



REPUBLIC OF KENYA



KENYA LAW
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**Boyi v Republic (Criminal Appeal E058 of 2021)
[2023] KEHC 827 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 827 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E058 OF 2021
JWW MONG'ARE, J
FEBRUARY 9, 2023**

BETWEEN

NICHOLAS BOYI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the sentence of Hon. R. Odenyo in Eldoret Chief Magistrate's
Criminal Court Case No. 1333 of 2018 delivered on 24th August 2021)*

JUDGMENT

1. The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence are that on the March 16, 2018 at Langas in Wareng District within Uasin Gishu County, jointly with others not before the court being armed with dangerous weapons, namely pangas and steel cutters robbed Sammy Muiruri of his 32' Sony TV, 13Kg gas cylinder and two Nokia Mobile phones valued at Kshs 57,000/- and at the time of such robbery threatened to use actual violence on the said Sammy Muiruri.
2. In the alternative, he was charged with attempted robbery with violence contrary to section 297 of the *Penal Code*. The particulars of the offence were that on the March 16, 2018 at Langas in Wareng District within Uasin Gishu County, jointly with others not before the court being armed with dangerous weapons, namely pangas and steel cutters attempted to rob Sammy Muiruri of his 32' Sony TV, 13Kg gas cylinder and two Nokia Mobile phones valued at Kshs 57,000/- and at the time of such attempted robbery threatened to use actual violence on the said Sammy Muiruri.
3. The appellant pleaded not guilty and the matter proceeded to full hearing. Upon considering the facts of the case and the evidence presented before it, the trial court found the appellant guilty on the second count and sentenced him to seven (7) years in jail.



4. Being aggrieved with the sentence only, the appellant instituted the present appeal *vide* a petition of appeal premised on the following ground;
 1. That (I) am a first offender and thus beg for leniency.
 2. That (I) am remorseful, repentant and reformed since incarceration in prison.
 3. That (I) am a young man and pray to be re-constituted in society to serve as a role model and a teacher/mentor to others of similar behaviour.
 4. That may the honourable court consider the time spent in remand custody and be commuted as part of the sentence pursuant to section 333(2) of the [Criminal Procedure Code](#).
 5. That may this honourable court be pleased to consider the sentencing policy of 2016 published by the Kenya judiciary to establish the mitigating circumstances that would lessen the custodial sentence.
 6. That more grounds to be adduced at hearing thereof and determination of this appeal.

The parties filed submissions on the appeal.

Appellant's Case

5. The appellant is challenging the sentence only. He submits that he is remorseful and repentant, he has learnt crime does not pay and promises to never involve himself in crimes again. He requests the court to consider his young family since at the time of his arraignment he was the sole breadwinner and his wife was unemployed and as such, his incarnation has caused a lot of hardship to the family. He urged the court to consider that he was in custody during the trial and to apply that period as part of his sentence. He urged the court to consider the mitigating factors and allow his appeal.

Respondent's Case

6. Learned counsel for the respondent submitted that the appellant's mitigation was taken into account and the court meted out a lenient sentence that is not anchored in law. He stated that the conviction was safe but conceded to ground (4) of the appeal.

Analysis And Determination

7. Upon considering the grounds of appeal and the submissions of the parties, the following issue arise for determination;
 1. Whether the sentence was harsh/excessive
 2. Whether the trial court took into account time spent behind custody

Whether the sentence was harsh/excessive

8. The appellant was convicted of the offence of attempted robbery with violence. The sentence for attempted robbery with violence is prescribed by section 297(2) of the [Penal Code](#) which states;
 - (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 before or



immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

9. I note that although the prescribes a death sentence for the offence of attempted robbery with violence under section 297(2) of the Penal Code, the trial court applying its discretion sentenced the appellant to a custodial term of 7 years instead.
10. The Court of Appeal sitting in Kisumu in the case of Jared Koita Injiri v Republic [2019] eKLR per Musinga, M’Inoti & Murgor JJ.A held that despite the mandatory nature of section 8(2) of the Sexual Offences Act in providing for the minimum sentence of life imprisonment, applying the principles set out in the Francis Karioko Muruatetu & others v Republic case[2017]eKLR, it was inclined to hold that life imprisonment was not mandatory sentence under section 8(2) of the Sexual Offences Act. The Court of Appeal reduced life imprisonment imposed on the appellant to thirty (30) years imprisonment.
11. Upon considering the circumstances surrounding the offence, the aggravating factors and the mitigation of the appellant, I find no reason to disturb the sentence. It is commensurate with the offence committed.

Whether the trial court took into account the time spent behind custody

12. The appellant was arraigned in court on March 19, 2018 and from the record it is apparent that he was in remand throughout the hearing of the case. He was sentenced on August 24, 2021 and was therefore in remand for a period of about three years.

13. Section 333(2) of the Criminal Procedure Code provides;

- (2) 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.

In the case of Abmad Abolfathi Mohammed & Another Criminal Appeal No 135 of 2016 (eKLR 2018) held thus at Page 28:

“Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person”

1. In the premises, I uphold the sentence and the same shall be calculated from the date of March 19, 2018. The appeal is hereby dismissed.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 9TH DAY OF FEBRUARY 2023

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J. W.W MONGARE



JUDGE

Judgment delivered virtually in the presence of;

- 1) Appellant present
- 2) Ms Okok- Prosecution Counsel
- 3) Loayanae - Court Assistant

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J. W.W MONGARE

JUDGE

