



REPUBLIC OF KENYA



**Ebei v Republic (Criminal Case 10 of 2023)  
[2023] KEHC 25919 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25919 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL CASE 10 OF 2023  
RN NYAKUNDI, J  
NOVEMBER 29, 2023**

**BETWEEN**

**ETITIBU EBEI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Before court is a notice of motion filed by the appellant expressed to be brought under Article 50(6) (a) (g) and 27 (1) of the constitution. In support of the application being amended affidavit the gist of which the applicant invokes the jurisdiction of this court based on the following grounds;
  1. That my lord I was arrested charged and sentenced to 7 years CT 1. For the offence of being in possession of unlicensed firearm contrary to section 4 (2) (a) as read with section 4 (3) (a) of firearm act cap 114 2015 laws of Kenya, CT 2. I was sentenced to 2 years for an offence of being in possession of ammunitions without a firearm certificate C/sec 14 (a) (1) (a) of the firearm amendment act No.6 of 2010.
  2. That my Lordship, the time I spent in custody was not considered during my resentencing hence section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period that a convicted person has spent in custody prior to the sentence.
  3. That I the applicant was on custody since the time of arrest on 8/1/2020 and since then I had not been released on bond up to conviction.
  4. That the applicant is serving excessive sentence since Article 27 (1) was violated. I pray the honorable court to include 3 years that I spent in custody the 9 years imprisonment period relying on the case of Relaying on the case of *Bernard Mulwa Musyoka – vs – Republic* CA 26/01/2018 at Mombasa and *Abdul Hussein Gholi Safe and Another – vs – Republic* [2018] eKLR where the court of appeal at Nairobi resentenced the applicant from date of arrest.



5. That I believe I will receive equal protection and equal benefit of the law like any other Kenyan whose rights were not violated.
2. Basically, the applicant must first pass the hurdle in section 362 as read with 364 of the *criminal procedure code* to be infused with article 50 (6) (a)& (b) of the *constitution* for this court to exercise jurisdiction on the matter. The notice of motion purports to indicate that the applicant is aggrieved with the decision on sentencing which failed to take into account the provisions of section 333(2) of the *criminal procedure code*. That by the trial magistrate's omission to factor in the period spent in remand custody his rights to equality before the law under article 27 and rights to a fair hearing in article 50 of the *constitution* remained violated. The jurisdiction of this court is well laid out in the *constitution* and other enabling statutes. I would like to say first that the applicant is seeking a re-trial or some kind of review structurally on sentence, meaning he is satisfied with the findings on conviction. So the application falls to be decided by considering existence of such compelling evidence to be admitted by this court to interfere with the decision on sentence based on section 333(2) of the *criminal procedure code*. In answer to the applicant I rely on the principles in essence under civil law which are appropriate to do justice in the matter. The case in *Republic – v – Public Procurement Administrative Review Board & 2 others* [2018]eKLR is on point as demonstrated in the following principles;

section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- (a) discovery of new and important matter or evidence which after the exercise of the diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without reasonable delay”.

3. The power to review this sentence requires discovery of new compelling evidence, mistake or error of law apparent on the face of record. My reading of the record presented by the applicant shows no such evidence for this court to exercise jurisdiction for a review of the judgment. The ground argued pursuant to section 333(2) of the *CPC* is not relevant given the following statement by the learned trial magistrate:

having considered the accused mitigation and the duration he has been in custody, I hereby sentence the accused to serve imprisonment for a period of 7 years in respect of count 1 and in respect of count II accused is to serve imprisonment for a period of 2 years. Sentences to run concurrently.

4. Having said that, it's reasonably clear that under Article 165 (6) & (7) and 50 (6) (a) (b) of the *constitution* I find no new compelling evidence to review the sentence imposed by the trial court. The significance of this is that to the extent for the proposition in the application it lacks merit and duly dismissed under Section 382 of the *criminal procedure code*.

It's so ordered.

**DATED, SIGNED AND DELIVERED AT LODWAR THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2023.**

And in the presence of;



Mr. Kakoi for the State

Appellant in person

**R. NYAKUNDI**

**JUDGE**

