



**Situma alias Madosa v Republic (Criminal Appeal E120 of 2022)  
[2024] KEHC 4262 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4262 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E120 OF 2022  
RN NYAKUNDI, J  
APRIL 11, 2024**

**BETWEEN**

**KEVIN SITUMA ALIAS KEVIN MADOSA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal on sentence from the Judgment of  
Hon. R. Odenyo (SPM) in Cr. Case No. E024 of 2022)*

**JUDGMENT**

1. The Appellant was charged with robbery with violence contrary to Section 295 as read with section 296(2) of the *Penal Code*. Particulars stated that the Accused person on March 28, 2021 at Riverside area in Turbo sub-County, jointly with others not before court robbed Jackson Toroitich of one Mobile phone make Infinix Note 8 valued at Kshs. 15,000/= and before the time of the robbery threatened to use violence against the said Jackson Toroitich.
2. One witness for the prosecution testified and thereafter the appellant together with his accomplices entered into a successful plea bargain negotiation with the Republic. A plea of guilty was entered and the accused persons were sentenced to serve 14 years imprisonment. The appellant in mitigation sought to be taken to his county.
3. Being aggrieved by the sentence meted out against him by the trial court, the appellant filed the instant appeal on the following grounds:
  - i. That the court considers his mitigation grounds and awards a lesser sentence or substitute the remaining sentence with a non-custodial sentence or the court be pleased to order that the appellant serves in the community service order.



- ii. That the court considers the provisions of section 333(2) of the *Criminal Procedure Code* to be factored in his sentence.
4. Both parties filed their submissions in support of their case.

### **Appellant's submissions**

5. It was submitted for the appellant that the sentence should be reviewed for reasons that the circumstances of the case were not too grievous and that the complainant was not injured.
6. The appellant stated that he regrets his actions and that they were due to drunkenness. The appellant in urging this court to impose an appropriate sentence, he made reference to the court of appeal's decision in *Thomas Mwambu Wenyi versus Republic* (2017) eKLR, where the court cited the decision of the Indian Supreme Court in *Alister Anthony Pereira versus State of Maharashtra*.
7. According to the appellant, there was no assault in this case and that no weapons were used. He prayed for a lesser sentence. He cited numerous decisions and prayed that he might also benefit from the provisions of section 333(2).

### **Respondent's submissions**

8. The Respondent on his part opposed the appeal on grounds that the sentence imposed is lenient and not at all excessive or manifestly harsh or illegal.
9. It was submitted for the respondent that the principles to be relied upon when reviewing sentences were captured by the Court of Appeal in the case of *Benard Kimani Gacheru versus Republic* (2002). In the said case the court stated as follows:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

10. According to the Respondent, the sentence prescribed under section 296(2) of the *Penal Code* is a death sentence. That the sentence for 14 years is therefore lenient and the appellant ought not to complain. The respondent urged the court to uphold the sentence.

### **Analysis and Determination**

11. First and foremost by dint of the plea agreement dated 11.11.2022 and the provisions of Section 137 (a) –(o) of the *CPC* conviction be and is hereby affirmed save for the issues arising out of sentence.
12. Having reviewed the trial Record, the grounds of appeal and the parties' submissions, the main issue is to determine whether the court can interfere with the decision of the trial court.
13. To start with, as submitted by the Respondent I must operate with caution having it in mind that the appellate court ought not to interfere with the trial court sentence unless the circumstances so demand. The position was spelled out in the decision aforementioned and I agree with the said decision.



That sometimes the Appellate Court might feel that the sentence is heavy and that the Appellate Court might itself not have passed that sentence. However, these alone are not sufficient grounds for interfering with the discretion of the trial court.

14. The offence of robbery with violence is contained in Sections 295 and 296(2) of the [Penal Code](#) as follows:

“295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296(2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

15. The sentencing objectives in Kenya have been captured in the [Sentencing Guidelines 2023](#) to be the following: -

- a. Retribution: to punish the offender for his/her criminal conduct in a just manner.
- b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
- d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
- e. Community protection: to protect the community by incapacitating the offender.
- f. Denunciation: to communicate the community’s condemnation of the criminal conduct.
- g. Reconciliation: To mend the relationship between the offender, the victim and the community.
- h. Reintegration: To facilitate the re-entry of the offender into the society.

16. Reference is made to the Principles in *Nilson v Republic* (1970) KLR 552 and [Bernard Kimani Gacheru v Republic](#) (2002) and I am also alive to the decision in [Muruatetu](#) (2017) eKLR and it has been said time I again that the mandatory nature of the death sentence that was declared unconstitutional is no longer good law. The trial courts have the sole discretion to exercise in identifying the appropriate and proportionate sentences for the offence in which an offender has been found guilty and convicted accordingly. The courts are now moving away from imposing mandatory minimum sentences, which in essence allows trial courts presided over by session magistrates to impose a sentence depending on the circumstances of a case, the aggravating factors, mitigation, personal antecedents, the victim impact statement, the community based social inquiry report, nature and seriousness of the offence etc. The Appellant in this appeal was sentenced to 14 years imprisonment by the learned trial magistrate for the offence of Robbery duly negotiated under a plea bargaining agreement. The admission of the plea agreement by the trial court is in itself a positive score for reduction of sentence to be computed as a final order of the court. There is no evidence that the Appellant had a previous record on related commission



of offences to the one he had been convicted by the court on admission. The aggravating factors as appreciated from the record are such that the offence is serious by this information an elements but on further evaluation 14 years imprisonment was on the higher side of the fulcrum of the sentencing scheme. It appears that the [Sentencing Policy Guideline of 2023](#) were never taken into account by the learned trial magistrate. This is a legal tool and the trial court must demonstrate in exercising discretion to sentence to Appellant the contribution drawn from the [Policy](#). I seen nothing of the sort in the impugned judgement of the trial court. Accordingly, there are no compelling and substantial circumstances which could have influenced the trial magistrate to impose a lengthy term of custodial sentence of 14 years against the Appellant.

17. Therefore, in considering the above-mentioned factors, I have come to the conclusion that the sentence imposed by the trial court was harsh, punitive, and excessive to invite this court to interfere by reviewing it to a term imprisonment of 5 years. By this decision, the doctrine of proportionality and its interlocking elements plays an important weight in reviewing the sentence. The appellant also benefits from the provisions of section 333(2) of the [CPC](#), which in my opinion is an issue that was not addressed by the trial court. In the circumstances, the appeal on sentence partially succeeds in favour of the Appellant. The five-year term imprisonment shall be effected from March 28, 2021.

18. It is so ordered.

**DATED AND SIGNED AT ELDORET THIS 11<sup>TH</sup> DAY OF APRIL, 2024**

.....

**R. NYAKUNDI**

**JUDGE**

