



**Itiriani v Republic (Criminal Appeal 116 of 2019)  
[2023] KECA 929 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 929 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CRIMINAL APPEAL 116 OF 2019  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
JULY 28, 2023**

**BETWEEN**

**JAMES ITIRIANI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the judgement of the High Court at Eldoret (Githinji J.) on 13th November, 2018) in Criminal Appeal NO. 4 of 2011)*

**JUDGMENT**

1. This is the first appeal of James Itiriani, the appellant, against the judgement of S M Githinji J at the High Court at Eldoret, dated 13<sup>th</sup> November, 2018. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The judge found him guilty as charged and sentenced him to serve 30 years imprisonment.
2. The particulars of the offence were that on the night of 10<sup>th</sup> and 11<sup>th</sup> January, 2011 at an unknown time, at Karuma area in Uasin Gishu district within the then Rift Valley province, the appellant murdered Peter Elar Eregai.
3. The appellant pleaded not guilty to the offence, precipitating the trial in which the prosecution called seven witnesses to prove their case. At the close of the prosecution case the appellant was found to have a case to answer. He testified without oath in his defence and did not call any witness.
4. The sum of the case for the prosecution was that Johnson Kiptum Murrey (PW1), introduced his cousin the deceased to Jackson Kamreg, who employed him to tend his cows. The deceased shared a house with the appellant who also worked for the same employer and the appellant later sold him a bicycle at Kshs. 3000/-.



5. On 8<sup>th</sup> January, 2011 the deceased divulged to PW1 that he intended to travel home to Turkana, as soon as the appellant gave him a receipt for the bicycle he had sold to him. PW1 did not see the deceased again after that day. On 11<sup>th</sup> January, 2011 PW1 saw the appellant riding the bicycle that the deceased had bought from him and enquired where the deceased was and why he was the one riding his bicycle. The appellant told him that the deceased had gone to look for work elsewhere, and that he had refunded the purchase price of the bicycle to the deceased.
6. On 15<sup>th</sup> January, 2011, the sons of Julius Kipngetich Koech (PW4's), made a macabre finding. They came upon the charred remains of the body of the deceased lying in one Johnson Murei's farm. The farm owner reported the matter at Moiben police station. CPL Joseph Kamau, (PW7) and another officer made the initial scene visit on that date and returned the following morning in the company of the Officer in charge of their station. The body had been burnt using maize cobs and was in a bad condition, but Johnson Murei recognized it as the body of the deceased by the remaining pieces of clothe on the body.
7. The police visited the house the appellant and the deceased were living in and found blood spatters on the wall and the un-cemented floor. The police recovered a machete from the house and collected blood samples from the floor and the wall. They also took a blood sample from the appellant who was with them during the scene visit.
8. Moses Muhu Mwaura (PW6), examined the samples and established that the blood sample collected from the appellant was of blood group O, while the deceased belonged to blood group B. The soil and the machete were stained with human blood of group B, similar to the deceased's blood group.
9. Dr. Macharia Benson (PW3), conducted the autopsy on the body of the deceased on the 20<sup>th</sup> January, 2011. He observed that the body was burnt beyond recognition, but he found that there was a cut wound on the left cheek measuring 13 x 6 centimeters and the remnants of a rope around the neck, which had caused bruising around the neck. On dissection he found no soot within the trachea and the lungs. He concluded that the cause of death was due to lack of oxygen due to ligature (rope) strangulation, which was then followed by burning the body.
10. When the appellant was put on his defence, he told the court that the deceased was his uncle. That there were ten employees and they each had their own room. That the appellant had shifted to the trading centre when he got married, because his employer did not want him living in his room with a wife and that his employer had given him a bicycle to use to ferry milk.
11. The appellant further told the court that on the material day the deceased drove the cows back home at 4.00 p.m and asked the appellant to take care of them before he left. The following day when the appellant reported on duty, he found that the cows had not been milked. It was the duty of the deceased to milk them. That the employer asked where the deceased was and the appellant told him that he did not know.
12. Two weeks later he was called by his neighbour and told that someone had died on the farm where they worked. He went to the scene and was shocked to find the body of the deceased whereupon he remarked that "if employees are being killed now how will life be like". That the remark displeased his employer and for that reason the appellant was arrested.
13. The learned Judge, upon considering the case before him, found that the prosecution had proved the case against the appellant beyond reasonable doubt. He convicted the appellant as charged and sentenced him to 30 years imprisonment.



14. The appellant filed this appeal against sentence only. The appeal is predicated on the single ground that the appellant was in custody since his arrest in January, 2011 and throughout the trial. His prayer is that the 8 years he spent in remand custody before conviction should be considered in the sentence.
15. This appeal was disposed of by way of written submissions that were orally highlighted during plenary at the virtual hearing. M/S Reece Mwani & Company Advocates filed undated submissions on behalf of the appellant while Senior Assistant Director of Public Prosecution, Jalson Makori filed the submissions dated 7<sup>th</sup> February, 2023 on behalf of the respondent. At the hearing learned Counsel, Mr. Mukhabani appeared for the appellant and Mr. Makori appeared for the respondent.
16. Mr. Mukhabani submitted that the appellant was arrested on 17<sup>th</sup> January, 2011 and was tried and finally convicted and sentenced on 13<sup>th</sup> November, 2018. At the time of the sentence therefore, the appellant had been in custody for seven (7) years, 10 months and 25 days. That the trial court should have taken in to account the aforesaid period and deducted it from the 30 years sentence in accordance with section 333(2) of the Criminal Procedure Code.
17. Counsel urged this Court to order the imprisonment sentence to run from 17<sup>th</sup> January, 2011 when the appellant was arrested and relied on this Court's decisions in Abamad Abolfathi Mohammed & Another v Republic [2018]eKLR and Bethwel Wilson Kibor v Republic [2009] eKLR to fortify his case.
18. In rebuttal, Mr. Makori submitted that the sentence prescribed is commensurate with the offence committed and the manner in which it was committed. Further that in his mitigation, counsel for the appellant raised the issue of the appellant being in custody since 2011. The court in sentencing held that: "I have considered the mitigation" and proceeded to exercise its discretion, bearing in mind the facts and circumstances of the case.
19. We have analyzed the record of appeal, the submissions of both parties and the law. This being a first appeal we are guided by the decision in David Njuguna Wairimu v Republic [2010] eKLR where this Court held that:

"In Okeno v R [1972] EA. 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyse and re- evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision. In Okeno v. R (Supra) the Court said: -

"It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions."
20. As stated earlier, the appeal is only in regard to the sentence imposed, to the extent of how the sentence was computed. The only issue for consideration is whether the learned judge, in computing the sentence, complied with section 333(2) of the Criminal Procedure Code.



21. The appellant was convicted for murder contrary to section 203 as read with section 204 of the *Penal Code* which stipulates that:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

Any person convicted of murder shall be sentenced to death.”

22. The appellant was sentenced to thirty years imprisonment and it is his argument that the trial court did not comply with section 333(2) of the *Criminal Procedure Code*, when imposing the sentence. On the other hand, the respondent urges that the time the appellant spent in custody was considered by the trial court after the mitigation. Therefore, the sentence meted upon the appellant was commensurate to the offence he committed.

23. It is common ground that Section 333(2) of the *Criminal Procedure Code* should be adhered to when sentencing. The said section reads:

“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.”

24. This Court has also pronounced itself on the mandatory nature of the supra section. In its decision in *Abamad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR relied on by the appellant, this Court pronounced itself as follows:

“The appellants have been in custody from the date of their arrest on 19th June 2012. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had 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 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. 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.” (Emphasis added)

25. The Judiciary Sentencing Policy Guidelines further addresses this legal position by providing that: -

“The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court



must take into account the period in which the offender was held in custody during the trial.”

26. The impugned sentence is found at page 66 and 67 of the Record of Appeal. The appellant’s mitigation and the learned judge’s sentence respectively, read as follows:

“Mr. Chemoyai: -

The accused is remorseful for the offence. The Court has discretion on sentence. The accused has been in custody since 2011. He was not able to secure bond. We pray for lenient sentence.

Court: -

I have considered the mitigation. I have also considered that a life was lost in the offence. Accused is sentenced to serve 30 years imprisonment.”

27. With respect, the learned judge in passing sentence, did not indicate that the sentence would take in to account the period that the appellant had already spent in custody. By not ordering the sentence to run from the date of initial incarceration, that amounts to ignoring altogether the period already spent in custody before sentence, even though the learned judge pronounced that he had considered the appellant’s mitigation.
28. Ultimately, we find that the appeal has merit. Accordingly, we order that the sentence imposed by the trial judge be and is hereby reduced by 7 years, 10 months and 25 days that the appellant spent in custody before he was convicted and sentenced.
29. This order shall be served on the Officer-in-charge of the G.K Prison where the appellant is serving sentence for compliance.

**DATED AND DELIVERED IN ELDORET THIS 28TH DAY OF JULY, 2023**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

