



**Mwite v Republic (Criminal Appeal E141 of 2022)  
[2024] KEHC 4357 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4357 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E141 OF 2022  
LW GITARI, J  
APRIL 23, 2024**

**BETWEEN**

**FRANKLINE MWITE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant appealed in this court against the judgment in case no. 399/2019 in the Principal Magistrate's court at Isiolo. The appellant was charged with Robbery with violence contrary to Section 295 as read with Section 296 (2) of the *Penal Code*. The particulars of the charge are that on 2<sup>nd</sup> May, 2019 at Soko Nangatule area in Isiolo Township within Eastern Region jointly with another not before the court robbed Ikimat Lokuruka of cash Kshs. 10,000/= and at or immediately before or immediately after the time of such robbery wounded Ikimat Lokuruka.
2. The appellant denied the charge and after a full trial he was convicted under Section 215 of the *Criminal Procedure Code* and sentenced to serve ten years imprisonment. The appellant was charged with another and he (Frankline Mwite) was the second accused in that matter.
3. He was dissatisfied with the conviction and sentence based on five grounds. It was his contention that the prosecution did not prove the charge against him beyond any reasonable doubts. It was further his contention that key witnesses were not called. The evidence was uncorroborated, contradictory and his defence was not considered.
4. The respondent opposed the appeal. Directions were given that the appeal be disposed off by way of written submissions. The matter came up to confirm filing of submissions on 25<sup>th</sup> October, 2023, the appellant abandoned the grounds of appeal and informed the court that he had not filed submissions as he wished the court to consider the time spent in prison pending trial.



5. I will therefore proceed to consider whether the time spent in prison awaiting trial was taken into account when passing the sentence.
6. The record shows that the appellant was sentenced by the learned trial magistrate on 7<sup>th</sup> September, 2022. There is no indication on the record that the time spent in prison was considered.
7. It is a mandatory requirement under Section 333 (2) of the Criminal Procedure Code that the time spent in prison be taken into account. Section 333 (2) of the [Criminal Procedure Code](#) provides as follows-;

“(2) 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.”

This section has been interpreted by the courts to mean that the time spent in custody by an accused person while awaiting trial must be taken into account to proportionately reduce the sentence imposed on him. In the case of [Ahamad Abolfati Mohammed & Another v Republic](#) [2018] eKLR the Court of Appeal stated-;

“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....

“Taking into account the period already spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody...

The trial magistrate erred by failing to take into account the period the appellant spent in custody awaiting trial.

In the end this ground of appeal has merits.

The record shows that the appellant was charged in court on 3<sup>rd</sup> April 2019 and remained in custody up to 7<sup>th</sup> September, 2022 when the sentence was passed. The appellant was therefore in custody for a period of three (3) years and five (5) months. This period should have been taken into account to reduce the sentence which was imposed on him by the trial magistrate.

## Conclusion

8. I find that the appeal has merits. I order that-
  - i. Sentence imposed on the appellant by the trial magistrate shall be reduced by a period of three (3) years and five (5) months being the period the appellant spent in custody before the sentence was passed.



- ii. The order be served on the Officer in Charge of the Prison where the appellant is serving sentence for compliance.

**DATED, SIGNED AND DELIVERED AT MERU THIS 23<sup>RD</sup> DAY OF APRIL 2024**

In the presence of

Court Assistant- Tupet

Appellant

**HON. LADY JUSTICE L. GITARI**

**HIGH COURT -JUDGE**

