REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CRIMINAL APPEAL NO E003 OF 2025

PETER KAVAI KEYA……. APPELLANT

VERSUS

REPUBLIC……. RESPONDENT

(Being an Appeal from the Judgment of Hon J.A. Agonda (PM) delivered at Vihiga in Principal Magistrate's Court in Criminal Case No 248 of 2020 on 20th January 2025)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged jointly with five (5) others with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya).
2. He was tried and convicted by the Learned Trial Magistrate, Hon J.A Agonda (PM) who sentenced him to twenty five (25) years imprisonment.
3. Being dissatisfied with the said Judgement, on 21st February 2025, he lodged the Petition of Appeal herein. The same was dated 20th February 2025. He set out six (6) grounds of appeal. Subsequently, on 25th July 2025, he filed Supplementary Grounds of Appeal dated 4th July 2025. He set out two (2) Supplementary Grounds of Appeal.
4. His Written Submissions were dated 4th July 2025 and filed on 25th July 2025 while those of the Respondent were dated and filed on 18th August 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 but 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. In his Petition of Appeal, the Appellant had challenged his conviction but in his Supplementary grounds of Appeal and submissions, he only challenged the sentence.
8. Having looked at his Supplementary Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that 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.

9. As his submissions raised two (2) limbs under the said issue of sentence, this court dealt with the same under the following separate and distinct heads.

I. REMISSION OF THE SENTENCE

10. Supplementary Ground of Appeal No (1) was dealt with under this head.

11. The Appellant submitted that the Trial Court erred in not granting him a discount of up to one third (1/3) of twenty five (25) years sentence pursuant to Paragraph 4.3 to 4.3.9 Sentencing Policy Guidelines, 2023 after he pleaded guilty during his defence.

12. He was emphatic that having pleaded guilty, he ought to have benefited from the above provisions. He further stated that his Co-Accused persons were sentenced to twenty (20) years imprisonment and hence, there was discrimination and biasness on his part.

13. On its part, the Respondent submitted that the one third (1/3) reduction principle as stated in the Sentencing Policy Guidelines was a principle meant to ensure that sentences were fair, proportionate to the crime and also to take into account mitigating factors **(sic)**. It asserted that the same was not a mandatory reduction and the court has the discretion to apply the principle.

14. It stated that the sentence meted out on the Appellant was to instill a sense of responsibility for his actions and also allow for his rehabilitation. In this regard, it placed reliance on the case of **Republic vs Jagani & Another (2001) KLR 590** where the court

held that the purpose of sentence was to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in rehabilitation by providing for reparation for harm done to victims in particular and to society in general.

15. It submitted that the Trial Court considered the Sentencing Policy Guidelines of 2023 and its objectives and that the Appellant was given an opportunity to mitigate. It added although the Probation Pre-sentence Report was not favourable, the court still granted a lenient sentence.

16. Notably, Paragraph 4.3.1 of the Sentencing Policy Guidelines,2023 states as follows:-

“Although a guilty person is entitled not to admit the offence and to put the prosecution to proof of its case, an acceptance of guilt, reflected in a guilty plea:

i. **Normally reduces the impact of the crime upon the victims;**
ii. **Saves victims and witnesses from having to testify; and**
iii. **Is in the public interest in that it saves public time and money on investigations and trial.”**

17. Paragraph 4.3.2 of the Sentencing Policy Guidelines provides that:-

“In order to maximise these benefits, and to provide an incentive to those who are guilty to indicate a guilty plea as early as possible, this guideline suggests that a reduction in sentence should always follow upon a guilty plea.”

18. Paragraph 4.3.6 of the Sentencing Policy Guidelines stipulates that:-

“Where courts are satisfied that it is safe to accept a plea of guilty, they should grant a discount after considering the appropriate sentence based on culpability and harm specific to the offence alongside other aggravating and mitigating features. Once the court has arrived at that sentence, a discount of up to one third of the sentence should be applied where the offender has pleaded guilty at the earliest opportunity. Thereafter, e.g., where an offender has pleaded guilty just before, or during trial, a lesser reduction may be afforded.”

19. A perusal of the proceedings showed that the Appellant never pleaded guilty to the charges. He entered a plea of not guilty and trial proceeded to its full conclusion. He only admitted to having committed the offence when he was tendering his defence,. It was, therefore, the view of this court that he could not benefit from the provisions of Paragraph 4.3.6 of the Sentencing Policy Guidelines as he did not plead guilty when the charges were read to him which could have saved judicial time and resources.

20. Notably, the Appellant and one Stanley Musungu, were each sentenced to twenty five (25) years imprisonment. Their other Co-Accused persons were, however, sentenced to twenty years (20) years imprisonment for the same offence. While sentencing the Appellant herein, the Trial Court considered his mitigation and aggravating factors. It also took into account that he had been convicted in another offence related to the instant case. The Trial court never stated if this was the reason why it sentenced him to twenty five (25) years imprisonment.

21. Although it was discriminatory for the Trial Court to have sentenced the Appellant herein and one Stanley Musungu to a higher sentence despite finding that all accused persons were guilty of the same offence of robbery with violence, this court, nonetheless, noted that it was meting out thirty five (35) years imprisonment to persons who had been convicted of the offence of robbery with violence and gang rape when they filed re-sentencing application. This court was, however, not persuaded that it should enhance the sentence as no notice had been issued to the Appellant herein informing him that there was a risk of the sentence being enhanced if his Appeal was to be unsuccessful.

22. As the Trial Court still had the option of sentencing him to death, this court found the sentence of twenty five (25) years to have been fair and did not, therefore, interfere with the same. This court set aside the convictions and sentences of his Co-Accused persons in **HCCRA No E006 of 2025, HCCRA No E007 of 2025**,

HCCRA No E008 of 2025 and **HCCRA No E018 of 2025** who had been sentenced to twenty (20) years imprisonment and hence, there would be no discrimination if this court left the twenty (25) years imprisonment undisturbed.

23. In the premises foregoing, Supplementary Ground of Appeal No (1) was not merited and the same be and is hereby dismissed.

II. RUNNING OF THE SENTENCES

24. Supplementary Ground of Appeal No (2) was dealt with under this head.

25. The Appellant averred that the Trial Court erred in not having directed that the sentences in **Cr Case No 248 of 2020** and **SO Case No 10 of 2020** should run concurrently.

26. He stated that the two offences were committed under the same transaction or criminal intent though were tried in different courts. He stated that he ought to have benefited from the provisions of Sections 12 and 14 of the Criminal Procedure Code and Section 37 of the Penal Code.

27. He cited the case of **Peter Mbugua Kabui vs Republic (2016) eKLR** where the court emphasised that where a person committed more than one offence at the same time and in the same transaction, save in very exceptional circumstances, a concurrent sentence ought to be imposed as was held in the case of **BMM vs Republic Criminal Appeal No. 97 of 2013 [2014] eKLR**. He pointed out that if separate and distinct offences were committed in

different criminal transactions, even though the counts might in one (1) charge sheet and in one (1) trial, it was not illegal to mete out a consecutive term of imprisonment.

28. The Respondent did not oppose the Appellant's plea for the sentences to run concurrently. It submitted that Sections 12 and 14 of the Criminal Procedure Code and Section 37 of the Penal Code provide for instances where the sentences could run consecutively and concurrently. It submitted that the courts were required to consider factors like the nature of the offences, their connection and whether they constituted a single transaction when deciding whether to impose concurrent or consecutive sentences. It placed reliance on the case of **B.M.N. vs Republic** (Supra) to buttress its arguments.

29. It argued that the offences were committed in the same transaction and the victim was one hence the Appellant's prayer that the sentences in the two criminal cases do run concurrently was tenable in the circumstances of the case.

30. A perusal of the proceedings showed that initially, the Appellant and his Co-Accused persons were charged on two (2) counts, one on robbery with violence and the other on gang rape. They were also charged with an alternative count of committing an indecent act with an adult. On 11th March 2020, the Prosecution separated the counts and amended its Charge with only one (1) count of robbery with violence being tried in **Criminal Case No 248**

of 2020. The said Charge Sheet also indicated that the Appellant and his Co-Accused persons raped one EC, the Complainant herein.

31. Under Section 37 of the Penal Code Cap 63 (Laws of Kenya), the trial court was given discretion to determine whether sentences imposed subsequent to prior conviction and sentence of the convict in a different case could be executed concurrently with the former sentence. The said provision provides as follows:-

"Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof."

32. It was the view of this court that the Trial Court had the discretion to order the two (2) sentences in **Criminal Case No 248 of 2020** and **Sexual Offences Case No 10 of 2020** to run concurrently since they were committed at the same time in a single transaction and the victim was the same. Failing to direct that the sentences run concurrently led an error which called for interference by this court.

33. 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).

34. 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).

35. 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:…

(ix) Time already spent in prison by the convict…"

36. 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 [2018] eKLR**.

37. Notably, the date of arrest was not indicated in the Charge Sheet. The Appellant was, however, arraigned in court on 10th March 2020. He was denied bond and he was sentenced on 17th February 2025. It was important to note that Court administrator Dinah Kusa (PW 9) testified in **Criminal Case No 248 of 2020** that the Appellant was convicted in and **Sexual Offences Case No 10 of 2020** on 29th September 2022 from which date he started serving a lawful sentence.

38. The proviso to Section 333 (2) of the Criminal Procedure Code was clear that the same applied to the period the convict was in remand custody awaiting conclusion of his trial and did not apply from when the convict started serving a lawful sentence in a different case during the trial.

39. A perusal of the lower court proceedings indicated that the Trial Court did not take into consideration the said period while sentencing the Appellant. This was a period that, therefore, ought to be taken into consideration while computing his sentence.

40. In the premises foregoing, Grounds of Appeal No (1) and (2) of the Amended Grounds of Appeal were merited and the same be and are hereby allowed.

DISPOSITION

41. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 4th July 2025 and filed on 25th July 2025 were partly merited only to the extent of

when the sentence ought to start running. His conviction and sentence be and are hereby upheld as they were both safe.

42. It is hereby directed that sentences in **Criminal Case No 248 of 2020** and in **Sexual Offences Case No 10 of 2020** shall run concurrently.

43. It is further directed that the period between 10th March 2020 and 28th September 2022 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).

44. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **30th** day of **April** 2026

J. KAMAU
JUDGE