



REPUBLIC OF KENYA



**KENYA LAW**  
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**Dobirr v Republic (Criminal Appeal E016 of 2021)  
[2024] KEHC 1172 (KLR) (13 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1172 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL APPEAL E016 OF 2021  
F GIKONYO, J  
FEBRUARY 13, 2024**

**BETWEEN**

**NAIROTI DOBIRR ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

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

**JUDGMENT**

1. The appellant together with Barmoti Simpano 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 7/05/2018 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 xxxM 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 7/05/2018 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 xxxM 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. In the memorandum of appeal received in court on 22.07.2021, the appellant listed 7 grounds of appeal. The grounds can be condensed into two as follows;
  - i. That the sentence is too harsh and excessive in all circumstances; and
  - ii. That time spent in custody be considered in the sentence pursuant to section 333(2) of the Criminal Procedure Code.

### **The Appellant's submissions.**

9. The appellant orally submitted that he is seeking only time spent in custody to be considered in his sentence.

### **The Respondent's submissions.**

10. Ms. Kerubo, prosecution counsel orally urged this court to consider the record and determine the appeal.

### **Analysis and Determination**

#### **Court's Duty**

11. 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] E.A 32).

#### **Issue for determination**

12. The appellant abandoned all grounds of appeal except he pursued a singular issue for determination, which 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**

13. The purport of Section 333(2) of the CPC may be argued; as a ground of appeal; or in an application for a redress of violation of a right and fundamental freedom enshrined in the Bill of Rights under articles 23(1) and 165(3) of *the Constitution*. In most cases, the alleged violation is of the right to a less severe sentence or not to be detained arbitrarily.

‘...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.



### **The 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 (Ahamad 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 consider time spent in custody in accordance with the circumstances of each case. But, a more problematic scenario is where the sentencing court imposes a lenient sentence after considering time spent in custody. Unless it is so clearly demonstrated in that kind of approach- like is the case here- only serves to provoke applications under section 333(2) of the CPC, and also making the work of appellate court difficult.

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

17. Perusal of the trial court’s records reveals the following. 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 7/05/2018.
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, time spent in custody prior to sentencing was considered by the trial court in arriving at the sentence of 10 years imprisonment.
20. The appeal is, therefore, accordingly dismissed.
21. For clarity, however, the sentence shall commence from 13/07/2021- the date the sentence was pronounced. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**HON. F. GIKONYO M.**

**JUDGE**

In the Presence of:-

Court Assistant - Otoro

Appellant - Present

M/s Rakama for DPP - present

