



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.121 OF 2019**

**PETER KIMANI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Peter Kimani was convicted of two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. After hearing the evidence, the trial court held that the prosecution had established to the required standard of proof beyond any reasonable doubt that the Appellant, together with others not before court, had on 10<sup>th</sup> November 2016 in Huruma Nairobi County robbed Maurice Juma Musungu and Charles Ateru Allan of Kshs.21,000/-, 2 TV sets, a solar battery and a decoder and in the course of the said robbery, used actual violence to the said Maurice Juma Musungu and Charles Ateru Allan. The Applicant was sentenced to serve ten (10) years imprisonment. The Applicant applied to this court to have the period that he was in remand custody prior to his conviction be taken into account in determining the period that he shall serve in prison. The Applicant told the court that this period was taken into consideration when the trial court sentenced him to serve the custodial sentence in prison.

Ms. Kimaru for the State opposed the application. She was of the view that the sentence of ten (10) years imprisonment that was imposed was lenient taking into account the circumstance in which the robbery took place. She told the court that the Applicant was armed with a dangerous weapon and in the course of the robbery inflicted serious injuries on the complainants. She urged the court to maintain the sentence meted by the trial court.

The Court of Appeal in **Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016** (unreported) held thus at Page 28:

*“By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “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(2) 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.”*

In the present application, it was clear to the court that the trial court did indeed take into consideration that period that the Applicant was in remand custody prior to his conviction. Prior to sentencing the Applicant, the trial court had ordered for a probation report to be prepared. The trial court was also conversant with the Supreme Court’s decision of **Francis Karioko Muruatetu –vs- Republic [2017] eKLR**. The trial court noted the serious nature of the offence and took into consideration the period that the Applicant was in remand custody prior to his conviction. It is not therefore correct as alleged by the Applicant that that period was not taken into account when he was sentenced to serve the ten (10) years custodial sentence. Upon perusing the facts of the case, this court agrees with Ms. Kimaru for the State that the custodial period that was imposed on the Applicant was indeed lenient. The Applicant should ride his luck.

It is clear from the foregoing that the application lacks merit. The Applicant shall serve the sentence that was imposed by the trial magistrate. This court has discerned no error apparent in the record when the Applicant was sentenced. This court shall not interfere with the trial court’s legitimate exercise of judicial discretion when sentencing the Applicant. The application is dismissed. It is so ordered.

**DATED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JUNE 2020**

**L. KIMARU**

**JUDGE**