



REPUBLIC OF KENYA



KENYA LAW
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**Ijuma v Republic (Miscellaneous Application E066 of 2023)
[2023] KEHC 22344 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS APPLICATION E066 OF 2023
RN NYAKUNDI, J
SEPTEMBER 19, 2023**

BETWEEN

BENJAMIN EPODO IJUMA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1 The applicant’s appeal was heard and determined on 2nd May of 2023 on both conviction and sentence. On 21st June, 2023 he filed yet another motion seeking the following orders:-

1. That My lord I was arrested on 19/07/2018 and charged in three accounts for obtaining money by false pretence contrary to section 313 of the Penal Code and I was convicted and sentenced each account 2 years to consecutively (6years) in prison.
2. That My Lordship, 4 years I spent in custody was not considered during my time of conviction, 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 period of sentence.
3. That I stayed in custody for 4 years since the time of arrest on 19/07/2018 and since then, I had not been released on bond up to time of conviction date 3/08/2022.
4. That with a lot of humility and humbleness, I am serving excessive sentence since Article 27(1) was violated, I pray the honourable court to include 4 years that I spent in custody in 6 years imprisonment period relying on the case of Bernard Mulwar Musyoka Vs Rep 2018 eKLR

2 Section 37 provides

“Where a person after conviction for an offence is convicted of another offence either before sentence is passed upon him under the first conviction or before the expiration of that sentence, that sentence any sentence other than a sentence of death which is passed upon



him under the subsequent conviction shall be executed after the expiration of the former sentence unless the court directs that it shall be executed concurrently with the former sentence or any part thereof.

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (1) of paragraph (c) of subsection (1) of section 28 or of any part thereof”

- 3 In the instant case the complaint is on the power of the appellant court to exercise the power on the merits of demerits of the appeal but on the exercise of that power and the procedure in the exercising of the power to alter, vary or review the sentence in compliance with the provisions of Section 333 (2) of the *Criminal Procedure Code* which provides as follows:-

“Subject to the provision 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 the code.

Provided that where the person sentenced under sub section (1) has prior to such sentence been held in custody the sentence shall take account of the period spent in custody.”

- 4 What happened in the instant case, the applicant was convicted by the trial magistrate and sentence to serve cumulative sentence of 2 years for each count and the sentences to run concurrently for the three counts of obtaining money by false pretence contrary to section 313 of the *Penal Code*. The bone of contention is in respect of the application of Section 333(2) of the *CPC*. Having considered the motion and from the above well aware of the legal provisions it is correct to amend the warrant of committal to read with effect from the date of arrest with the applicant.

DATED, SIGNED AND DELIVERED AT ELDORET ON THE 19TH DAY OF SEPTEMBER 2023.

.....
R. NYAKUNDI

JUDGE

In The Presence Of

Applicant Present

Kakoi For The DPP

