



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCRA NO. 13 OF 2018**

**DAVID NDAMBUKI MUTISYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant was charged with robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars are that on the 25<sup>th</sup> February 2014 at Kaluu area along Nairobi-Mombasa Highway, Kambu Division of Kibwezi District, the accused jointly with others not before court while being armed (sic) with pangas, arrows, and iron bars robbed **JOSEPHINE MBENZI MAIRURA** of Kshs. 25,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **JOSEPHINE MBENZI MAIRURA**. The accused pleaded not guilty.
2. Alternatively, the accused is charged with handling stolen goods contrary to Section 322 (1) and (2) of the Penal Code. The particulars are that on or around March 2014 at Kambu market, Kambu Division in Kibwezi District, otherwise that in the course of stealing, the accused dishonestly received or retained one mobile phone make motorolla knowing or having reason to believe it to be stolen goods. He pleaded not guilty and matter went into full trial.
3. He was convicted on alternative count of handling stolen goods contrary to section 322 (1) (2) Penal Code Cap 63 Laws of Kenya. In mitigation he stated that the person who was found with the phone was released.
4. He (Appellant) was not found with the phone. He was sentenced to serve 5 years with hard labour on 17/05/2017. The court said it considered the 3 years Appellant was in custody.
5. Being aggrieved with the aforesaid decision, the Appellant lodged instant appeal and set out 4 grounds namely:-

**MEMORANDUM GROUNDS OF APPEAL**

- i. THAT the learned Hon. trial magistrate court erred in fact in convicting Appellant depending on evidence of PW1 who was his accomplice without proper finding that the Appellant was not arrested with anything in criminative to link him with the matter in question.*
- ii. THAT the learned Hon. trial magistrate erred in law and fact in failing to see that the complainant in this case told the court that she did not identify him as one of those who robbed her.*
- iii. THAT the learned Hon. trial magistrate erred in law and fact in failing to see that the prosecution case was poorly investigated for the investigation officer in this case never opened up to the court as to how his arrest was connected with this matter.*
- iv. THAT since the Appellant cannot recall all what was said or adduced as evidence in the entire trial process, he humbly beg this Hon. Court to assist him get certified copy of the trial proceedings so that he can file more strong grounds.*

6. In a nut shell he complained that it was not him who had possession of the pone allegedly handled by him as a stolen property.

7. I note the identification of the phone was only the word of PW6 who said she lost Motorola W230. She never stated its serial number nor produce receipt to confirm ownership. The value of the same was never stated by her.

8. The finding of the Appellant to be guilty on the account of such evidence is leaves a lot to be desired.

9. However the Appellant has abandoned the challenge of his conviction and concentrated on pleading to court to relook at the sentence. He urges court to direct same period be computed from 06/05/2014 when he was taken to court and thus deem to have cleared his 5 years jail term.

10. I have gone through the record and the address to court by both sides. The prosecution left it to the discretion of court to determine whether to grant what Appellant prayed.

The Judiciary sentencing policy guidelines dictates that ; on the ***Time Served in Custody Prior to Conviction;***

***7.10 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.***

***7.11 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.***

***7.12 An offender convicted of a misdemeanor and had been in custody throughout the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be discharged absolutely under section 35 (1) of the Penal Code.***

11. I find it fair in the circumstances of this case to agree with the Appellant that since he was in custody since 06/05/2014, he should be deemed to have served the full term of his sentence.

12. Thus the court orders;

***1) The conviction is affirmed.***

***2) The sentence order is adjusted so as the period is computed from the date of arrest 6/5/014.***

***3) The sentence served to date is adequate thus Appellant to be released forthwith unless otherwise lawfully held.***

**SIGNED, DATED AND DELIVERED THIS 12<sup>TH</sup> DAY OF JULY, 2019 IN OPEN COURT.**

.....

**HON. C. KARIUKI**

**JUDGE**