REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.634 OF 2010

(An Appeal arising out of the conviction and sentence of Hon. T. Ngugi - PM delivered on 3rd November 2010 in Makadara PM. CR. Case No.4174 of 2006)

DOUGLAS OTIENO……..……APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellant, Douglas Otieno was charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He pleaded not guilty to the charge. After full trial, he was convicted of the lesser but cognate offence of **robbery** contrary to **Section 296(1)** of the **Penal Code**. He was sentenced to serve eight (8) years imprisonment. The Appellant is not challenging his conviction. He was aggrieved by the sentence that was imposed on him. He has appealed to this court challenging the said sentence. In his petition of appeal, the Appellant stated that the sentence that was imposed on him was harsh and excessive taking into consideration the circumstances that the offence was committed. He was aggrieved that the trial court had not taken into account the period that he had been in remand custody at the time she meted out the sentence. In the premises therefore, the Appellant urged the court to allow his appeal and sentence him to an appropriate sentence.

During the hearing of the appeal, the Appellant pleaded with the court to exercise leniency on him. He told the court that since his incarceration, he had reformed. He urged the court to release him. Ms. Nyauncho for the State opposed the appeal. She submitted that the Appellant ought to have been convicted of the more serious offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** but was lucky to have been found guilty of the lesser offence of **robbery** contrary to **Section 296(1)** of the **Penal Code**. The maximum sentence provided for such offence is fourteen (14) years imprisonment. The sentence of eight (8) years imprisonment was therefore lenient. She urged the court to dismiss the appeal.

This court has carefully considered the rival submission made by the parties to this appeal. It also had the benefit of perusing the proceedings of the trial court. As stated earlier in this judgment, the Appellant is not appealing against conviction. He is only appealing against sentence. When the trial magistrate sentenced the Appellant to serve the custodial sentence, she was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Appellant or that the sentence was illegal.

In the present appeal, it was clear to this court that the Appellant was essentially raising one issue to challenge the sentence: that the trial court did not take into consideration the period that he had been in remand custody before she sentenced him to serve the custodial sentence. This court is of the considered view that the Appellant has a case when he argues that the period that he was in remand custody ought to have been taken into account at the time he was sentenced by the trial court. The Appellant was arrested on 21st July 2006 and arraigned in court on 1st August 2006. He was charged with the then non-bailable

offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. At the time of his conviction on 3rd November 2010, the Appellant had been in remand custody for four (4) years and four (4) months. **Section 333(2)** of the **Criminal Procedure Code** provides as follows:

> ***"Subject to the provisions of section 38 of the Penal Code 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."***

The **Sentencing Policy Guidelines** published by the Judiciary, provides at Page 20 under the heading ***"Times served in custody prior to conviction"*** thus:

> ***"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 trial."***

In the present appeal, it was clear to this court that had the trial court taken into account the period that the Appellant had been in custody, most probably she would have sentenced the Appellant to serve a lesser period in prison than the one that was imposed.

In the premises therefore, this court finds merit with the Appellant's appeal. As a result, taking into account the period that the Appellant was in remand custody, and the period that he has already served in prison, this court is of the view that the Appellant has been sufficiently punished. He has paid back his debt to society. His custodial sentence is commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF SEPTEMBER 2016

L. KIMARU

JUDGE