**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL REVISION NO. 50 OF 2020**

**MELLEN GESARE REUBEN.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. The Applicant, **Mellen Gesare Rueben** approached this court through an undated **Notice of Motion** filed on **27th February, 2020** seeking for orders that the court reviews the sentence imposed upon her by the trial court vide **Kibera Criminal Case No.3674 of 2014**.

2. The application is supported by an affidavit sworn by the Applicant and annexed thereto, wherein she has deposed that; she was charged with two Counts of being in **Possession of Wildlife Trophy contrary to Section 95 of the Wildlife Conservation And Management Act** and dealing in **Wildlife Trophy contrary to Section 84 (1) as read with Section 92 of the Wildlife Conservation and Management Act**.

3. She was subsequently tried, convicted and fined Kshs.One (1) million or to serve a period of three (3) years imprisonment in default in Count I and a further Kshs.two (2) million or to serve five (5) years imprisonment in default in Count II. The Applicant states that she is a first offender, is remorseful and the sole breadwinner of her young family. She has also stated that she has been rehabilitated and is duly reformed having learned new skills of survival in life.

4. At the hearing, both parties canvassed the application through oral submissions.

5. In her submissions, the applicant reiterated the grounds in her Supporting Affidavit and urged the court to consider the period she had spent in custody since **2014**.

6. The Respondent through learned prosecuting counsel, **M/S Akunja** orally opposed the application. **M/S Akunja** submitted that the Applicant was charged with the offence of being **Possession of Wildlife Trophy** in Count I and sentenced to pay a fine of One (1) Million Shillings or in default to serve 3 years imprisonment and **Dealing with Wildlife Trophy** in Count II and fined Two (2) Million Shillings or in default to serve 5 years imprisonment. The sentences were passed on **12th July 2019**.

7. She submitted that the sentences that were meted against the Applicant for both counts were legal and proper hence there was no justification for revision. Further, she submitted that the right of appeal was explained to the Applicant. It was also her submission that the application upsets the provision of **Section 364(5)** of the **Criminal Procedure Code** which provides that where an appeal lies, a revision should not be entertained.

8. This being an application invoking the court's revisionary jurisdiction, it is important to set out the law that governs the exercise of the court's power of revision in criminal cases.

9. The provisions of the law that, empowers and/or jurisdiction of the High Court to revise sentence are provided for under; **Article 165(6)** of the **Constitution of Kenya, 2020**, which states as follows: -

> **"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any persons or authority exercising a judicial or quasi-judicial function, but not over a superior court"**

10. Similarly, the provisions of **Section 362** of the **Criminal Procedure Code** states that:-

> **"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the**

**purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."**

11. In the same vein, the provisions of **Section 364** of the **Criminal Procedure Code** states that: -

**"(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may;**

**a. In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by Sections 354, 357 and 358, and may enhance the sentence;**

**b. In the case of any other order other than an order of acquittal, alter or reverse the order.**

**(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."**

12. Additionally, sentence may be revised under the provisions of **Section 333(2)** of the **Criminal Procedure Code** which 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."**

13. Finally, the **Judiciary Sentencing Policy Guidelines** states that:-

**"[7.10] 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.**

**[7.11] 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.**

**[7.12] An offender convicted of a misdemeanor and had been in custody through-out the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be discharged absolutely, under Section 35 (1) of the Penal Code.**

14. Therefore, it is clear from the aforesaid provisions that, a sentence will be revised in relation to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and the regularity of any proceedings of any subordinate court.

15. In the case of **Bethwel Wilson Kibor –vs- Republic [2009]eKLR,** the Court of Appeal pronounced itself on the subject provisions as follows:-

**"By the proviso to Section 333(2) of Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the Appellant did not specifically state that he had taken into account the 9 years' period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009, he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."**

16. Similarly, in the case of **Ahamad Abolfathi Mohammed & Another –vs- Republic (2018)** the Court of Appeal stated that:-

**"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. 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 19th June 2012."**

17. In the instant matter, after considering the accused mitigation and the prosecution's, the court stated as follows;

> **"I have considered the mitigation offered by the defence counsel on behalf of the accused, I have also taken into account the time that accused have been in custody. They have been in custody since 2014"**

18. From the above, I have no doubt in my mind that the learned Magistrate was alive to the proviso to **Section 333 (2)** of the **Criminal Procedure Code** and that she actually took it into account when sentencing the Applicant.

19. However, I note that the trial magistrate did not indicate whether the default sentences were to run concurrently or consecutively.

20. In an instance where there is a default sentence, the said default sentence can never run concurrently, with another sentence. Each default sentence runs separately.

21. In *the case of* **Republic –vs- Ofunya *[1970] EA 78,*** the court held that sentences in default of payment of a fine cannot be made to run concurrently.

22. Therefore, in the present case, even without an order having been made by the trial Magistrate, the sentences were to run consecutively. Thus in total, the Applicant has an aggregate of 8 years imprisonment running from **2014,** being the period she was in custody and during trial to the time of being sentenced.

23. As a result of the aforesaid, in my opinion, the application lacks merit and should be dismissed.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MARCH, 2022**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Applicant in person

M/S Ndombi counsel for State/Respondent

Court Assistant - Gitonga