



**Bosuben v Republic (Criminal Appeal 31 of 2019)  
[2025] KECA 130 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 130 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 31 OF 2019  
MA WARSAME, S OLE KANTAI & WK KORIR, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**AUGUSTINE KIPKEMOI BOSUBEN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nakuru  
(Mumbi Ngugi, J.) dated 27th February, 2019 in H.C.CR.C No. 13 of 2014)*

**JUDGMENT**

1. The appellant was charged and convicted by the High Court (Mumbi Ngugi, J. as she was then) for Murder contrary to Section 203 as read with Section 204 of the Penal Code and was sentenced to 20 years' imprisonment.
2. The appellant's appeal to this court is against his sentence which he framed as follows:

“The learned Judge erred in law and fact to take into account in a meaningful way the period that the appellant had spent in custody as required by Section 333(2) of the Criminal Procedure Code”.
3. The appellant has called upon us to interfere with the sentence meted by the trial court, in that the time spent in custody during the pendency of his trial was not taken into consideration.
4. When the matter came up for hearing, Mr. Alphonse Barrack represented the appellant while Mr. Omutelema, Senior Assistant Director of Public Prosecutions, represented the respondent.
5. Citing the case of Ahamad Abolfathi Mohammed & Sayed Mansour Mousavi vs Republic [2018] KECA 743 (KLR), Counsel for the appellant submitted that “Taking into account” of 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. It is not enough for the court to merely state that it 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.

6. According to counsel, the 20 year prison sentence began running from 27<sup>th</sup> February 2019, when the trial court's ruling on sentence was delivered, which is erroneous and illegal.
7. On his part, learned counsel for the respondent, argued that the record shows that the learned judge considered the mitigating and aggravating circumstances and also took into account the five years the appellant spent in lawful custody in imposing an appropriate sentence and that the trial court had stated so in sentencing the appellant to a term of 20 years' imprisonment.
8. Counsel further submitted that the sentence was neither harsh nor excessive in view of the circumstances of the offence, which are that : he fatally stabbed one Vincent in the head and on the cheek with a knife after a quarrel in a bar, when the deceased refused to buy him alcohol, that the medical report indicated the deceased died from a 9-inch stab wound on the head that resulted in laceration of the left external jugular veins and carotid vein resulting in massive hemorrhage and lastly that the appellant admitted that he and the deceased fought while intoxicated, but that he acted in self defence and stabbed the deceased with the knife he used to repair shoes. We were consequently urged to dismiss the appeal.
9. We have considered the submissions by the parties and the law.

The sole question for our determination is whether in sentencing the appellant, the court failed to take into consideration Section 333(2) of the Criminal Procedure Code. The Section provides:

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 ours

10. The trial court in sentencing the appellant considered the mitigation of the appellant, the probation report submitted by the probation officer and the circumstances of the case. The court in considering section 333(2) expressed itself as follows:
11. It is now settled that sentence is a matter that rests in the discretion of the trial court and that sentence must depend on the facts of each case. On appeal, such as this, the court will not easily interfere with sentence unless it is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle.
12. The position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola s/o Owoura vs Reginum (1954) 21 270 as follows:-

The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a



somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James V R., (1950) 18 E.A.C.A 147:

It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. V Sher Shewky, (1912) C.C.A. 28 T.L.R. 364."

13. In our view there is no evidence to show that the learned Judge failed to take into consideration any material issue or that he disregarded any material factor. The learned trial Judge took into account every matter that was urged before her including that the appellant had spent time in custody. We wholly agree with the Judge that the appellant took the life of another person while inebriated. He took his knife and stabbed the deceased in the neck so violently, that he severed the carotid and jugular veins and did not intend that the deceased should live.
14. The sentence meted out was well deserved, within the law and proportionate to the crime committed. The sentence in the circumstances, including the period spent in custody, is just. Consequently we find no reason to interfere with it and, we order this appeal to be and is hereby dismissed in its entirety. Orders accordingly.

**DATED AT NAKURU THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**S. Ole KANTAI**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

