



Bakwea v Director of Public Prosecution (Miscellaneous Criminal Application E070 of 2022) [2023] KEHC 20995 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20995 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CRIMINAL APPLICATION E070 OF 2022
SC CHIRCHIR, J
JULY 28, 2023**

BETWEEN

ATHANAS KHAEMBA BAKWEA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. The Applicant herein was charged with four (4) counts of robbery with violence at the chief Magistrate's court in Mumias, in Criminal Case No 452 of 2010. He was convicted on two of the charges and sentenced to death. On Appeal to the High Court, the Death sentence was set aside and substituted with 15 years' imprisonment.
2. In different case, also heard in Mumias Chief Magistrate's court, being Criminal Case No 1268, he was convicted on 2 counts of robbery with violence, handling stolen goods and gang rape and sentenced to Death. On Appeal, the conviction on handling stolen goods was the only one upheld, and the sentence was reduced to 10 years.
3. It is against these sentences that the Applicant is seeking a review. The Applicant's case is that the court did not take into account, the time he spent on remand. He also prays that the two sentences be ordered to run concurrently.
4. The hearing proceeded by way of oral submissions. On whether the sentences should run concurrently, the respondent has submitted that the sentences did not arise from the same transaction. The court of Appeal in the case of *Republic vs Saidi Nsabuga S/O Juma & another (1941) EACA 81*, cited with approval in *Okello vs Republic (1984)e KLR* explained the 'Same transaction rule' as follows: -

' If a series of acts are so connected together by proximity of time criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect so as to constitute



one transaction, then the offences constituted by these series of acts are committed in the cause of the same transaction'

5. The offences for which the Applicant was prosecuted in Mumias Chief Magistrate's Court Criminal Case No 452 of 2010 were committed on 11th and December 12, 2009, while in Mumias Criminal Case No 1268 of 2009 the offences were committed on December 9, 2009.
6. Section 14 of the *Criminal Procedure Code* provides as follows; -
 - i. 'Subject to sub section (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 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 the punishment shall run concurrently.'
7. In the present case, the offences were committed on different dates and indeed tried by courts and sentenced on different dates. In nutshell the offences do not fall within the same transaction. The Applicant there fore cannot benefit from concurrent sentencing.

Whether this court should review the sentence to take into account the provisions of section 333(2) of the Criminal Procedure Code.
8. I have perused the two Appeals to the High Court. In their concluding remarks, the Judges indicated that the sentences were to run from the date of convictions in the lower court. The judges, by their emphatic remarks gave the impression that they made section 333(2) of the Criminal Procedure Code at the back of their minds. This court is a court of concurrent jurisdiction and I do not have the jurisdiction to overturn the findings of a fellow judge with a current jurisdiction. This is not a case where a judge for instance has omitted to state the time the sentence begun to run. If the two judgments were silent on commencement, then it would be safe to assume that it was an oversight. To the extent that they were specific then it cannot have been an oversight. The remedy available to the Applicant is only an Appeal not a revision.
9. Further, Article 165(6) of the *Constitution* and Section 362 of the Criminal Procedure Code, gives the high court supervisory jurisdiction over the subordinate courts and tribunals but not over a superior court. The high court is a superior court within the context of Article 162(1) of the *Constitution*.
10. In conclusion the entire Application fails. It is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 28TH DAY OF JULY, 2023

S. CHIRCHIR

JUDGE

In the presence of:-

Eric- Court Assistant

No Appearance by the parties.

