



REPUBLIC OF KENYA



**Mutai v Republic (Criminal Revision E280 of 2022)  
[2023] KEHC 1055 (KLR) (Crim) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1055 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL REVISION E280 OF 2022  
JM BWONWONG'A, J  
FEBRUARY 21, 2023**

**BETWEEN**

**CAPT ROBERT KIPROTICH MUTAI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application from the order of the Court -Martial No.21 of 2021 delivered by the Court Martial on 31/10/2021 in Republic vs Capt Robert Kiprotich Mutai)*

**RULING**

1. The applicant applied under certificate of urgency by way of a notice of motion dated November 7, 2022, in which he sought the following orders.
  1. Spent
  2. An order to stay further proceedings of the Court Martial Case No 21 of 2021, pending the hearing and determination of the revision of the order of the said court martial
  3. An order that the record of the proceedings in the court martial be forwarded to this court for revisional purposes.
  4. An order to make provision for costs
2. The application is brought under sections 326, 364 (b) and 366 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya.
3. Additionally, the application is based on six grounds that are set out on the face of the notice of motion, with the major grounds being the following.



4. The verdict of the court martial placing the accused/applicant on his defence following the closure of the prosecution case, was done in subversion of justice and that it does not amount to a fair trial.
5. The [Kenya Defence Forces Act, 2012](#) requires the Judge Advocate to make decisions on points of law, which are binding on members of the court martial.
6. There was no evidence to warrant the accused/applicant being put on his defence.

#### **The Submissions of the Applicant.**

7. Counsel for the applicant, Mr. Bosire, filed written submissions in support of the application. He submitted that the proceedings of November 17, 2022 will show that the date had been set down for tendering of submissions of no case to answer. That the record will also show that on October 31, 2022, the trial of the accused was turned into a defence hearing without a proper quorum/coram.
8. Counsel also cited section 160 of the [Kenya Defence Forces Act](#) in support of his Submission That at least one of the members of the Court Martial should have been a captain, because that is the rank held by the applicant. Counsel also cited section 175 (1) of the [Kenya Defence Forces Act](#) and submitted that the members of the court martial should not have determined that the applicant/accused had a case to answer, without the in put of the Judge Advocate; since the issue involved a point of law.

#### **The Submissions of the Respondent**

9. Counsel for the respondent, Mr. Ishmael Maingi, submitted that the order made is not ripe for revision; since there is no error that warrants review. Counsel also cited [James Ntbuku Kitbinji v Republic](#) (2020) e-KLR, in which that court observed that in exercising its revisionary jurisdiction, the court is not required to delve into the merits or otherwise of the case for the prosecution, for it might be embarrassed should it be called upon to render a determination should an appeal be filed. That court further observed that it is not mandatory or advisable to give detailed reasons while putting an accused on his defence, for to do so may cause embarrassment to the court, when making a final determination.
10. Counsel also relied [Wesley Kiptoo Rotto & another v Republic](#) (2017) e-KLR, which in turn cited [Festo Wandera Mukendo v Republic](#) (1976-80) 1 KLR 1626,1631. This case restated the same principles.
11. Counsel therefore urged the court to dismiss the application.

#### **Issues for determination**

12. I have considered the submissions of the parties and the applicable law. As a result, I find that the following are the issues for determination.
  1. Whether the court martial was properly constituted.
  2. Whether the order placing the applicant/accused on his defence was warranted.
  3. Whether a re-trial is necessary

#### **Issue 1**

13. I have perused the record of the proceedings. I find that the accused/applicant is a commissioned officer who holds the rank of captain in the Kenya Defence Forces. It therefore follows that under section 160 (3) (a) of the [Kenya Defence Forces Act](#), at least one member of the court martial should have been a captain. The provisions of that act in that regard provide as follows:
  160. Constitution of the courts martial



- (1) In the case of any proceedings, the courts martial established under Article 169 of the Constitution shall consist of-
  - (a) a Judge Advocate, appointed under section 165, who shall be the presiding officer;
  - (b) at least five other members, appointed by the Defence Court-martial Administrator if an officer is being tried; and
  - (c) not less than three other members in any other case.
- (2) The members of the court-martial shall be officers so qualified and not ineligible in accordance with section 164.
- (3) At least one of the members provided for in subsection (1) shall be-
  - (a) of equivalent rank as the accused person where the accused person is an officer; and
  - (b) the lowest ranking officer in the Defence Forces who is available at the time where the accused person is a service member.”

14. The record of the proceedings of on October 26, 2021 shows as follows:

Coram

Judge Advocate: Hon Boaz Ombewa

Sitting Members: Lt Col M Gababo (18894) -HQ KA TRG

Maj E S Wanyama (130429) FI BN

Maj P N Okioma (21552) – HQKAF

Maj B K Mutegi (37530)- HQ KN

2Lt A Makena (131788) -SIG BN

Prosecutor: Lt Col. A T Naija (21610) DHQ -KOFK

: Capt E O Orenge (131391)

Defending Officer: Maj S M Mulyungi (130567)

Officer Udr Instrcs: Maj N R Ogonda (19861)

Lt I E Mwaki 37614).....”

15. Additionally, the record also shows that the following were the waiting members (also known as alternate members) of the court martial. Lt. Col KK Keitany, (19580), Maj D O Baraza (21525), CAPT J R Koli (37463) and 2Lt B. M. Kingi (131785).
16. It is clear from the coram for that day that there was no officer who held the rank of captain among the members of that court martial, that was trying the accused/applicant. The requirement that at least one member of the court martial should be an officer holding the rank of captain is a mandatory requirement; since the language of that relevant provision is couched in mandatory language.
17. It is equally from the coram for that date that 2LT A. Makena, who is held the lowest rank and was a member of that court martial would have been eligible to serve, only where the accused person was a service member, that is, a non-commissioned officer.



18. It therefore follows that the court martial was not properly constituted as required by the provisions of that act.
19. Furthermore, since the court martial was not properly constituted, it lacked the competence to try the accused. The acts, the proceedings and the resulting order of placing the accused on his defence were null and void.
20. The revisionary jurisdiction of this court is set out in section 364 (1) (b) of the Criminal Procedure Code (Cap 75) Laws of Kenya, whose provisions provide 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.”  
Underlining mine
21. Consequently, by virtue of the jurisdiction vested in this court by section 364 (1) (b) of the Criminal procedure Code (Cap 75) Laws of Kenya, I hereby declare the proceedings to be null and void. As a result, I hereby quash the order placing the accused on his defence.

## Issue 2

22. In view of the foregoing finding of the court, I find that it is moot or academic to consider whether the accused had a case to answer or not above. That issue appears to be very attractive and is good material for schools of law, but not for the court. I therefore decline to consider and determine it.

## Issue 3

23. The accused is charged with two counts of committing the offences of conduct to the prejudice of good order and service discipline contrary to section 121 of the Kenya Defence Forces Act, 2012; which attracts a penalty of not more than two years imprisonment. Furthermore, the accused has been in and out of the court martial for about one year and four months. It is not the fault of the accused that he was being tried by an incompetent court martial. I find that an order for a re-trial is not in the interests of justice.
24. Pursuant to the powers vested in this court under section 364 (1) (b) of the Criminal Procedure Code, I hereby quash the order of the court martial that placed the accused / applicant on his defence.
25. In the premises, the appellant’s application succeeds. The order placing the accused on his defence is hereby quashed. There will be no order for a re-trial.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 21<sup>ST</sup> DAY OF FEBRUARY 2023.**

**J M BWONWONG’A**

**JUDGE**

**In the presence of-**

Mr. Kinyua: Court Assistant



Mr. Bosire for the accused/applicant

The applicant in person

Ms Edna Ntabo for the Republic/Respondent

