



**Ochieng v Republic (Criminal Appeal E039 of 2021)
[2023] KEHC 2637 (KLR) (Crim) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL E039 OF 2021

JM BWONWONG'A, J

MARCH 14, 2023

BETWEEN

KEVIN ONYANGO OCHIENG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. A.R Kithinji, S.P.M, on 21st May 2019 in Makadara Chief Magistrate's Court in Criminal Case No. 2173 of 2016 Republic vs Kevin Onyango Ochieng)

JUDGMENT

1. The appellant was charged, convicted and sentenced to ten years imprisonment in respect of the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the [Penal Code](#).
2. Being dissatisfied with the sentence of the court, the appellant filed an appeal.
In his petition of appellant has raised four (4) grounds.
3. When the appeal was set down for hearing, the appellant abandoned his grounds of appeal save for the ground that the trial court failed to consider the time he had spent in pre-trial remand custody. The appellant urged the court to consider the period and reduce his sentence accordingly. He submitted that he had acquired adequate skills while in prison.
4. In response, Mr Kiragu, learned prosecution counsel urged the court to consider and rely on the record of the trial court.



Analysis and determination

5. Section 333 (2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya provides that: -

'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.'

6. The powers of the court under section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya and the proviso thereto were explained in the Court of Appeal case of *Abamad Abolfathi Mohammed & Another vs Republic [2018] e-KLR*. The court while applying this provision, held that by dint of section 333 (2) of the Criminal Procedure Code, the courts during sentencing ought to take into account the period that the appellants had spent in pre-trial custody before they were sentenced. The Judiciary Sentencing Policy Guidelines further buttresses this legal position as it provides that: -

' 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.'

7. I have perused the trial court record, and I note that upon being convicted and upon the appellant having put forward his mitigation, the trial court considered the social inquiry report, and the circumstances of his defence.

8. He was then sentenced to serve 10 years imprisonment. The right to appeal was also explained.

9. From the record, the applicant was arrested on August 25, 2016. He was arraigned in court to take plea on August 26, 2016. He was granted a bond of Kshs 500,000 with a surety of similar amount. However, he spent the entirety of the trial in custody until his conviction and sentence May 21, 2019. He therefore, spent 2 years, 8 months and 26 days in pre-trial custody. From the record, it is clear that the period was not factored in during his sentencing. Guided by the law, the court is of the view that the appeal on sentence ought to be considered. Failure to do so would amount to denying the appellant his right due to the failure of the court to discharge an obligation bestowed upon it by law.

10. I thus allow the appeal and order that the sentence of 10 years imprisonment imposed on the applicant be and is hereby reduced by 2 years 8 months and 26 days.

11. The sentence will commence from the date of conviction being May 21, 2019.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF MARCH 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua court assistant



The appellant in person

Mr. Mutuma for the respondent.

