



**Kinyua v Republic (Criminal Revision E038 of 2022)
[2022] KEHC 10538 (KLR) (Crim) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E038 OF 2022
CW GITHUA, J
JULY 27, 2022**

BETWEEN

**JAMES EDWARD KARIUKI NJIRU ALIAS FRANCIS IRERI
KINYUA APPLICANT**

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, James Edward Kariuki Njiru alias Francis Ileri Kinyua, approached this court through an undated chamber summons application filed on March 14, 2022 seeking review of the sentence imposed on him by the Kibera Chief Magistrate’s Court Criminal Case No 509 of 2019.
2. In that case, the applicant was charged and convicted in five counts in which he was charged with various offences. In count 1, he was charged with the offence of stealing a motor vehicle contrary to Section 268 (1) as read with Section 278 (A) of the *Penal Code*. The particulars of the offence were that on July 30, 2017, at Holy Family Basilica Church parking yard in Nairobi County, together with others not before the court, the applicant stole a motor vehicle registration number KBX 372Q Toyota Probox grey in colour valued at Kshs 600,000, the property of Dinah Amollo Jura.
3. In count 2, the applicant was charged with the offence of stealing a motor vehicle contrary to Section 268 (1) as read with Section 278 (A) of the Penal Code. The particulars were that on the night of October 9, 2017, at Roysambu-Mirema Estate in Kasarani Area within Nairobi County, jointly with others not before the court, the applicant stole a motor vehicle registration number KBP 633F, Toyota Probox white in colour valued at Kshs 550,000, the property of David Makau Wambua.
4. In count 3, he was charged with the offence of forgery contrary to Section 349 of the *Penal Code*. The particulars were that on unknown dates at an unknown place within the Republic of Kenya, the



applicant together with others not before the court, forged logbook S/No. K 828799C purporting it to be a genuine document issued by the National Transport and Safety Authority (NTSA) to enable him sell motor vehicle registration number KBX 372Q Toyota Probox, a fact he knew to be false.

5. In count 4, the applicant was charged with the offence of uttering a false document contrary to Section 353 of the *Penal Code*. The particulars were that on October 18, 2018 at Embu Town within Embu County, with intent to defraud or to deceive, he knowingly uttered a certain document namely logbook S/No K 828799C to Peter Muriithi Gachogu purporting the same to be a genuine document issued by the National Transport and Safety Authority (NTSA).
6. In count 5, he was charged with the offence of obtaining money by false pretences contrary to Section 313 as read with Section 312 of the *Penal Code*. The particulars were that on October 18, 2018 at Embu Town within Embu County, with intent to defraud, the applicant obtained Kshs 420,000 from Peter Muriithi Gachogu by falsely pretending that he was in a position to sell a motor vehicle registration number KBX 372Q.
7. Upon conviction, in count 1 and count 2, the applicant was sentenced to serve four (4) years imprisonment in each count. In counts 3, 4 and 5, he was sentenced to serve one (1) year imprisonment in each count. The sentences were ordered to run consecutively.
8. In the depositions made in his supporting affidavit, the applicant averred that he is a father of six children and the sole bread winner of his family; that he was suffering from chronic asthma and high blood pressure; that he had benefitted from multiple prison based reform programmes; and that he was remorseful for his actions. He urged this court to revise the trial court's sentence by deducting the time of two years he had spent in remand custody during the trial and by ordering that the sentences imposed in each count should run concurrently instead of consecutively as ordered by the trial court.
9. I have considered the application which invokes the revisional jurisdiction of this court donated by Section 362 as read with Section 364 of the *Criminal Procedure Code*. In the exercise of its revisional jurisdiction, this court is empowered to call for and examine the record of proceedings of the lower court to satisfy itself as to the correctness, legality or propriety of any findings, sentence or order recorded or passed by the trial court and the regularity of the proceedings leading to the impugned order or decision, and if satisfied one way or the other make appropriate orders.
10. This being an application seeking sentence review, it is important to point out at the outset that as a general rule, sentencing is always at the discretion of the trial court. It is now settled law that a court exercising supervisory jurisdiction over the trial court which includes this court's revisional jurisdiction cannot review or alter the sentence of the trial court unless it was satisfied that the sentence was either illegal or that in passing it, the trial court considered the wrong legal principles or considered irrelevant factors. The court can also revise the sentence imposed by the trial court if it was convinced that the sentence was harsh and manifestly excessive in the circumstances of the case. See: *Ogolla S/O Owuor v Republic*, 1954 EACA 270; *Macharia v Republic*, [2003] KLR 115.
11. The applicant has invited this court to revise the trial court's sentence on grounds that the court had failed to take into account the time he had spent in remand custody during the trial as required by Section 333 (2) of the *Criminal Procedure Code* which states as follows:

“Subject to the provisions of section 38 of the *Penal Code* (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.



Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

12. After perusing the record of the trial court, I am satisfied that the learned trial magistrate fully complied with the proviso to Section 333 (2) of the *Criminal Procedure Code* as can be seen from her pre-sentence notes save that there was a mathematical error in the computation of the sentence she intended to impose on the applicant in count 1 and count 2. After taking into account the applicant’s plea in mitigation, the learned trial magistrate noted that the applicant had been in remand custody for about 2 years since April 2019. She proceeded to state that she would have sentenced the applicant to a term of five years imprisonment in count 1 and count 2 but after subtracting the period of two years he had spent in remand custody during the trial, she was imposing a sentence of four years in each count.
13. Section 278 A of the *Penal Code* prescribes a maximum sentence of seven years imprisonment for a person convicted of the offence of stealing a motor vehicle. However, having determined in her discretion that the appropriate sentence for the applicant was five years imprisonment in count 1 and count 2 less the two years he had spent in lawful custody during the trial, the trial magistrate ought to have imposed a sentence of three years not four years imprisonment in each of the aforesaid counts.
14. It is common knowledge that five minus two is three and therefore the imposition of four years imprisonment in count 1 and count 2 instead of three years appears to have been either a mathematical or typographical error by the trial court which this court is duty bound to correct in the exercise of its revisional jurisdiction. Consequently, the applicant’s sentence in count 1 and count 2 is hereby revised and set aside. It is substituted with a sentence of three years imprisonment in each count effective from date of sentence by the trial court.
15. With regard to the sentences imposed in respect of the other three counts, I find that the learned trial magistrate must have had in mind the period the applicant had spent in remand custody as expressed when passing sentence in count 1 and count 2 and that is why she imposed the lenient sentence of one year imprisonment in each of the three counts instead of the three years imprisonment prescribed by the law for the offences charged in those counts.
16. As stated earlier, after pronouncing the sentences in each count, the learned trial magistrate ordered that the sentences will run consecutively. The applicant has urged this court to revise that order and substitute it with an order that the sentences should run concurrently.
17. The question that I am now called upon to determine is whether the learned trial magistrate erred in ordering that the sentences should run consecutively instead of concurrently.

To determine this question, the starting point is a consideration of the law that governs imposition of sentences by trial courts. 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.

18. Section 14 of the *Criminal Procedure Code* provides for the circumstances in which a court can direct sentences to run consecutively or concurrently. The relevant parts of Section 14 provide as follows:

“(1) Subject to subsection (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 the less; or.....”

19. Section 7 (1) of the [Criminal Procedure Code](#) stipulates that:

- “(1) A subordinate court of the first class held by—
 - (a) a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court;
 - (b) a resident magistrate may pass any sentence authorized by law for an offence under section 278, 308(1) or 322 of the Penal Code or under the [Sexual Offences Act](#), 2006.”

20. The [sentencing policy guidelines](#) also sets out circumstances in which a court can direct sentences to run either concurrently or consecutively. At paragraph 7.13 it states that:

“Where 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.”

21. A reading of section 14 of the Criminal Procedure Code (CPC) and the aforesaid sentencing guidelines leaves no doubt that a trial court has discretion in deciding whether or not to order sentences to run consecutively or concurrently but as a general principle, where a person commits multiple offences at the same time against the same complainant, except in very exceptional circumstances, the court should consider imposing concurrent as opposed to consecutive sentences.

22. The Court of Appeal in [Peter Mbugua Kabui v Republic](#), [2016] eKLR expressed itself on this subject and 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/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.”

23. In the instant case, it is clear from the charge sheet and the evidence on record that the applicant’s convictions related to offences which were committed on diverse dates, in different locations and against different complainants. They were not committed in the course of the same transaction. The aggregate sentences amounted to a total of 11 years imprisonment which means that Section 14 (3) of



the CPC was not applicable and in any event, the sentences were imposed by a court authorized by Section 7 (1) of the CPC to pass any sentence authorized by the law.

In the premises, I find that the learned trial magistrate correctly exercised her discretion in ordering that the sentences meted out on the applicant shall run consecutively. I therefore find no legal basis to revise the trial court's aforesaid order as sought by the applicant.

24. In view of the foregoing, I find the application partially merited and it is hereby allowed to the extent specified in paragraph 14 above in which the sentence of four years imprisonment in count 1 and count 2 has been revised and substituted with a sentence of three years imprisonment in each count.
25. For the avoidance of doubt, the prayer seeking revision of the trial court's order directing that the sentences imposed against the applicant in each of the five counts shall run consecutively is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2022.

C W GITHUA

JUDGE

In the presence of:

Applicant present in person

Ms Oduor for the respondent

Ms Karwitha: Court Assistant

