illness he alleges he is battling. A medical certificate or medical report from a qualified medical doctor attesting these facts would have been sufficient.

23. In addition, the Applicant stated that he is an old man aged 65 years and that he was remorseful for his actions. On these grounds, he asked this Court to be lenient.

24. A part of the Probation report filed in Court during his sentencing read as follows: "[the Applicant] showed no remorse to the offence he has been found guilty. To this end, it will be challenging to supervise [the Applicant] should he be granted a non-custodial sentence."

25. For the above reasons, and on the strength of the Probation report, this Court finds that the Applicant has not convinced this Court that a non-custodial sentence is appropriate in his circumstances. The prayer for conversion of the sentence into a non-custodial sentence is hereby disallowed.

26. Ultimately, I conclude that the instant application is partially warranted as far as the time spent in custody affects the sentence. I direct that the period of 219 days that the Applicant spent in custody while awaiting his trial be deducted from his respective sentence periods.

27. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 9TH DAY OF MAY, 2025.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Amin

Appellant present

Mr. Kamau Waweru Advocate for Appellant

Mr. Chebii, ODPP for Respondent