



REPUBLIC OF KENYA



**Ngoma v Republic (Criminal Appeal E025 of 2022)  
[2023] KEHC 21990 (KLR) (30 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21990 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E025 OF 2022  
AK NDUNG’U, J  
AUGUST 30, 2023**

**BETWEEN**

**JOHN CHISWA NGOMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the decision and original conviction in respect of Criminal Case No.575 of 2019 before Hon S.K.Ngii – SRM delivered on 17th July, 2020 at Mariakani)*

**JUDGMENT**

**CORAM:** Hon. Justice A.K.NDUNG’U

Appellant in person

Mr Kirui for the State

1. The Appellant was charged before court with the offence of dealing with wildlife trophy of specified endangered species without permit or other lawful exception c/sec 92(2) of the [Wildlife Management Act](#).
2. After a full trial, he was convicted and sentenced 7 years imprisonment. Aggrieved by the said conviction and sentence he lodged this appeal initially raising 5 grounds which he later amended reducing them to 2, namely; -
  - a. That this Honourable Court sees it fit to reduce my sentence on medical ground.
  - b. That this Honourable Court takes into consideration the pre-trial custody period of 8 months which will bring a lot of reprieve to me.



3. The appellant filed written submissions with the state, through Mr Kirui Prosecution counsel, giving oral submissions in court.
4. I have considered the grounds of appeal and the record of the trial court on sentencing noting that there is no appeal against conviction.
5. To begin with and as rightly pointed out by Mr Kirui, sickness after sentence is not a ground of appeal. Once imprisoned, a convict has their rights protected under the constitution, the prisons Act and the regulations governing the serving of a term of imprisonment. These include the right to access treatment while in jail.
6. The Court's concern at the Appellate level in so far as sentencing is in issue is to consider the legality thereof and considerations whether the sentence is manifestly excessive or manifestly low as to invite disturbance by the Court.
7. In regard to this appeal, I note the sentence is legal and neither is it manifestly excessive or low as to require interference by this Court. Ground 1 of the Appeal fails.
8. As regards ground 2, I have perused the Court record and note that the trial court did not comply with sentencing 333(2) of the Criminal Procedure Code.
9. Addressing such omission, the Court of Appeal in Abmed Abofadbi Mohamed & Another versus Republic [2018] eKLR stated;

“There are however two grounds upon which we must fault the first appellate court, as regards sentence. The first is the imposition of an omnibus sentence for all the three counts. The appellants were entitled to be sentenced separately for each count. (See *Majole v R* [1956] EACA 576). However, as the appellants did not raise this issue, we shall not say more about it. 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. That provision provides as follows:

“333(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.”

The appellants have been in custody from the date of their arrest on June 19, 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(s) 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.”

10. The Appellant herein ought to have benefited from the taking into account of the period spent in custody before sentence.
11. The record shows he spent 12 months (1 year) in custody before sentence. There is therefore sufficient ground to interfere with the sentence and factor in this period.
12. To that extent therefore, the appeal herein is partially successful. I set aside the sentence of 7 years imposed on the Appellant and substitute thereof a sentence of 6 years imprisonment to run from the date of sentencing at the trial court.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF AUGUST, 2023**

.....

**A.K. NDUNG’U**

**JUDGE**

**In the Presence of: -**

1.

