

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VIHIGA**  
**CRIMINAL APPEAL NO E009 OF 2024**

**NELSON OSENDI ALIAS NELI.....**  
**APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

**(Being an Appeal from the Judgment of Hon R. M. Ndombi (SRM) delivered at Vihiga in the Principal Magistrate's Court in Criminal Case No 260 of 2019 on 1<sup>st</sup> March 2021)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code.
2. The Learned Trial Magistrate, Hon R. M. Ndombi (SRM) convicted and sentenced him to fifteen (15) years imprisonment.
3. Being dissatisfied with the said decision, on 13<sup>th</sup> February 2024, he lodged an appeal herein. His Petition of Appeal was dated 8<sup>th</sup> January 2024. He set out nine (9) grounds of appeal.
4. His undated Written Submissions were filed on 20<sup>th</sup> May 2025 while those of the Respondent were dated 10<sup>th</sup> September 2025 and filed on 17<sup>th</sup> November 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

**LEGAL ANALYSIS**

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that all the grounds of appeal were related and the only issue that had been placed before it for determination was whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The Appellant faulted the Trial Court for failing to consider that he was a first offender rendering his mitigation ineffective. He referred to a First Report about Eugene Wanyama Etale, the Complainant (hereinafter referred to as "PW 1") having been defiled by a person that he knew. He submitted that he was framed for the offence because he had differences with PW 1's mother.
9. He further faulted the Trial Court for having said that its hands were tied because such cases were rampant in Vihiga. He urged this court

to consider his case and not compare it with others and consider a non-custodial sentence. He placed reliance on Section 362, 364(1) and 365 of the Criminal Procedure Code and prayed for a non-custodial sentence.

10. He cited Section 26 (2) of the Penal Code and placed reliance on the case of **Makanga vs Republic Criminal Appeal No 972 of 1989** (unreported), **Mathai vs Republic (1983) KLR 442** and **Hezekia Mwaura Kibe vs Republic (1976) KLR 118** without highlighting clearly the holding he relied on therein.
11. He averred that he was a young man who was influenced by peers into the commission of the offence and hence, sought a second chance in life to take care of his family. He contended that he had undergone rehabilitation programs while in prison, which had shaped him into a better and suitable person for reintegration into the society to utilise the skills he had acquired. He pleaded with the court to appreciate his total behavioural change and gains made through rehabilitation during the period he had spent in the correctional facility.
12. He submitted that in the event this court reduced his sentence, it should consider Section 333(2) of the Criminal Procedure Code which the Trial Court failed to take into account. He argued that the omission by the Trial Court was not in promotion of a fair trial guaranteed under Article 25(2) of the Constitution of Kenya, 2010.

13. On its part, the Respondent opposed the Appellant's appeal. It argued that the charge of robbery with violence provided for a death penalty once one had been convicted but that in the recent jurisprudence in **Petition No 15 and 16 (Consolidated) of 2015 Francis Karioko Muruatetu & Another vs Republic** (eKLR citation not given), courts had been empowered to impose lesser sentence than death after considering the mitigation of an accused person.
14. It further submitted that in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra), the court held that the guidelines applicable with regard to mitigating factors in re-hearing sentence for the conviction of murder charge included age of the offender, whether the offender was a first offender, whether he pleaded guilty, the character and the record of the offender, the commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and re-adaptation of the offender plus any other factor that the court considers relevant.
15. It cited Section 216 and 309 of the Criminal Procedure Code and averred that the Appellant was given an opportunity to mitigate before his sentencing at the Trial Court. It was emphatic that the sentence imposed on him was lenient and that the Trial Court found it appropriate after considering the mitigating factors. It urged the court to disallow the Appeal herein.

16. Notably, the Appellant was found guilty of the offence of robbery with violence. Section 295 of the Penal Code states that:-

**“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”**

17. Further, Section 296 (1) and (2) of the Penal Code provides as follows:-

**1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.**

**2. If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.**

18. The Trial Court sentenced the Appellant to fifteen (15) years imprisonment for the offence of robbery with violence. In the mind of this court, the Trial Court was very lenient as it had the option of sentencing him to death.

19. In view of the atrocity that was meted on PW 1 in the nature of deep cuts that warranted a theatre procedure, this court found and held that the circumstances of this case warranted a higher sentence than what was meted upon the Appellant. However, enhancing his sentence would cause him great prejudice. This was because the Respondent did not issue him with a Notice of Enhancement of the sentence which could have allowed him to make an informed decision as to whether he wished to continue with the Appeal herein. As a result, this court left the sentence of fifteen (15) years imprisonment undisturbed

20. Going further, this court was mandated to consider the period the Appellant spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

21. The said Section 333(2) of the Criminal Procedure Code provides that:-

**“Subject to the provisions of section 38 of the Penal Code (cap 63) 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”**

(emphasis court).

22. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:-

**“The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:...**

**Time already spent in prison by the convict...”**

23. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs Republic**(Supra).

24. The Charge Sheet indicated that the Appellant was arrested on 15<sup>th</sup> February 2019. Although he was granted bond on 30<sup>th</sup> September 2019, he does not appear to have posted the same. He was convicted on 1<sup>st</sup> March 2021 and sentenced on 7<sup>th</sup> April 2021.

25. A perusal of the lower court proceedings showed that the Trial Court did not take into consideration the said period that the Appellant spent in custody during trial while sentencing him. This was a period that ought to be taken into consideration while computing his sentence.

26. In the premises foregoing, Grounds of Appeal No (1), (2), (3), (4), (5), (6), (7), (8) and (9) of the Petition of Appeal were not merited and the same be and are hereby dismissed. His prayer under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws

of Kenya) was found merited and the same be and is hereby allowed.

**DISPOSITION**

27. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated 8<sup>th</sup> January 2024 and lodged on 13<sup>th</sup> February 2024 was not merited save for the ground of appeal regarding Section 333(2) of the Criminal Procedure Code. The Appellant's conviction and sentence be and is hereby upheld as they were both safe.

28. It is hereby directed that the period between 15<sup>th</sup> February 2019 and 30<sup>th</sup> September 2019 and between 1<sup>st</sup> March 2021 and 6<sup>th</sup> April 2021 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

29. It is so ordered.

**DATED** and **DELIVERED** at **VIHIGA** this **19<sup>th</sup>** day of **March** 2026

**J. KAMAU**  
**JUDGE**