

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS. 18 & 102 OF 2018

(An Appeal arising out of the conviction and sentence of Hon. A. R. Kithinji - SPM delivered on 4th August 2016 in Makadara CMC. CR. Case No.1476 of 2011)

ABDUL AZIZ ODUOR.....1ST APPELLANT

STEPHEN OMONDI WANYAMA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, Abdul Aziz Oduor and Stephen Omondi Wanyama were charged and convicted of two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 3rd February 2011 at Kahawa Wendani Estate in Nairobi County, the Appellants, jointly robbed Everlyne Munini Mutuku and Augustine Kyalo Mua of their mobile phones and during the course of the robbery, used actual violence to the victims. In the case of Augustine Kyalo Mua, he was fatally injured during the course of the robbery. They were sentenced to serve fourteen (14) years imprisonment. Both Appellants are not appealing against conviction. They are also not directly appealing against the sentence but rather are seeking the intervention of this court to have the period that they were in remand custody taken into account.

During the hearing of the appeal, the Appellants reiterated their plea. They stated that they were in lawful custody from the time of their arrest and during the entire period of their trial before their conviction by the trial court. The Appellants were convicted on 4th August 2016. From the charge sheet, the Appellants were arrested on 4th April 2011 and were arraigned in court on 8th April 2011. From the proceedings, it was clear that during their entire trial, the Appellants were in remand custody. It is this period that the Appellants plead with the court to have taken into account in accordance with **Section 333(2)** of the **Criminal Procedure Code**. It was apparent that although the Appellants brought this fact to the attention of the trial court, the trial court did not take into account this period that the Appellants were in remand custody before sentencing them to serve the custodial sentence. That being the position, the Appellants have made a case to have that period taken into account. During the hearing of the appeal, Ms. Sigei for the State was not opposed to the Appellants' plea to have the period that they were in remand custody taken into account.

This court has carefully considered the facts of this case and the Appellants grounds for seeking to have the custodial sentence meted on them reviewed by this court. It was clear from their submission that the Appellants were entitled to have the period that they had spent in remand custody taken into account before the trial court sentenced them to a custodial sentence. 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 appeal, the period that the Appellants were in remand custody i.e. five (5) years and four (4) months shall be taken into account. Thus the sentence of fourteen (14) years imprisonment imposed by the trial court shall be reduced by the said period of five (5) years and four (4) months. The Appellants shall therefore serve a period of eight (8) years and eight (8) months imprisonment. The Appellants shall also be entitled to remission of their custodial sentences if they qualify due to good behaviour while serving their respective sentences. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE