



**Nyabuto v Republic (Criminal Revision E339 of 2021)
[2022] KEHC 11002 (KLR) (Crim) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11002 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E339 OF 2021
CW GITHUA, J
JULY 28, 2022**

BETWEEN

BENARD NYABUTO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The main prayer in the applicant's chamber summons application filed on July 28, 2021 is revision of the trial court's order that the sentences of five years and ten years imposed on him in Makadara Chief Magistrate's Sexual Offence Case No. 33 of 2017 for the offence of robbery and rape should run consecutively.
2. The applicant avers that since the sentences were based on convictions arising from the same trial, the learned trial magistrate under Section 12 of the *Criminal Procedure Code* should have ordered that the sentences should run concurrently.
3. I have called for and perused the record of the trial court. The court record shows that the applicant was convicted in two counts with the offences of rape contrary to Section 3 (1) (a) (b) of the *Sexual Offences Act* and robbery contrary to Section 296 (1) of the *Penal Code*.
4. The particulars of both offences alleged that on December 23, 2016 along Jogoo Road in Makadara District within Nairobi County, the applicant raped VWM and jointly with his co-accused robbed her of a mobile phone make Techno 7c tablet valued at Kshs.11,000, cash money amounting to KShs.3,000, make MI valued at Kshs.14,000 and a necklace and during the time of such robbery, he threatened to use actual violence on the said VWM.



5. It is worth noting that in count 2, the applicant was charged jointly with another with the offence of robbery with violence contrary to Section 296 (2) of the [Penal Code](#) but after a full trial, they were convicted of the lesser offence of robbery contrary to Section 296 (1) of the [Penal Code](#).
6. The trial court's record confirms that after a full trial, the applicant was convicted of the offence of rape and was sentenced to serve 10 years imprisonment. He was also convicted together with his co-accused with the offence of robbery contrary to Section 296 (1) of the [Penal Code](#) and was sentenced to serve five years imprisonment.

The trial court did not however pronounce itself on whether the sentences were to run consecutively or concurrently.

7. Having considered the applicants' application, I find that it invokes the court's revisional jurisdiction by inviting the court to revise the sentences imposed by the trial court by directing that they should run concurrently. The revisional jurisdiction of the High Court is donated by Section 362 as read with Section 364 of the [Criminal Procedure Code](#). It is exercised to correct any error, illegality or impropriety in orders made by the lower court or irregularities in the trial court's proceedings.
8. To determine the applicant's prayer, it is important to set out the law that governs imposition of concurrent or consecutive sentences. Section 12 of the [Criminal Procedure Code](#) provides that any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.
9. Section 14 of the [Criminal Procedure Code](#) spells out the circumstances in which a court may direct that sentences shall run consecutively or concurrently. It provides that where a person is convicted in one trial of two or more distinct offences, the court may pass sentence in respect of the different offences which it is authorized by law to impose and such sentences if consisting of a term of imprisonment will take effect one after expiration of the other in the order the court may direct unless the court directs that the sentences shall run concurrently.
10. A plain reading of the above provision reveals that where the court is silent on whether multiple terms of imprisonment will run concurrently, the sentences will automatically run consecutively so that each term will begin at the expiry of the other.
11. It is also clear from the wording of Section 14 of the [CPC](#) that a trial court has discretion to order whether or not sentences imposed on a convict in respect of different offences will run concurrently or consecutively. But whereas it is within the trial court's discretion to order that the sentences run consecutively or concurrently, the general principle which has been buttressed by the Court of Appeal in several authorities is that where a person has been convicted of more than one offence and the offences were committed at the same time in the course of the same transaction, save in very exceptional circumstances, concurrent sentences should be imposed.
12. In [Peter Mbugua Kabui v Republic](#), [2016] eKLR, the Court of Appeal pronounced itself on the subject 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.”



13. What then constitutes the same transaction? The Court of Appeal addressed its mind to this question in *Mwarome Munga Janji v Republic*, CR.A. No. 10 of 2019, KLR and adopted the definition given to the term in *Nathan v Republic*, [1965] EA 777 where the court stated thus:
- “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 as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.”
14. From the particulars supporting the charges preferred against the applicant and the evidence tendered before the trial court, it is clear to me that the offences subject of the applicant’s convictions were committed at about the same time in the course of the same transaction.
15. In sentencing the applicant, the learned trial magistrate does not appear to have considered the fact that the offences were committed in the course of the same transaction. Had she been alive to this fact, she would in all probability have ordered that the sentences would run concurrently.
16. Though the applicant had also invoked the provisions of Section 333 (2) of the *Criminal Procedure Code* seeking that the time he had spent in remand custody be computed as part of his sentence, the trial court’s record clearly shows that in passing sentence, the learned trial magistrate considered the time the applicant had spent in lawful custody during the trial. There is therefore no basis for this court to invoke Section 333 (2) of the *CPC* at this stage.
17. For the foregoing reasons, I find that the application is partially successful and it is hereby allowed only to the extent that the sentences imposed on the applicant in count 1 and count 2 shall run concurrently.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28 TH DAY OF JULY 2022.

C. W. GITHUA

JUDGE

In the presence of:

The applicant present in person

Ms Oduor for the respondent

Ms Karwitha: Court Assistant

