Mburu v Republic (Revision Case E124 of 2024) [2024] KEHC 9418 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9418 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

REVISION CASE E124 OF 2024

HM NYAGA, J

JULY 31, 2024

BETWEEN

STEPHINE NGUGI MBURU .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. This file has been brought up for Revision under the Prisons Decongestion Programme.
2. Article 165(6) and (7) of the *Constitution* confers upon this Court supervisory jurisdiction over subordinate courts and empowers this Court to make any order to give any direction it considers appropriate to ensure fair administration of justice. The said provisions are couched in the following terms:
   (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
   (7) for the purpose of clause (6), the High Court may call for the record of any proceedings before any court or person, body of authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."
3. As regards the *Criminal Procedure Code*, the correct legal provision ought to have been section 362 of the Criminal Procedure Code provides as follows:

> "The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

4. Section 367 of the *Criminal Procedure Code*, on the other hand, provides as hereunder:

> "When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith."

5. In view of the above, it is patent that the powers of revision under section 362 of the *Criminal Procedure Code* are invoked to enable this Court satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court.

6. Therefore, if the Subordinate Court's decision is wanting in its correctness, legality or propriety or the proceedings are irregular, this Court will no doubt step in and correct the same.

7. *Joseph Nduvi Mbuvi vs Republic* [2019] eKLR G.V. Odunga J (as he then was) while interpreting the provisions of Section 363 of the *Criminal Procedure Code* opined as follows:-

> "A strict reading of section 362 of the *Criminal Procedure Code*, however, does not expressly limit the High Court's revisionary jurisdiction to final adjudication of the proceedings. The section talks of "any criminal proceedings". "Any criminal proceedings" in my view includes interlocutory proceedings. Suppose a subordinate court would be minded to make an absurd decision of commencing a criminal trial by directing the accused to give evidence before the prosecution, I do not see why the High Court cannot call the proceedings in question to satisfy itself as to the correctness, regularity or legality of such order. In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still on-going, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well."

8. The Appellant was charged with two counts. In the first count he was charged with the offence of threatening to kill, contrary to Section 223 (1) of the *Penal Code*. In the second count he was charged with the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to Section 95 (1) (a) of the *Penal Code*. The particulars of each count are set out in the charge sheet.

9. The Applicant pleaded guilty and he was subsequently convicted and sentenced by Hon. E. Soita (S.R.M.) on 30th November, 2023 as follows: -

   Count 1: One Year Imprisonment

   Count 2: Two Years' Imprisonment.

10. The Court did not indicate if the two sentences were to run concurrently or consecutively as provided for under Section 14 of the *Criminal Procedure Code.* The Section provides as follows: -

> " 14. Sentences in cases of conviction of several offences at one trial
>
> (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.
>
> (4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence."

11. The *Sentencing Policy Guidelines* provide as follows as regards a situation where an accused is charge with several counts in one trial: -

> " Concurrent and Consecutive Sentences
>
> 7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentences should consecutively.
>
> 7.14 The discretion to impose concurrent or consecutive sentences lies in the court.
>
> 7.15 In the case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a previous sentence."

12. In *Peter Mbugua Kabui vs Republic* (2016) eKLR, the Court of Appeal addressed the issue as follows: -

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the courts may be in one charge sheet sand one trial, it is not illegal to make out a consecutive term of imprisonment."

13. The same view was expressed in the case of *Peter Mbugua Kabui vs Republic* [2016] eKLR, where the Court referred to *Sawedi Mukasa s/o Abdulla Aligwaisa* [1946] 13 EACA 97, *Ondieki -vs- R* 1981 KLR 430, and in *Nganga vs R*, 1981 KLR 530, where it was stated as follows:

> " ..... the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice."

14. In *B.M.N. vs Republic* Criminal Appeal No. 97 of 2013 [2014] eKLR the Court of Appeal dealt with a similar situation and pronounced itself as follows:

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though

the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."

15. In the present case, both offences were committed on the same date and against the same complainant. The particulars of the charges actually constitute one continuous utterance by the applicant. It is not clear why the State decided to sever the facts and present two counts against the accused.

16. Since the acts complained of were constituted in a single transaction, guided by the authorities cited above, the sentences ought to have run concurrently, unless the court deemed it fit to rule that they run consecutively. Since the court was silent, then the law is that they ought to have run concurrently.

17. I therefore revise the sentence and order that the sentences were to run concurrently.

18. I will now look at the sentence itself and the revision sought.

19. The Sentence Review Report dated 14th March, 2024 was favorable to the Applicant, who has already served 7 months of his sentence.

20. Consequently, I revise the sentence of the trial court and direct that the Applicant shall serve the remainder of his sentence under Community Service Order (C.S.O) at Naishi Chief's Office for six (6) months.

21. Order accordingly.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer