



**Fedha v Republic (Criminal Petition 101 of 2020)
[2024] KEHC 12342 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 12342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION 101 OF 2020
E OMINDE, J
SEPTEMBER 16, 2024**

BETWEEN

MAXWELL MUTETI FEDHA PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Petitioner herein was the accused person in Eldoret Chief Magistrate’s Court Case No. 891 of 2013. He was charged with three counts of the offence of Robbery with violence.
2. On the first count, the Petitioner was charged with Robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars were that on the 26th day of February 2013 at Maili Nne estate in Eldoret West District within Uasin Gishu County, jointly with others not before court, he robbed Prudence Chepchirchir of a mobile phone make Sony Erickson valued at Kshs 38,000/= and immediately before the time of such robbery wounded the said prudence Chepchirchir.
3. On the second count, he was charged with the offence of Robbery with Violence contrary to section 296(2) of the *Penal code*. The particulars were that on the 26th day of February 2013 at Maili Nne estate in Eldoret West District within Uasin Gishu County, jointly with others not before court, he robbed Hilda Birech Chepkogei of a mobile phone make Nokia valued at Kshs 4,500/= and cash Kshs 2000/= and immediately before the time of such robbery wounded the said Hilda Birech Chekogei.
4. On the third count, he was charged with the offence of Robbery with violence contrary to Section 296(2) of the *Penal code*. The particulars were that on the 26th day of February 2013 at Maili Nne estate In Eldoret West District within Uasin Gishu County, jointly with others not before court, he robbed Tomas Kipyatich Kiptoo cash Kshs 4,000/- and immediately before the time of such robbery, threatened to use violence to the said Thomas Kipyatich Kiptoo.



5. The Petitioner was also charged with the offence of being in possession of Narcotic drugs contrary to Section 3(2) as read with Section 1(a) and 3(2) of the [Narcotic Drugs and Psychotropic substances Control Act](#) Legal Notice No. 4/1992. The particulars were that on the 26th day of February 2013 at Maili Nne estate in Eldoret West District within Uasin Gishu County, was found in possession of Narcotic drug to wit 15 rolls of cannabis sativa (Bhang) which was not in medical preparation form.
6. The appellant was found guilty on all the counts of robbery and sentenced to death. On the count of being in possession of narcotic drugs, he pleaded guilty and was sentenced to 2 years' probation. He then approached this court vide High Court Criminal Appeal 116 of 2017.
7. The court considered his appeal and dismissed it for want of merit. However, pursuant to the decision in [Francis Muruatetu & Others Vs Republic](#) Supreme Court Petition No 15/2015 ([Muruatetu 1](#)), the court permitted the appellant an opportunity to mitigate the sentence before the trial court *vide* its judgement dated 19/10/2018.
8. The file was then remitted to the trial court for mitigation and resentencing. The Chief Magistrate reduced the sentence of the Petitioner from Life Imprisonment to 10 years' imprisonment *vide* the judgment delivered on 07/06/2019.
9. The Petitioner then filed the present Petition for resentencing vide an Application dated 22/09/2020. The Petition is premised on the grounds on the face of it and the contents of the affidavit in support of the same. The Petitioner prayed that the court consider the period served in prison and reduce his sentence by a further one year.
10. As the trial court already conducted the resentencing hearing and resented the Petitioner, it follows that the issue pending for determination is :

Whether the court should reduce the sentence of the Petitioner by a further one year

Analysis And Determination

11. Section 333(2) of the [Criminal Procedure Code](#) provides as follows:

Subject to the provisions of section 38 of the Penal Code 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.

12. I have perused the record of the trial court and it is apparent that when meting out the 10-year sentence, the Trial Court did not indicate whether the sentence was to include the period the petitioner spent in custody before the sentence.
13. Because of this omission, the court shall grant the accused the benefit of the doubt as to whether the Hon Magistrate did in fact take into account the time the petitioner spent in custody.
14. From the committal warrants, the Petitioner was in remand from the date of his arrest on 22/02/2013 but was released on bond on 16/01/2014. Therefore, before the sentence, he spent eleven (11) months in remand.
15. 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 trial. 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.

16. In *Bethwel Wilson Kibor v Republic* [2009] eKLR the Court of Appeal expressed itself as follows:

“By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take 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 September 22, 2009 he had been in custody for ten 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.”

17. The Section 333(2) of the *Criminal Procedure Code* upon which the petitioner has hinged his application is couched in mandatory terms. In this regard, the Sentencing Guidelines herein above cited states that the Court is therefore obligated to take the period served in remand custody into account in sentencing an offender to avoid a situation where an excessive sentence that is not proportionate to the offence is meted out.

18. As I have already observed, the Trial Court was not clear on whether it took the remand period into account and this being the case, as was held in the Court of Appeal decision herein above cited, the Court will grant the benefit of that uncertainty to the accused and find that it did not.

19. From the computation done by the Court as already captured elsewhere in this Judgement, the accused spent eleven (11) months in remand before he was released on bond.

20. The Court therefore takes this into account and reduces the petitioner’s 10 years sentence as already reduced by the Trial Court by sentence by a further eleven (11) months. This period shall also be computed in the term already spent in prison after conviction.

21. The upshot therefore is that the petition is allowed and the petitioner’s sentence is accordingly reduced and it is now hereby so ordered.

22. Right of Appeal 14 days.

READ DATED AND SIGNED AT ELDORET ON 16TH SEPTEMBER 2024

E. OMINDE

JUDGE

