



**Kiprop v Republic (Criminal Appeal E065 of 2023)  
[2024] KEHC 10252 (KLR) (19 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10252 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E065 OF 2023  
RN NYAKUNDI, J  
AUGUST 19, 2024**

**BETWEEN**

**JOSEPHAT KIPROP ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an appeal from the judgment and sentence of the Chief Magistrate Court at Eldoret by Hon. P. Areri (S.P.M) dated 6/3/2023 in Criminal Case Number E491 of 2023))*

**JUDGMENT**

1. The Appellant herein was charged with the offence of assaulting a police officer contrary to Section 103 (a) of the [National Police Service Act](#) of 2011. The particulars of the offence were that on the 28<sup>th</sup> day of February 2023 at Huduma Centre Eldoret, Turbo sub county within Uasin Gishu County, the Appellant assaulted No 260938 APC Ken Mwiti, a police officer by biting his right hand, middle and ring fingers thereby occasioning him actual bodily harm while in due execution of his duties.
2. The Appellant was also charged with a second charge being the offence of assaulting a police officer contrary to Section 103 (a) of the [National Police Service Act](#) of 2011. The particulars of the offence were that on the 28<sup>th</sup> day of February 2023 at Huduma Centre Eldoret, Turbo sub county within Uasin Gishu County, the Appellant assaulted No 2001011533 SGT Teclah Jemutai, a police officer by punching her on the chest thereby occasioning her actual bodily harm while in due execution of his duties.
3. When the Accused was brought before the court he pleaded guilty to the charges and was sentenced to serve 3 three years' imprisonment in each count. Being aggrieved he preferred this appeal. The appeal is premised on the following grounds: -



- a. That, the trial Court erred on both law and fact by not complying with the provision of the law that allows the sentence to run concurrently for offences that have been committed under one transaction.
  - b. That, I am remorseful, repented and rehabilitated for the offence that I have committed thus beg for leniency of the court.
4. The appeal is vehemently opposed.

### **Appellant's case summary**

5. On ground one, the Appellant submitted that in the law it lies in the discretion of the court to order whether sentence should run concurrently or consecutively and that it is an established principle that aligns with the law that where offences are committed in one transaction, even when laid in separate courts; the sentences ought to run concurrently. He further stated that in his case, the trial magistrate entered conviction on both limbs of the charges for the two assaults not considering that they were committed in one transaction.
6. The Appellant further submitted that he is certain that the trial magistrate ought not to have ordered the sentence on the two limbs of the charges to run consecutively and as a result he entreats this Honourable Court to redress the omission thus order his sentences to run concurrently.
7. On ground two, the Appellant relied in the case of *Republic Vs Bieber* (2009) WLR 223. He further stated that as was recognized by the Court of Appeal in this case of *Republic Vs Bieber* (2009) WLR 223 and in its judgement in the present case, the grounds will include punishment, deterrence, public protection and rehabilitation. He further stated that for all those to be proved, the sentence should have been reasonable one that the Appellant may finish quickly and be re-instituted in the society and serve as a mentor and a teacher to others.
8. It was the humble prayer of the Appellant that his sentence be ordered to run concurrently or any other such others which would result that he is set at his liberty the earliest opportunity possible.

### **Analysis and Determination**

9. I have perused and considered the submissions filed by the Appellant as well as the submissions filed by the Director of Public Prosecutions.
10. This being a first appeal, the primary duty of this court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions as to whether or not to uphold the decision of the trial court. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. The Supreme Court of India explained the duty of a first appellate court in *K. Anbazhagan v State of Karnataka and Others* Criminal Appeal No. 637 of 2015 as follows: -

“The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively



and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.”

11. Having considered the grounds of appeal, and evidence adduced before the trial court, I shall proceed to determine whether the sentences ought to run concurrently.
12. In this appeal however, the appellant was convicted on his own plea of guilty and this means that a full trial was not conducted. I have therefore scrutinized the record to establish if the plea was unequivocal.
13. Section 281 of the *Criminal Procedure Code* provides that an accused person may plead not guilty, guilty subject to a plea agreement. The said section does not however provide for the steps to be taken by the court when taking plea.
14. Section 207 (2) of the *Criminal Procedure Code* stipulates as follows:

“207 (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.”

15. In *Adan vs Republic* [1973] EA 445, the Court of Appeal J set out the steps to be taken in recording pleas as follows:

“When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts, relevant to sentence. The statement of facts and the accused’s reply must of course, be recorded.”

16. In the instant case, the lower court proceedings show that the appellant was arraigned in court on 6<sup>th</sup> March 2023 and the proceedings were taken as follows:

“The substance of charge (s) and every element thereof has been stated by the court to the Accused person in Kiswahili language that he/she understands, who being asked whether he/she admits or denies the truth of the charges replies in Kiswahili/English:

Court: Which language do you understand?

Accused: Kiswahili



Court: You have a right to choose and be represented in this proceeding by an advocate of your own choice.

Accused: I have understood

Count I

Ni ukweli (It is true)

Count II

Ni ukweli (It is true)

Court A plea of guilty entered for accused in both.

06/03/23.

Prosecutor & Facts

“Facts are that on 28.02.2023 at around 1.30 pm the complaints were at their posts at Huduma Centre Eldoret when they were informed that the accused was obtaining money from members of the public pretending that you will assist them access services at the centre. The police officer went to where the accused was and when they started to question him the accused became violent and bit APC Ken Mwiti on the middle and ring fingers of the right hand. The accused also punched Sergeant Teclah Jemutai on the chest. The case was reported at Eldoret Police Station where they were issued with P3 form and referred to the hospital. The P3 forms were dully filled and the accused was arrested and charged. I wish to produce the P3 forms as exhibits in this case. That’s all.”

Accused

Facts are correct.

Court

Accused is convicted in both counts on his own plea of guilty.

Prosecutor

Records Nil.

Accused in mitigation

I apologize to the court. I have children.

Court

“I have considered the nature of the offences, the circumstances under which they were committed, record and mitigation and sentence the accused to serve three years’ imprisonment in each count. The sentence to run consecutively. Right to Appeal 14 days.”

17. Section 348 of the [Criminal Procedure Code](#) which provides that:

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”



18. The Court of Appeal considered the above provisions in the case of *Merali v Republic* [1972] EA 47 and its finding was that: -

“Although by Section 348 (1) of the *Criminal Procedure Code* no appeal shall be allowed in the case of any person who has pleaded guilty and has been convicted on such a plea by a subordinate court, except as to the extent or legality of the sentence, this limitation applies only where the plea itself is freely given and is unequivocal.”

19. More recently in the case of *Wandete David Munyoki v Republic* [2015] eKLR the same court held: -

“It has long been settled that Section 348 of the *Criminal Procedure Code* which provides that no appeal is allowed in a conviction arising from a plea of guilty except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. Indeed, in *Ndede v R* [1991] KLR 567, this court held that the court is not bound to accept the accused person’s admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there has been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person’s own plea of guilty are not closed.”

20. Similarly, in the case of *Nyawa Mwajowa v Republic* [2016] eKLR the court observed:

“Before we consider the merits of this appeal, we wish to make two quick preliminary observations. Firstly, as a general rule, by dint of Section 348 of the *Criminal Procedure Code*, no appeal is allowed from a conviction arising from a plea of guilty. However, it is settled that the provision is not an absolute bar to all and sundry appeals challenging conviction from a plea of guilty. Where for example the appellant has pleaded guilty to a non-existent offence; where the facts admitted by the appellant do not disclose the offence; or where there are unusual circumstances surrounding the plea of guilty, the appellant is not precluded from appealing. See *Ndede v Republic* (1991) KLR 567; *John Muendo v Republic*, Cr. App. No. 365 of 2011 and *Kilingo Ngome v Republic*, Cr. App. No. 69 of 2014 (Malindi).”

21. The above decisions of the Court of Appeal clothe this court with jurisdiction to determine whether the conviction of the appellant herein was sound by considering whether the plea was unequivocal. It is my finding that the appellant herein is within his right to raise the issues touching on his conviction.

22. Section 103 (a) of the *National Police Service Act*, 2011 states: -

“ 103. Assault in execution of duty

Any person who –

- (a) assaults, resists or willfully obstructs a police officer in the due execution of the police officer’s duties;
- (b) Assaults, resists or willfully obstructs any person acting in aid of the police officer;
- (c) .....



(d) .....

Commits an offence and shall be liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years, or to both.”

23. A reading of this section discloses that assaulting, resisting or willfully obstructing a police officer in the due execution of the police officer’s duties are all separate offences. The words in the section are to be read disjunctively hence the use of the word “or”. The doing of any act denoted in the section whether it is assaulting, resisting or obstruction all constitute the offence known as Assault in execution of duty.

24. The prosecution of the appellant for the charge under the *National Police Service Act* rather than the Penal Code was also not erroneous as Section 63 of the *Interpretation and General Provisions Act* states that: -

“63. Where an act or omission constitutes an offence under two or more written laws, the offender shall, unless a contrary intention appears be liable to be prosecuted and punished under any of those laws, but shall not be liable to be punished twice for the same offence.”

25. I now move to the question of whether the plea was unequivocal. The manner of recording a plea is provided in Section 207 (1) and (2) of the *Criminal Procedure Code* which state: -

“(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary: Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.”

26. In the words of the Court of Appeal in the case of *Adan v Republic* [1973] EA 445 the steps to be taken in recording pleas are as follows: -

“When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence, and when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts, relevant to sentence. The statement of facts and the accused’s reply must of course, be recorded.”



27. From the above extract of the proceedings, it is clear that the charges were read to the accused in Kiswahili/English language which he confirmed that he understood. I am therefore satisfied that the plea was properly taken in the language that the appellant understood, which is Kiswahili/English, and I find that the plea was unequivocal.
28. Section 103 (a) of the [Police Service Act](#) provides a very stiff sentence for the offence defined as Assault in execution of duty. The section however gives the court a discretion to impose a fine, a term of imprisonment or both. In this case the trial Magistrate elected to impose a term of imprisonment without a fine. Apart from the statutes the courts are also guided by the [Sentencing Policy Guidelines](#). In this case the relevant guideline is found in paragraph 11.5 of the Policy which states:
- “ 11.5 Where the option of a fine is provided, the court must first consider it before proceeding to impose a custodial sentence. If, in the circumstances a fine is not a suitable sentence, then the court should expressly indicate so as it proceeds to impose the available option.”
29. It is my finding that whereas the law considers assaulting a grave offence the trial Magistrate should have considered that the appellant was a first offender that he had pleaded guilty and that he was remorseful hence treated him with leniency by considering the option of a fine. In addition to paragraph 11.5 of the [Sentencing Policy Guidelines](#) I am persuaded by the holding of PJ Otieno J in the case of [Jackson Konde Chalo v Republic](#) [2018] eKLR that: -
- “7. The law and policy in sentencing in (sic) that where the law provide(sic) for a for a fine or imprisonment or both then unless the court for good reasons decides to give both, the accused has a right to be given an option of a fine. In *Annis Mubidin Nur v Republic*, High Court Criminal Appeal No. 98 of 2001, Mwera J, as he then was stated the relevant policy in sentencing, most appropriately;
- Unless circumstances obtain which irresistibly [impede] a trial court from imposing a fine first where the law provides for a fine in default of (sic) a prison term, the option of a fine must be visited first. This is a sound and tested principle in the art of sentencing...”
8. Accordingly, when the trial court opted to mete out an imprison (sic) sentence without the option of a fine, there was an error and thus an improper sentence which can only be viewed as too harsh. Harsh only to the extent that it denied the appellant his option of a fine.”
30. The case of the present appellant is no different and the trial court ought therefore to have considered the option of fine. It is instructive that the trial Magistrate did not give any explanation or expressly indicate why he did not find a fine suitable. It is my finding that the sentence of 3 years’ imprisonment in each count without an option of a fine whereas a fine was an option may be sometimes considered harsh and excessive dependent on individual facts and circumstances.
31. It is also settled law that an Appeal’s court does not alter a sentence of the trial court on grounds that if it was seating as a trial court it would have imposed a different sentence. Indeed from the principles in the case of [Bernard Kimani Gacheru v Republic](#) 2002 eKLR as can be deduced from the following extract, review of sentence is approached with a caution. Thus: “It is well -established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carter blanche to interfere with sentence which have been properly



imposed by a sentencing court, In my view, this includes the terms and conditions imposed by a sentencing court on how or when the when sentence is to be served.

32. In the instant case, the Appellant committed two counts of assault from which he was convicted and sentenced to 3 years custodial sentence to be served consecutively. In my view the principles in the case of *Muruatetu versus Republic* (2017) eKLR apply *Mutatis Mutandis* even when a trial court is sentencing an offender who is not directly charged under Section 203 of the *Penal Code*. What are the key parameters to consider:
- a. Age of the offender
  - b. Being a first offender
  - c. Whether the offender pleaded guilty
  - d. Character and record of the offender
  - e. Commission of the offence in response to gender-based violence
  - f. Remorsefulness of the offender
  - g. The possibility of reform and social re-adaptation of the offender
  - h. Any other factor that the court considers relevant
33. When I peruse the record of the trial court, factors like Age of the offender, him being a first o offender and having pleaded guilty to the offence never featured anywhere in the final verdict of imprisonment sentence. The others aspect worth mentioning is on the canon of consecutive and concurrent sentences being the carrier order on how the sentences should be executed. This is the applicable test:
- i. A court shall determine, if accused has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offences. The court shall state on the record and shall indicate in the order of judgement and commitment.
    - a. If the sentences imposed are to run concurrently or consecutively to each other and
    - b. If the sentences before the court are to run concurrently or consecutively with any other sentences the accused is already serving.
  - (ii) In determining whether state offenses are to run concurrently or consecutively, the court shall consider the gravity and circumstances of the offences, the number of victims, and the history character, and rehabilitative needs of the defendant.
34. In the case at hand, there are no compelling of substantial circumstances to warrant the trial magistrate to order for the sentence to run consecutively other than concurrently. This was the same transactional offence. I am therefore convinced and persuaded that review of this sentence to the extent of ordering it to be executed concurrently would be fair and proportionate to the crime.
35. Consequently, the appeal on conviction is dismissed but on sentence it is ordered to run concurrently.

**DATED AND SIGNED AT ELDORET THIS 19<sup>TH</sup> DAY OF AUGUST, 2024**

**R. NYAKUNDI**

**JUDGE**

In the Presence of

Mr. Mark Mugu for Accused



Accused

