



REPUBLIC OF KENYA



**Ngaii v Republic (Miscellaneous Application E334 of 2021)  
[2022] KEHC 3076 (KLR) (Crim) (26 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 3076 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS APPLICATION E334 OF 2021  
LN MUTENDE, J  
APRIL 26, 2022**

**BETWEEN**

**SAMUEL NGAII ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Samueln Ngaii, the Applicant approached this court through a Notice of Motion seeking interpretation of the trial court order issued on September 15, 2021 and to direct that sentences meted in Makadara Criminal Case No. 1182/20 and Makadara Criminal Case No. 1183/20 be interpreted to run concurrently.
2. The applicant was charged with two counts of Stealing a Motor Vehicle contrary to Section 278(A) of the *Penal Code* in Makadara CMCR No.1182/20 where he was sentenced to serve 3 years imprisonment for each count, sentences that were ordered to run concurrently. In Makadara CMCR No.1182/20, he faced charges of: Stealing a Motor Vehicle contrary to Section 278(A) of the *Penal Code*; Obtaining money by False Pretence contrary to Section 313 of the *Penal Code*; Forgery Contrary to Section 349 of the *Penal Code* and Making a Document Without Authority contrary to Section 357(a) of the *Penal Code*. The applicant was sentenced to serve 2 years imprisonment for the second count of obtaining by false pretence while the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> counts were withdrawn.
3. The application was canvassed through oral submissions. It was urged by the applicant that the sentences should run concurrently as they were meted out by the same magistrate.
4. The State/Respondent through learned counsel Ms.Kibathi argued that contrary to the allegations, the sentences were ordered to be served separately which should run from the date they were passed.



5. The application having been drawn in person is not brought under any provision of law, but looking at the nature of the relief sought, it is review of the lower court sentence. The jurisdiction of this court to determine the matter therefore emanates from Section 362 of the Criminal Procedure Code (CPC) which provides thus:

“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.”

6. Section 364 of the CPC provides :

“In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may in the case of any other order other than an order for acquittal, alter or reverse the order.”

7. The applicant seeks clarification on how he should serve the sentences. It behooved him to demonstrate an illegality or irregularity in the sentences meted out in Makadara CMCR 1182 /20 and 1183/20, respectively.

8. The applicant admitted the charges following plea bargain. The genesis of the application is that the applicant was charged with several offences which were committed on different dates in the month of February, 2020. He admitted having stolen Motor Vehicle Registration No. KCG 629 G make Toyota white in colour belonging to Mary Nyambura Kinyanjui in Ruai Sub-County on 14/2/20 and also Motor Vehicle Registration No. 880K Mazda Demio belonging to John Kyalo at Ruaraka on 19/2/20. From Elizabeth Kinyanjui the applicant obtained money, Ksh.335,000/-having pretended to be in possession of Motor Vehicle Registration No. KCU 294S Toyota Vitz silver in colour.

9. The applicant was arraigned in court on 12/3/20 but the charges were brought in two different files. Ultimately the applicant admitted charges in both files on 15/9/2020. Though the same Magistrate determined the cases, there was no consolidation.

10. Section 12 of the Criminal Procedure Code stipulates that:-

Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.

11. Circumstances in which a court can direct sentences to run concurrently or consecutively are provided in Section 14 of the CPC as follows:-

- (1) 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 punishments shall run concurrently.
- (2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess



of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases 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 less or

b. Of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

13. In the case of *Sawedi Mukasa s/o Abdulla Aligwaisa* [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that 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.

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.

14. Offences in the two files were separate and distinct and were committed in different transactions. The trial court in CMCR 1183 /2020 did not have jurisdiction to direct that the additional period runs concurrently or to be combined with the custodial sentences in CMCR 1182/2020.

15. In the case of *Ogolla s/o Owuor v Republic* [1954] EACA 270 the Court of Appeal held that:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (R v Shershowsky (1912) CCA 28TLR 263).” See also *Omuse v R (supra)* while in the case of *Shadrack Kipkoech Kogo v R*, Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R* [1989] KLR 306)”

16. In the case of *Kenneth Kimani Kamunyu v R* [2006] eKLR, the Court of appeal reiterated the stated principle by stating that an appellate Court can only interfere with the sentence if it is illegal or unlawful.

17. The trial court record is clear. There was no evidence of an illegality or ambiguity in the manner which the applicant ought to serve his sentences in both CMCR 1182/ 2020 and CMCR 1183/2020. The order of the court was clear, the sentences should run from 12/3/2020 when he was arraigned in court, but, the sentences in Makadara CMCR 1182/2020 and Makadara CMCR 1183/20 cannot run concurrently.



18. That having been said, I find the application lacking merit, accordingly, it is dismissed.

19. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF APRIL, 2022.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Appellant

Ms. Oduor for the State

Court Assistant – Mutai

