



**Munyao v Republic (Criminal Appeal E011 of 2023)
[2024] KEHC 16056 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16056 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E011 OF 2023
MW MUIGAI, J
DECEMBER 19, 2024**

BETWEEN

STEPHEN NTHULI MUNYAO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the judgment by Hon. M.A.Otindo (PM) in Machakos Chief Magistrate's Court in Cr. S.O No. E0475 & E476 of 2022 Delivered on 28th September, 2022)

JUDGMENT

Background

1. The Appellant herein Stephen Nthuli Munyao was charged with an offence of Stealing Contrary to Section 268 (1) as read with section 275 of the Penal Code in case number E476 of 2023.
2. The particulars of the offence being that on the 9th September 2022 at Kaviani Village, Iveti location in Kathiani Sub county within Machakos county, stole 450 kgs of maize and 180kgs of pigeon peas all valued at Kshs 66,600 the property of Jesse Kitheka.
3. In the Alternative Charge the Appellant herein was charged with Handling Stolen Goods contrary to Section 322(1) as read with section 322(2) of the Penal Code.
4. The particulars of the offence being that on the 9th and 16th day of September 2022 at Kaviani village and Nzaikoni Market. , Iveti location in Kathiani sub County within Machakos County, other than in the course of stealing, dishonestly received or retained 50kgs of maize valued at Kshs 6000 knowing or having reason to believe them to be stolen goods.
5. The Appellant herein Stephen Nthuli Munyao was charged with an offence of Stealing Contrary to Section 268 (1) as read with section 275 of the Penal Code in case number E475 of 2022.



6. The particulars of the offence being that on diverse dates of 25th and 26th September 2022 at Iviani village, Kaewa location in Kathiani sub county within Machakos County, stole 125kgs of dry coffee grains valued at Kshs 21,875 the property of Nelson Katoto Wambua
7. In the Alternative Charge the Appellant herein was charged with handling Stolen Goods contrary to Section 322(1) as read with section 322(2) of the Penal Code.
8. The particulars of the offence being that on the 26th September 2022 at Iviani village Kaewa location in Kathiani sub county within Machakos County, other than in the course of stealing, dishonestly received or retained 35kgs of dry coffee grains valued at Kshs 6125 knowing or having reason to believe them to be stolen goods
9. The Appellant pleaded guilty to the offences in separate cases/proceedings Criminal Case E476 of 2022 & Criminal Case E 475 of 2022 and was convicted on his own plea of guilt.

Judgment of the Trial Court

10. The Trial Court proceeded to sentenced him to 2 years imprisonment in Criminal Case 475 of 2022 which was to shall run concurrently with sentence in Criminal Case E476 of 2022.

Appeal:

11. Aggrieved by the Judgment the appellant filed his amended Petition of appeal based on the following grounds;
 1. That the Learned trial magistrate erred in matters of law and fact by failing to order that the sentence of 2 years for each count to run concurrently.
 2. That the Honourable Court issue any other orders it deems fit in the circumstances
12. The Appeal was canvassed by way of written submissions.

Written Submissions

Appellant Submissions

13. The Appellant in his submission relied on the case of Republic vs Jagani & Another (2001) and Kennedy Indiemu Omuse v Republic Appeal 344 of 2006
14. It was submitted that the charges in the two files were as a resultant of the offences committed in the same transaction hence the appellate court should reverse the lower court findings as it erred in fact and law by conducting split trials prejudicing the applicant.
15. Reliance was placed in the case of Owiti vs Republic [1984] KLR and Ng'anga vs Republic [1981] where the appellate court replaced consecutive sentences with concurrent sentences. He also relied on the case of Ngibuini vs Republic (1987) KLR and Section 362 of the CPC.
16. He prayed that the court to reverse the Trial Court judgment as it used wrong principles not in line with the tenets of a fair trial as sentence meted was done without making a specific finding.

Respondent's Submissions

17. On behalf of the Respondent, It was submitted that the two year imprisonment was within the law and not excessive.



18. Reliance was placed in the case of Bernard Kimani Gacheru vs Republic [2002] eKLR, Mokela vs the State [2011] and Ogolla s/o Owuor V Republic.
19. It was finally submitted that the sentence against the appellant was sufficient and appropriate.

Determination

20. The Court considered the Appeal, the Trial Court record in both Criminal Case E476 of 2022 & Criminal Case E 475 of 2022 and the submissions of parties on record.
21. This is a first Appeal and in the case of Okeno v Republic [1972] EA 32 the court stated:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.”

The Appellant pleaded guilty to the charges in both matters, Facts were read to him again in both matters and he pleaded guilty to the facts in both matters during conduct of criminal proceedings separately.

During Pre – sentence proceedings in Criminal E 476 of 2022, the Prosecution informed Trial Court that the Appellant /Accused person then had previous conviction of stealing mobile phone In Machakos Law Courts and was convicted in E 556 of 2021 in Court 4 Machakos Law Courts.

22. The issue that arises for determination is whether the sentence should run concurrently. The accused pleaded guilty to both offences in the different cases.
23. This Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR where it was stated as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

24. Sections 12 and 14 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya and Section 37 of the Penal Code, Cap. 63 of the Laws of Kenya provide for instances where sentences may run consecutively and concurrently.
25. Sections 12 and 14 of the Criminal Procedure Code provides as follows:



12. Any Court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.
- 14.
- (1) Subject to subsection (3), when a person is convicted over one trial of two or more distinct offences, the court may sentence him for those offences, to the several punishments prescribed therefore 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 punishments shall run concurrently.
 - (2) In the case of consecutive sentences, it shall not be necessary for the Court, by the reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent impose on conviction of a single offence, to send the offender for trial before a High Court.
 - (3) Except in case to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences-
 - a. of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or
 - b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.
 - (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.
26. Section 37 of the Penal Code provides as follows:
37. Sentences when cumulative: 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, 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 (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.
27. In *Peter Mbugua Kabui vs Republic* [2016] eKLR the Court of Appeal stated 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.
28. In *Sawedi Mukasa s/o Abdulla Aligwaisa* [1946] 13 EACA 97, the Court of Appeal for Eastern Africa considered the issue of a consecutive as opposed to a concurrent sentence and expressed the view that it



was still good practice to impose concurrent sentences where a person commits more than one offence at the same time and in the same transaction save in very exceptional circumstances

29. The Sentencing Policy Guidelines which contain specific provisions on whether a court should impose consecutive or concurrent sentences. The Guidelines provide as follows:

7.13 here 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 sentence should run consecutively.

7.14 The discretion to impose concurrent or consecutive sentences lies in the Trial Court.

In *Samuel Kinyua Kirimania v Republic KMBU HCCRA No. 26 of 2017 [2018] eKLR* held 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 or transaction, a concurrent sentence should be imposed. However, if the accused commits separate and distinct offences in different criminal transactions, even though the charges are tried in one trial, it is not illegal to mete out a consecutive term of imprisonment (see *BMN v Republic NYR CA Criminal Appeal No. 97 of 2013 [2014] eKLR*).

30. In this case the offence of stealing was carried out between 9th September and 26th September, the offences committed in both cases are distinct to the extent that they were committed against different victims/ Complainants. The Trial court did not err in imposing that the sentences run concurrently. The charging of the offenders is within the province of the ODPP not the Court, in this case the Particulars of the offence depict different dates, different parties and different items stolen or handled as stolen property. Even then, the ODPP was within the law in preferring different charges in different files of the same suspect.

31. In *Vincent Ngetich Kipkemboi vs. Republic [2017] eKLR*, in circumstances similar to the instance case, the offences charged in the two counts for which the applicant had been convicted and sentenced, were committed in the same transaction, though against different complainants but at around the same time.

32. The court took the view that the Trial Court had erred in imposing consecutive sentences. It set aside the consecutive sentences and substituted the same with an order that the sentences should run concurrently.

33. The Appellant request that the sentences in both Court files in Criminal Case 475 of 2022 & Criminal Case E476 of 2022 to run concurrently was /is already granted by the Trial Court; specifically; in Criminal Case E 475 of 2022 it reads;

He is sentenced to serve 2 years in prison which sentence shall run concurrently with the sentence in E 476 of 2022.

Disposition

1. The Upshot is that the appeal lacks merit and is hereby dismissed.
2. The Court has reviewed the matter as presented before the Trial Court and the Court record confirms that the Trial Court sentenced the Appellant to serve 2 years imprisonment and to run concurrently.



3. The sentence as ordered by Trial Court is affirmed and ought to be implemented forthwith as provided in the Court record.

It is so ordered

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT ON 19/12/2024 IN MACHAKOS HIGH COURT. (VIRTUAL /PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

