



**Marwa & another v Republic (Criminal Appeal 239 of 2018)
[2025] KECA 2297 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2297 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 239 OF 2018
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA
DECEMBER 19, 2025**

BETWEEN

STEPHEN ROBI MARWA 1ST APPELLANT

DANIEL MARWA BOKE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at
Migori, (Mrima J.) dated 28th July, 2018 in HCCRC No. 71 of 2014)*

JUDGMENT

1. This is a first appeal against the sentence imposed on the appellants, Stephen Robi Marwa and Daniel Marwa Boke by the High Court of Kenya at Migori in Criminal Case No. 71 of 2014, wherein the appellants, faced the information charging them with murder contrary to Section 203 as read with Section 204 of Penal Code. They were accused of murdering one, Solomon Adams Mwita, “the deceased”.
Upon conviction, they were each sentenced to twenty years imprisonment.
2. The facts resultant to this appeal are that on 12th June 2013, at Kurutiange Market in Kuria West, Migori County, the deceased, Solomon Adams Mwita, was fatally attacked in circumstances implicating the two appellants and one Charles Nyamohanga (now deceased).
3. Being aggrieved by the sentence, the appellants lodged the instant appeal on one single ground that the trial court erred in law and fact, by failing to factor in the time spent by the appellants in custody while sentencing them, hence arriving at a wrong decision.



4. When the appeal came up for hearing, the appellants were represented by Ms. Onyango, learned counsel, while Ms. Ikol, learned Assistant Director of Public Prosecutions, appeared for the respondent.
5. Counsel for the appellants challenged the trial court's sentence on the basis that it failed to take into account their pre-trial incarceration while imposing the sentence which was, contrary to the provisions of Section 333(2) of the Criminal Procedure Code. She argued that the appellants had spent over three years in custody before being granted bail, and had served an additional seven years post-conviction. Citing *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, counsel emphasized that courts must proportionately reduce sentences to reflect time spent in remand custody. Counsel also relied on the 2023 Judiciary Sentencing Guidelines, which direct that time spent in remand custody be factored into the eventual sentence. Counsel finally prayed that the sentence imposed be set aside and or recalculated accordingly.
6. In response, Ms. Ikol conceded to the appeal stating that she was cognizant of the provisions of Section 333(2) of the Criminal Procedure Code which creates a legal obligation for the sentencing court to order that in computing period of sentence; time spent in remand custody be factored in.
7. The main issue for determination in this appeal is whether the trial court erred by failing to take into account the period the appellants spent in remand custody whilst sentencing the appellants contrary to the mandatory provisions of Section 333(2) of the Criminal Procedure Code. That section provides interalia:

“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.”
8. The appellants contended, and the respondent conceded, that they were arrested on 12th June 2013 and remained in custody until their release on bail sometimes in November 2016, three or so years later.
9. In *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, this Court clarified that:

“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.”

However, this principle must be applied contextually.
10. In the present case, the trial court imposed a sentence of twenty (20) years' imprisonment for the offence of murder, which under Section 204 of the Penal Code attracts a maximum sentence of death. The sentence imposed was therefore significantly below the statutory maximum and cannot be deemed as excessive or disproportionate. However, the record does not show that in imposing the sentence, the trial court as legally required, took into account the period that the appellants remained behind bars as their trial was being processed. To this extent, the trial court misdirected itself and we are therefore entitled to interfere.
11. To that extent, the appeal succeeds. Whereas we uphold the sentence imposed, we nonetheless direct their sentences will take into account the period from their arraignment in court until sometimes in November 2016, when they were each respectively released on bail.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2025

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

