

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL REVISION NO. E077 OF 2025**

**POLYCARP IKIMU .....**

**APPLICANT**

**VERSUS**

**REPUBLIC.....**

**RESPONDENT**

**Coram: Before Justice R. Nyakundi**

**M/s Sidi for the state**

**RULING**

1. This Applicant was charged, tried, and convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offences were as follows:

*The particulars of the first count were that 'On the 30th day of December 2013 at Chemoset village in Eldoret West District within Uasin Gishu County, jointly while armed with offensive weapon namely Somali sword, rungu, robbed Jason Kipserem Too one mobile phone make Nokia, Kshs. 2000/=all valued at Kshs. 5000/= and immediately after the time of such robbery used actual violence to the said Jason Kipserem Too. 'The particulars of the second count were that 'On the 30th day of December 2013 at Chemoset village in Eldoret West District within Uasin Gishu County jointly while armed with offensive weapon namely Somali sword, rungu, robbed Jane Too one mobile phone make Nokia, cash Kshs. 2500/= all valued at Kshs. 4500/=and immediately after the time of such robbery used actual violence to the said Jane Too.' The particulars*

*of the third count were that 'On the 30th day of December 2013 at Chemoset village in Eldoret West District within Uasin Gishu County jointly while armed with offensive weapon namely Somali sword, rungu, robbed Isabella Chepkemboi one mobile phone make Nokia, Kshs. 5500/=, Laptop make Sony and a computer phone all valued at Kshs. 123,500/= and immediately after the time of such robbery used actual violence to the said Isabella Chepkemboi.*

2. The Trial Magistrate sentenced the Applicant to suffer death, however on appeal the High Court considering the issues raised in the memorandum of appeal ruled as follows:

- a. *In the case of **R v. Tabulayenka s/o Kirya (1943) EACA 51** the Court of Appeal of East Africa held that common intention may be inferred from the accused presence, their actions and omissions of either of them to disassociate himself from the assault. In this case the Appellant, the deceased and the other one who is at large executed a common unlawful intent against the complainants.*
- b. *The attackers also used actual violence on PW1 and PW2. The P3 Forms filled by PW5 vouched for that. There is evidence that they used weapons like knives and rungu as well as blows. The rungu and knives were dangerous weapons in the circumstances of this matter. As for PW3, there is evidence that the Appellant was armed with a knife and a rungu and was in the company of the deceased as they commandeered her.*
- c. *As to whether there was theft, there is as well evidence to that end. PW1 lost Kshs. 2,200/= and a mobile phone, PW2 lost Kshs. 2,000/= in cash, Kshs. 4,000/= in electronic form and her mobile phone. PW3 lost Kshs. 5,500/= and a Samsung Galaxy Tablet. That evidence was uncontroverted. It is therefore reasonable and*

believable that PW1, PW2 and PW3 lost their items in the attack and that constitutes theft.

- d. The upshot is that all the ingredients of the offence of robbery with violence in each of the here counts were proved. The Appellant was hence rightly found guilty and convicted.

**The other issues raised by the appellant:**

- e. The Appellant further raised several other issues which I must consider. One of them was that none of the lost items were recovered from him. The Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret Peter Okee Omukaga & Another vs Republic (unreported)** rightly stated that such non-recovery of the items did not in any way point to the innocence of the Appellants. On whether **Article 50(2)(h)** of the **Constitution** was infringed during the trial, this Court concurs with the position taken by the State that the Appellant was charged during the transition period as provided for under the **Fifth Schedule** of the **Constitution** hence no violation.
- f. The Appellant also contended that the sentence was very harsh, unconstitutional and excessive. I have looked at the sentencing proceedings where the Court was then rightly guided by the mandatory nature of the then sentence. The Court then had no option but to hand down the death sentence.
- g. That legal position has by now changed Courtesy of the Supreme Court in **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR**. The Court, rightly so, found and held that the mandatory nature of the death sentence in capital offences is

*unconstitutional since mitigation is an important congruent element of fair trial. The Supreme Court remitted the matter to the High Court being the trial and sentencing Court for purposes of sentence re-hearing. I have no doubt that such remain the only reasonable way forward as the sentencing Court will receive appropriate submissions from the prosecution and the defence prior to the sentencing.*

*h. One thing which I must clarify is that although the decision in **Francis Karioko Muruatetu** (supra) was on a murder case, the position changes not in the case of robbery with violence cases since **Section 296(2)** of the **Penal Code**, Cap. 63 of the Laws of Kenya provides the only sentence on conviction to be a death sentence.*

*i. The upshot of the foregone analysis is that the appeal is dismissed on conviction and allowed on sentence only. The matter is hereby remitted to the Chief Magistrate's Court at Eldoret for hearing on sentence only and on priority basis. It is so ordered.*

3. Following the order of the session Judge the Chief Magistrate Eldoret sentence the Applicant to 20 years custodial sentence for the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

4. He has now moved the Court in a notice of motion pursuant to Section 333(2) of the Criminal Procedure Code, Section 4 of the Probation of Offenders Act, Article 50(2)(p) of the Constitution, amongst other enabling law provisions. The Applicant seeks the following orders:

*a. THAT, the period spent by the appellant in pre-trial detention as from 30.12.2012 to 26.06.2015 (2 years, 5 months and 27 days) be computed into the twenty (20) years sentence imposed by the High*

*Court pursuant to the Court of Appeal's decision in Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743(KLR) and the Constitutional's Court decision in Jona & 87 others v Kenya Prison Service & 2 others [2021]KEHC 457 (KLR) and in adherence with Section 333(2) of the Criminal Procedure Code.*

- b. *THAT, the Court be pleased to review and grant probation orders in respect of the remaining period of the sentence of the applicant, which has less than three years to serve.*
  - c. *THAT, the Court be pleased to consider the applicant's conduct, rehabilitation, and other relevant factors in the granting of the probation order.*
  - d. *THAT, the Court be pleased to set such terms and conditions as it deems fit for the applicant's probation.*
  - e. *THAT, the Court do issue such other or further orders as it may deem fit and just in the circumstances.*
5. This Application essentially is about interpretation of Section 333(2) of the CPC on pretrial detention which by law must be a period an offender spent in remand awaiting trial of his/her case. The objective of the section is that upon the offender being found guilty and subsequently convicted any custodial sentence imposed must take into account the period spent in remand custody hence the words giving credit to the offender for the period he was in custody.

### **Decision**

6. The principles under Section 333(2) of the CPC are now well settled as demonstrated in the following case law:

*"A declaration that trial Courts are enjoined by section 333(2) of the Criminal Procedure Code, in imposing sentences, other than sentence of death to take into account of the period spent in custody. A declaration that those who were sentenced in violation of the said section are entitled to have their sentences reviewed by the high Court in order to determine their appropriate sentences. A declaration that Section 333(2) CPC applies to the original sentence as well as sentence imposed during sentencing..."*

7. Additionally, in **Ahamad Ablofathi Mohammed & another v Republic [2018] eKLR** where the Court of Appeal held that:

*"The second is the failure by the Court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code, the Court was obliged to take into account the period that they spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial Court. With respect, there is no evidence that the Court took into account the period already spent by the appellants in custody. "taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionality by the period spent in custody. It is not enough for the Court to merely state that it is has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the Court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate Court misdirected itself*

*in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012."*

8. Sentencing is an integral part of criminal proceedings. As such, it is a matter governed by procedural law. The sentencing guidelines contemplated by Section 333(2) of the CPC are inherently transformative and forward-looking. Not only are they intended to give effect to the sentences prescribed by the Legislature in a Statute, but also to achieve a criminal justice system that imposes punishment that is just to society, vindictive of the interests of the victims of crimes, and commensurate with the nature of the crime and the offender.
9. On sentencing matters appellate Courts are required to show defense to the trial Judge's decision, absent an error in law, an error in principle to the imposition of a sentence that is demonstrably unfit in the circumstances. In the Kenyan jurisdiction there is no authority given to the trial Courts for the dating back of any sentence in favor of an accused person. The sentence as by dint of the law is expected only to bear the date on which the learned trial Magistrate or Judge pronounces himself or herself when imposing the verdict on sentence. The only rider being the interpretation of Section 333(2) of the Criminal Procedure Code, providing for any period of incarceration which the accused has already undergone between the date of his or her arrest and the date of sentence to be taken into account as a material factor. This provision empowers trial Judges and Magistrates with a substantive powers to count pre-sentence custody in fixing the fair, proportionate and length of sentence to be served. There is need therefore to interpret Section 333(2) of the CPC so as to avoid conflict within its internal provisions and the applicable penal Statute under which the accused has been charged and punishment prescribed to avoid absurd results by searching for internal coherence and consistency in the statute.

10. International law dictates that time spent in pre-trial detention must be credited toward the final sentence, based on the principle of fairness and the presumption of innocence. Because pre-trial detention is considered an exceptional measure rather than the rule, international standards emphasize that any deprivation of liberty before trial must be deducted from the overall sentence imposed.

11. The key international standards on pretrial detention include the following guideline principles:

- **Presumption of Innocence:** *Under international human rights law, including the Universal Declaration of Human Rights (Article 9) and the International Covenant on Civil and Political Rights (ICCPR), all persons are presumed innocent until proven guilty, making the excessive use of pre-trial detention a human rights issue.*
- **Last Resort Principle:** *Pre-trial detention is permitted only when absolutely necessary (e.g., to prevent absconding or interference with justice) and should not be used as a default measure.*
- **Right to Liberty and Security:** *Article 9(1) of the ICCPR states that no one shall be deprived of their liberty except on grounds and in accordance with procedures established by law.*
- **Time Calculation:** *While international standards strongly suggest crediting this time, specific mechanisms often rely on domestic implementation of these international norms.*

12. In so far as this application is concerned, the record shows that he was first arraigned in Court on 2<sup>nd</sup> January 2014. He was later to be sentenced to suffer death and following an appeal by the High Court delivered on 1<sup>st</sup> November 2018 an order was issued to the CM's Court to conduct a hearing on sentence. That hearing culminated on the death penalty to be varied, reviewed and substituted with custodial sentence of 20 years imprisonment. This sentence should be and shall be deemed to be computed from 2<sup>nd</sup> January 2014 when the Applicant was first arraigned in

Court and there is no evidence that he had been released on bail under Article 49(h) of the Constitution. Therefore, the credit period for pretrial detention forms part of the computation of sentence is so served in consonant with Section 333(2) of the CPC. The committal warrant to prison dated 23<sup>rd</sup> of November 2018 shall be amended to give effect to the provisions of the CPC that the sentence shall be presumed to commence on the 2<sup>nd</sup> January 2014 to date being the date the correctional facilities shall also take into account a third of the remission within our regulatory framework

**DATED, DELIVERED AND SIGNED VIA CTS AT ELDORET THIS 6<sup>TH</sup> DAY  
OF MAY 2026.**

.....

**R. NYAKUNDI**

**JUDGE**