



REPUBLIC OF KENYA



**Barasa v Republic (Criminal Appeal E076 of 2022)
[2023] KEHC 791 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E076 OF 2022
JWW MONG'ARE, J
FEBRUARY 8, 2023**

BETWEEN

MOSES BARASA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. R. Odenyo in Eldoret
Criminal Case No. 3505 of 2018 delivered on 14th June 2022)*

JUDGMENT

1. The appellant was charged with two counts of the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence are that on the night of 16th and August 17, 2018 at Kabeya Estate in Turbo Sub County within Uasin Gishu County, jointly with others not before the court while armed with dangerous weapons namely a rungu and metal bars, robbed Victor Nyongesa of one mobile phone of make ITEL, one blanket, one bed sheet and a mattress all valued at KShs 7,350/- and immediately before the time of such robbery wounded the said Victor Nyongesa Owino.
2. The appellant pleaded not guilty and the matter proceeded to full trial. Upon considering the testimony of all the witnesses and the evidence presented before the trial court, the trial magistrate found the appellant guilty on both counts and sentenced him to 10 years imprisonment for each count. The sentences were to run consecutively.
3. The appellant being dissatisfied with the sentence, instituted this appeal vide a petition of appeal premised on the following grounds;

1. That (I) am a first offender and thus beg for leniency.



2. That (I) am remorseful and reformed as (I) have learnt to take responsibility of (my) own actions.
3. That (I) am a young man and (I) pray to be re-constituted in the society to serve as a role model and a teacher/mentor to others of similar behaviour.
4. That (I) request this honourable court to allow the two sentences to run concurrently.
5. That request this court to consider the time spent in remand custody pursuant to section 333(2) of the *Criminal Procedure Code* among other enabling laws.
6. That this honourable court be pleased to consider the sentencing policy of 2016 published by the Kenya judiciary and establish the mitigating circumstances that would lessen the custodial sentence.
7. That more grounds to be adduced at the hearing thereof and determination of this appeal.

The parties filed written submissions on the appeal.

Appellant's case

4. The appellant stated that he was arraigned in court on August 20, 2018 and sentenced on June 14, 2022. He submitted that by the time of his conviction he had served three years and ten months in remand. He urged the court to invoke its powers under section 333(2) of the Criminal Procedure Code and consider the time he had served in remand in reducing his sentence.

Respondent's case

5. Learned counsel for the state opposed the appeal and submitted that the sentence of 10 years was illegal. It was his case that section 296(2) of the Penal Code is couched in mandatory terms and therefore the trial court was wrong in passing an otherwise illegal sentence. Further, that the appellant is a dangerous person and caused untold suffering to the victims. He urged that the appeal be enhanced to one of death.

Analysis and determination

6. The appeal is against the sentence only and therefore I shall not delve into the merits of the conviction. Upon considering the grounds of appeal, the submissions of the parties and the circumstances of the case, the following issues arise for determination;
 1. Whether the sentence was illegal
 2. Whether the court should enhance the sentence of the appellant

Whether the sentence was illegal

The issue of mandatory sentences has been discussed far and wide over various decisions. Section 296(2) of the Penal Code prescribes a mandatory death sentence for the offence of robbery with violence. In *James Kariuki Wagana v Republic [2018] eKLR*, Prof Ngugi J observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. I am also guided by the Court of Appeal decision of *Paul Ouma Otieno v*



Republic [2018] eKLR where the Court of Appeal substituted the death sentence for a similar offence with a sentence of 20 years imprisonment and will therefore not interfere with it.

7. In the premises, it is clear that the trial court had the discretion as to whether to impose the death sentence or a custodial sentence. Therefore, the sentence was not illegal.

Whether the court should enhance the sentence

8. Having determined that the sentence was not illegal, the issue of whether the sentence should be enhanced arises. The appellant was sentenced to a total of 20 years in prison as the sentences shall run consecutively. I find that the same is commensurate to the offence committed.
9. The appellant invited the court to find that the period of his incarceration during the trial was not taken into account during sentencing. He submitted that by the time of his conviction he had served three years and ten months in remand. He urged the court to invoke its powers under section 333(2) of the Criminal Procedure Code and consider the time he had served in remand in reducing his sentence. The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is well stated in the case of *Ogalo s/o Owuora 1954 24 EACA 70*. It is well set out that: 'This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice'
10. Upon considering the facts and circumstances of the case, I find that there is no reason to disturb the sentence. I however direct that the sentence to be considered to run from the time the appellant was placed in custody on August 20, 2018. The appeal lacks merit and is hereby dismissed.

DATED, DELIVERED AND SIGNED AT ELDORET ON THIS 8TH DAY OF FEBRUARY, 2023

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JWW MONGARE

JUDGE

Judgment delivered virtually in the presence of;

1. Appellant present
2. Ms Okok for the State
- 3. Loyanae- Court Assistant**

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J.W.W. MONGARE

JUDGE

