



REPUBLIC OF KENYA



**Atunu v ODPP (Criminal Miscellaneous Application
E040 of 2023) [2024] KEHC 2185 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2185 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL MISCELLANEOUS APPLICATION E040 OF 2023**

AK NDUNG’U, J

MARCH 1, 2024

BETWEEN

EMMANUEL ATUNU APPLICANT

AND

ODPP RESPONDENT

RULING

1. The Applicant, Emmanuel Atunu vide a notice of motion dated 31st October, 2023, sought the following orders;
 - I. That he will be present before the Hon. Judge of this honourable court for hearing and disposal.
 - II. That it is within the rule of law for the Hon. Judge of this honourable court to consider and be pleased to review the conviction and sentence of seven (7) years imprisonment.
2. The background to the application is that the applicant was charged in Nyahururu CM’S CRC E2586 of 2021 with the offence of being in possession of a specified endangered wildlife trophy without permit or other lawful exemption contrary to Section 92(4) as read with 105(1) (b) of the [Wildlife Conservation and Management Act](#) 2013. He was tried, convicted and sentenced to a term of 7 years imprisonment or in the alternative to pay a fine of Kshs.3,000,000/-.
3. The application is supported by an affidavit by the Applicant dated 31st October, 2023 in which he depones that was charged with an offence of Possession of specified endangered wildlife trophy (sandal wood) without permit and sentenced to serve seven (7) years imprisonment on 10th May, 2021. That since conviction and imprisonment his young family has suffered since he is the sole bread winner.
4. He humbly begs leave for this honourable court to bring into play Section 333 of the CPC and include the duration he spent in custody with his serving years.



5. He adds that he has come to realize that there is government property and those that are of common use.
6. Ms. Kariuki appearing for the Odpp did not oppose the application.
7. On perusal of the application and the submissions, the main issue for determination herein is whether the applicant is entitled to review of sentence under Section 333(2) of the [Criminal Procedure Code](#).

Section 333(2) of the [Criminal Procedure Code](#) provides:-

“Subject to the provisions of Section 38 of the [Penal Code](#), 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.”

8. The law thus obligates the court to take into account the period the convict spent in custody. Addressing this issue in [Abamad Abolfathi Mobammed & Another v Republic](#) [2018]eKLR the Court of Appeal held that:-

“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](#). 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.”

9. The issue was subject to discussion by the Court of Appeal in [Bethwel Wilson Kibor v Republic](#) [2009]eKLR where the court stated:-

“By proviso to section 333(2) of the [Criminal Procedure Code](#) where a person sentenced has been held in custody prior to such sentence, the sentence shall take into 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 10 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.”

10. According to *The Judiciary Sentencing Policy Guidelines*:

“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.”

11. I have considered the record of the trial court. The trial court did not indicate that it had considered the period in which the Applicant was in remand. There is no evidence on record of such taking into account of the period spent in custody during trial. The sentence is thus contrary to the dictates of the law and good ground is laid to invoke this court’s jurisdiction to interfere with the discretion and the sentence meted out by the trial court.

12. With the result that the sentence by the trial court is set aside and substituted thereof with a sentence of a fine of Kshs.3000,000 in default 5 years and 7months imprisonment to be computed from 10th May 2023.

DATED SIGNED AND DELIVERED IN OPEN COURT THIS 1ST DAY OF MARCH, 2024

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A.K. NDUNG’U

JUDGE

