



**Maina v Republic (Criminal Miscellaneous Application
E003 of 2025) [2025] KEHC 6809 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 6809 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL MISCELLANEOUS APPLICATION E003 OF 2025
DKN MAGARE, J
APRIL 24, 2025**

BETWEEN

KELVIN WAMAE MAINA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is a Ruling over a Notice of Motion Application filed on 22.1.2025 by the Applicant seeking reconsideration of sentence to consider time spent in custody.
2. The Application is supported by the Affidavit of the Applicant and it was deposited in material as follows:
 - a. The Applicant was charged with illegal cutting of forest produce (Indigenous species *Colea Africana*) contrary to Section 64 (1) as read with 68(1) (b) of the [Forest Conservation and Management Act](#) 2014.
 - b. The Applicant was arrested on 31.8.2024, convicted on 7.10.2024, and sentenced on 27.11.2024 to one year imprisonment.
 - c. The sentence was deemed to start from the date of conviction where time spent in custody was not considered under Section 33.
3. The Respondent opposed the Application and submitted that the ruling on sentencing clearly stated that the court considered the time spent in custody. The maximum sentence was 3 years.

Analysis

4. The issue is whether the trial court properly considered the time the Applicant spent in custody when computing the sentence. Sentencing is a matter of discretion of the trial court and may be interfered



only in exceptional circumstances. In the case of *MM1 v Republic* [2022] eKLR, the Court referred to the case of *Mokela v. The State* (135/11) [2011] ZASCA 166, where the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

5. This court will not alter a sentence unless the trial court has acted upon wrong principles or overlooked some material factors. The Court of Appeal in *Ogolla s/o Owuor v. Republic* [1954] EACA 270, held that “The Court does not falter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

6. This court may also interfere if the sentence is excessive and, therefore, an error of principle has occurred. In the case of *Shadrack Kipkoech Kogo v R.* Eldoret Criminal Appeal No. 253 of 2003, the Court of Appeal held that:

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R.* [1989 KLR 306])

7. In the case of *Bernard Kimani Gacheru v. Republic* [2002] eKLR, the Court of Appeal restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence 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. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

8. The trial court is by required to take into account the time spent in custody. This is also anchored in the *Sentencing Guidelines*. The Sentencing Guidelines (2023) provide thus:

2.3.18 Section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offence that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.

2.3.19 Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated- and courts should make an enquiry particularly with unrepresented offenders- for example, there may be periods served



where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.

2.3.20 An offender convicted of a misdemeanour and who had been in custody throughout the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be deemed to have served their sentence and be released immediately.”

9. The Applicant was arrested on 31.8.2024 and remained in custody after he was convicted on 7.10.2024 and sentenced on 27.11.2024. The court erroneously indicated that it had considered the period from the date of arrest on 21.2.2023 to be 7 months and 26 days, which did not apply to the Applicant’s case. There is therefore no record that the period in custody was taken care of. In the circumstances Section 333(2) of the *Criminal Procedure Code* provides:

(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.

10. The trial court had the duty to show that it considered the time spent in custody and it was not enough to state without justification that the time had been considered without the record confirming such consideration. In *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, the Court of Appeal held that the court is obliged to consider the period an accused person has spent in custody before they were sentenced. The Court held thus:

“ 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.”

11. Consequently, the period between 31.8.2024 and 27.11.2024 days that the Applicant spent in custody are to be considered in computing the sentence. Consequently, the one-year sentence shall commence on 31.08.2024, the date of arrest.

Determination

12. In the upshot, I make the following orders: -

a. The sentences is reviewed to have regard the period the Applicant was in custody from 31.08.2024. consequently, the sentence of one year shall commence on 31.08.2024, pursuant to section 333(2) of the *Criminal Procedure Code*.

b. The file is closed.

**DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 24TH DAY OF FEBRUARY, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**



KIZITO MAGARE

JUDGE

In the presence of:-

Applicant present

Mr. Kimani for the State

Court Assistant- Michael

