



**Lolem v Republic (Criminal Miscellaneous Application
E087 of 2023) [2023] KEHC 24040 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24040 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL MISCELLANEOUS APPLICATION E087 OF 2023**

**RN NYAKUNDI, J
OCTOBER 25, 2023**

BETWEEN

ENOCK LOLEMU APPLICANT

AND

REPUBLIC RESPONDENT

(Being a review from original conviction and sentence in Kakuma Senior Principal Magistrates Court criminal Case No. E040 of 2022, Hon. Mayamba C.A PM on 5th December, 2022)

RULING

1. The applicant was convicted with the offence of being in possession of a specified fire arm without a firearm certificate contrary to section 4 A (1) as read together with section 4 A (2) of the [Firearms Act](#) chapter 114 laws of Kenya.
2. The particulars of the offence are that on the 10th day of February, 2022 at Lokipoto village in Turkana West sub county within Turkana County, without reasonable excuse had in his possession a specified firearm namely L1A1 rifle with serial number not visible in circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order. The applicant was convicted of the said charge and a sentence of 8 years was imposed.
3. The applicant prays that this court invokes the provisions of Section 333(2) of the [Criminal Procedure Code](#) and take into account the time he has been in custody.

Analysis and determination

4. The issue before this adjudicatory forum is whether the learned trial magistrate committed an error on the face of the record in so far as application of the provisions of section 333(2) of [Criminal Procedure Code](#). It is all about having decided to impose a custodial sentence the trial court is obligated to give credit to the period spent in remand custody in favour of the convict pending hearing and



determination of his or her trial. From the onset I find the following persuasive sentencing guidelines to be of clarity in *Meisha Clement v R* in that case, Morrison P stated:

5. Having decided that a sentence of imprisonment is appropriate in a particular case, the sentencing judge's first task is as Harrison JA explained in *R v Everalld Dunkley*, to make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any other factors that will serve to influence the sentence, whether in mitigation or otherwise. More recently, making the same point in *R v Saw and others* ([2009] 2 All EWR 1138, 1142), Lord Judge CJ observed that the expression 'starting point' ... is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating features'. In seeking to arrive at the appropriate starting point, it is relevant to bear in mind the well-known and generally accepted principle of sentencing that the maximum sentence of imprisonment provided by statute for a particular offence should be reserved for the worst examples of that offence likely to be encountered in practice. By the same token, therefore, it will, in our view, generally be wrong in principle to use the statutory maximum as the starting point in the search for the appropriate sentence. But, in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence. Although not a part of our law, the considerations mentioned in section 143 (1) of the United Kingdom *Criminal Justice Act 2003* are, in our view, an apt summary of the factors which will ordinarily inform the assessment of the seriousness of an offence. These are the offender's culpability in committing the offence and any harm which the offence has caused, was intended to cause, or might foreseeably have caused.
6. I have considered the application and the court's mandate is to determine the application of section 333(2) of the *Criminal Procedure Code* to the prayers sought in the notice of motion. The section 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.
7. The Judiciary Sentencing Policy Guidelines are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.
8. In the case of *Ahamad Abolfathi Mohammed & 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 June 19, 2012."

9. It follows then that the court should state in its decision that indeed the time spent by the accused in custody has been considered and that it has factored it in the final sentence. Failure to do so means that the period has not taken into consideration.

10. The punishment prescribed by the law for the offence of being in possession of a firearm without a license or permit or other lawful justification, is liable to imprisonment for life. I take note that the trial court duly considered the mitigation advanced by the applicant. The trial court categorically stated as follows:

"I do also note that he is a family man and has taken almost one year in remand. I do therefore sentence him to serve 8 years in prison."

In my considered view, the sentence was rather lenient and the applicant ought to serve it fully.

11. In the end, I believe that the applicant cannot seek refuge under section 333(2) of the *Criminal Procedure Code*. The application is thus dismissed.

DATED AND SIGNED AT LODWAR THIS 25TH DAY OF OCTOBER, 2023.

.....

R. NYAKUNDI

JUDGE

In The Presence Of;

The Applicant

Mr. Yusuf for the DPP

