



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION- MILIMANI COURT

MISC APPLICATION NO. E055 OF 2021

ERIC MAINGA MURIUKIAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Eric Mainga Muriuki**, the Applicant, approached this court by way of Chamber Summons seeking review of the sentence meted out by the subordinate court pursuant to the provisions of **Section 362** of the Criminal Procedure Code (CPC) and the court to take into account the period he was in remand custody following the provisions of **Section 333(2)** of the CPC and consequently to act pursuant to **Section 35** of the Penal Code (PC).

2. The application is premised on grounds that he was arrested on 22nd September 2016 and convicted on 17th October 2019, a period of three (3) years that was not discounted from the meted out sentence and he has already served a 3rd of the imposed sentence as provided by the law.

3. The Applicant was jointly charged with two (2) others with two (2) counts. 1. Kidnapping with interest to confine contrary to **Section 259** of the Penal Code where he participated in kidnapping **Fredrick Otieno Owuor**. 2. Robbery with violence contrary to **Section 295** as reads with **Section 296 (2)** of the Penal Code. They were armed with pistols, stole from Fredrick Otieno Owuor and at the time used actual violence and also kidnapped him. He was satisfied with the conviction that resulted and did not appeal. Similarly he did not appeal against the sentence imposed.

4. Circumstances that transpired were that the applicant with his co-accused who pretended to be customers of the complaint, subsequently assaulted and detained him. They stripped him naked and took nude photographs of him an act that made him suffer humiliation and physical trauma. They did not show any remorse but remained calm during trial, according to the demeanor noted by the court.

5. The jurisdiction of the court sought to be invoked is provided for in **Section 362** of the CPC that stipulate 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. In response, Ms. Ndombi, the learned State Counsel opposed the application on grounds that the sentence meted out was within the law hence does not warrant the courts interference and that the principles applied were proper.

7. The court therefore, must satisfy itself of the correctness of the sentence meted out.

8. **Section 259** of the Penal Code provides that:

Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years.

9. **Section 296 (2)** of the penal code provides as follows:

If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

10. On the first count, the court sentenced the applicant to serve two (2) years imprisonment instead of the maximum term provided of seven (7) years imprisonment. This was a legal sentence.

11. On the second count, the trial court sentenced the applicant pursuant to the provisions of **Section 295** of the penal code, a definition Section of the offence of robbery (Also see the case of **Joseph Onyango Owuor and Cliff Ochieng Oduor Vs. Republic (2010) eKLR (Criminal Appeal No. 353 of 2008)**)

12. **Section 364** of the CPC provides as follows:

(1) 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—

(a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) In the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

13. An omission is noted in the sentence meted out as the court did not direct on how the sentences meted out were to be served.

14. **Section 14** of the CPC provides for circumstances in which a court can direct how sentence are to run. It states 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 therefor 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

(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

15. In the case of **Sawedi Mukasa s/o Abadulla Aligwaisa (1946) 13 EACA 97**, it was stated that the practice is that where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, a court would impose concurrent sentences.

16. In the case of **Peter Mbugua Kabui Vs. Republic (2016) eKLR** the Court of Appeal stated that:

“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”

17. In the instant case, the complainant was kidnapped, and confined and robbed during the period of confinement. An order should have been made by the trial court for the sentences to run concurrently.

18. Pursuant to the provisions of **Section 362** of the CPC the illegality apparent on record must be regularized which calls for this courts intervention.

19. The applicant was convicted for robbery with violence, a conviction that should have been pursuant to **Section 296 (2)** of the Penal Code that provides for a death sentence. This court has power to enhance and/or vary the sentence to what would be envisaged as legal and reasonable in the circumstances (See **Section 364 (1) (b) and (2)** of the CPC).

20. But, it is worth noting that no response was filed by the respondent seeking such enhancement and/or variation of the sentence to what would have been legal in the circumstances. Therefore the applicant having not been heard on that particular issue the court cannot grant an order that may be detrimental to him.

21. The upshot of the above is that this court will intervene to the extent of regularizing the order of the court on how sentences were to be served. It is therefore ordered that the sentences meted out that are to run from the date of arrest shall be served concurrently. The application therefore succeeds partially, to that extent.

22. It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 21ST DAY OF OCTOBER, 2021

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Mutai

Ms. Chege -ODPP

Applicant