



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CONST. CRIMINAL PETITION NO. 22 OF 2019

PAUL OTIENO NDEJWE.....PETITIONER

-VERSUS-

1. COMMISSIONER GENERAL OF PRISONS

2. DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS

JUDGMENT

1. The Petitioner herein, *Paul Otieno Ndejwe*, filed an undated Notice of Motion on 20/06/2019.

2. The Petitioner sought the following orders: -

(a) That the Honorable Court be pleased to grant this application as urgent and be heard for priority basis and I the petitioner to appear before Court for the hearing of this Petition.

(b) That I the Petitioner be admitted in Court for the hearing and determination of the prayers sought, whether Section 46 of the Prisons Act Cap 90 prevails over the principles of the constitution to be used by the Prisons Authority to discriminate I the Petitioner by depriving the remission on the the sentences of 40 years and 20 years imposed upon me by the High Court and Kisumu Court of Appeal.

(c) That the sentence of 40 years in Migori HCCR No. 105 / 2014 and 20 years in Migori Cr. Case No. 787/05 as ordered by Kisumu Court Appeal vide CCRA No. 616/2010 be consolidated and run concurrently.

3. At directions stage, the Petitioner abandoned prayer (b) of the application as it had already been settled in previous decisions of the Court. The rest of the Petition was heard orally.

4. The petition herein has a long history. The background was well captured by the Court of Appeal in **Kisumu Criminal Appeal No. 616 of 2010 Paul Ouma Otieno alias Collera & Paul Otieno Ombogo alias Ndejwe (2018) eKLR** as follows: -

[3]. The prosecution case against the appellants was briefly as follows. On 5th April, 2004 at about 10 pm, Gilbert Oluoch Nyandiega, the complainant, drove to his house in Awendo in his motor vehicle registration No. KAD 858 L, Nissan Sunny. He stopped at the door and knocked the door for his wife to open. Four people went towards him and told him that they were his visitors and he should not make noise. Cavin Akinyi Owino, the complainant's wife who was watching T.V switched on the lights and opened the door. Ombogo who was armed with a pistol entered into the bedroom which had lights and directed that the complainant be brought into the bedroom. Ouma who was also armed with a pistol took the complainant to the bedroom. The two demanded money and were directed to where the money was and took Kshs. 2,500/=. The robbers also took a mobile phone and sonny speaker. They also demanded the car keys and the complainant gave the keys to them. Thereafter, the complainant and his wife were led outside, forced inside the car and driven off to a sugar cane plantation where they were abandoned. The robbers drove off in the complainant's car. Thereafter the two reported at Awendo police station.

[4] On the same night between 10 – 11 pm, a motor vehicle bearing registration No. KAD 858L was driven into the compound of Joshua Owino Osambo, (Joshua), made a U-turn, faced the house and hooted several times. Joshua came out. The people inside the vehicle told Joshua that they were police officers and asked him to go to the vehicle. The headlights of the vehicle were switched on. One of them interviewed Joshua and asked him to take them to the house of his father which he did. The people had guns and introduced themselves as police officers from Migori police station to Joshua's father and told him that they had been sent by OCS to take him to the police station. Joshua and his father were put in the boot of the car and driven to a bridge near Kuja River where the vehicle stopped and the two were removed from the boot. Joshua's father was tortured and

shot dead and his body thrown over the bridge.

Joshua was also shot but the gun failed to fire and he was tied and thrown over the bridge. Joshua managed to save himself, slept in a house in the neighbourhood and reported to the police the next morning. Joshua testified that he identified the two appellants and that Ouma was his cousin. The murder of Joshua's father is the subject of a murder case No. 38 of 2005 before High Court, Kisii.

[5] On 2nd June, 2004, at 5.30 am, P.C. Obiero (PW4) attached to CID Keroka and police officers acting on information went to a house in Homa Bay, Sofia Estate, where they arrested Ombogo and recovered a sonny speaker from the house.

On 6th April, 2004, the complainant's motor vehicle was found abandoned and recovered and thereafter Ouma was arrested. On 8th June, 2004, I.P Alfred Ouko (PW5) conducted an identification parade where the complainant identified Ombogo. The complainant also identified the motor vehicle and sonny speaker as some of goods that were stolen from him.

[6] Ombogo gave sworn evidence at the trial and stated that he did not commit the robbery and that the charge is fabricated. In his evidence in cross-examination, he stated that Joshua was his brother and a friend. Similarly, Ouma gave sworn evidence at the trial and stated that he was at Chemelil on 3rd April, 2005, and that the charge is framed-up.

5. As a result of the foregoing, the Petitioner herein and his accomplice were charged with several offences. They were charged with various counts of robbery with violence in *Migori Principal Magistrates Courts Criminal Case No. 1409 of 2005*, *Migori Principal Magistrates Courts Criminal Case No. 1410 of 2005* and *Migori Migori Principal Magistrates Courts Criminal Case No. 787 of 2005*.

6. They also faced a murder charge in *Kisii High Court Criminal Case No. 38 of 2005*. The murder case was eventually transferred to this Court and became *Migori High Court Criminal Case No. 105 of 2014*.

7. The Petitioner and his accomplice were found guilty and convicted in *Migori Migori Principal Magistrates Courts Criminal Case No. 787 of 2005*. They were sentenced to suffer death. They preferred an appeal to Kisii High Court in *Criminal Appeal No. 197 of 2006*. The appeal was dismissed. A further appeal to the Court of Appeal in *Kisumu Criminal Appeal No. 616 of 2010* (supra) was lodged. The appeal was dismissed on conviction. Due to recent developments in the law the appeal on sentence was allowed. The death sentence was set-aside and substituted with a term of 20 years' imprisonment.

8. The Petitioner was also found guilty of the information of murder in *Migori High Court Criminal Case No. 105 of 2014*. He was sentenced to suffer death. He thereafter filed a Petition on re-sentencing which was successful. The Petitioner was sentenced to a term of 40 years' imprisonment.

9. The Petitioner then filed the Petition subject of this decision seeking that the two sentences, being the one for 20 years and that of 40 years, would run concurrently.

10. The Petitioner submitted that the offences were committed in the same transaction and that was a good ground for the petition to be allowed.

11. The prosecution strenuously opposed the petition. It was submitted that the two sentences were not a product of the same trial and as such this Court lacks jurisdiction to order that the sentences run concurrently. No decisions were referred to by either parties.

12. I have carefully considered this petition alongside the parties' submissions.

13. The issue for determination in this Petition is only one. It is whether the two sentences which the Petitioner is serving can be ordered to run concurrently.

14. **Sections 12 and 14 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya and Section 37 of the Penal Code, Cap. 63 of the Laws of Kenya** provide for instances where sentences may run consecutively and concurrently.

15. **Sections 12 and 14 of the Criminal Procedure Code** provides as follows: -

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

14. (1) Subject to subsection (3), when a person is convicted over 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 punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by the 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 High Court.

(3) Except in case 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.

16. Section 37 of the Penal Code provides as follows: -

When a person has been taken into custody without a warrant for an offence other than a murder, treason, robbery with violence and attempted robbery with violence of the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring the person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable;

Provided that an officer in charge of a police station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge.

17. The provisions of the **Criminal Procedure Code** relate to instances where an accused person is charged with more than one offence but in a single criminal case. Those are the cases where an accused person faces several counts in one charge sheet or information, as the case may be. The **Penal Code** on the other hand provides for instances where an accused person is charged with more than one offence but in different criminal cases.

18. In this case, the applicable law is **Section 37** of the **Penal Code**. That is because the Petitioner was charged before the High Court and before the now Chief Magistrates Court.

19. The general principle in **Section 37** of the **Penal Code** is that the two sentences must run consecutively. That being the case, the Court still has powers to order the sentences to run concurrently. The law is however silent on the principles for consideration by the Court in deciding whether the sentences shall run concurrently.

20. With such a state of affairs, the fall back is on how Courts have previously dealt with the issue. I have come across decisions where the Court of Appeal dealt with **Sections 12 and 14** of the **Criminal Procedure Code**. In **Peter Mbugua Kabui v Republic Criminal Appeal 66 of 2015 [2016] eKLR** the Court of Appeal made reference to the case of **Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97** a position which was later on agreed with in **Ondiek – v- R 1981 KLR 430**, and in **Nganga – v- R, 1981 KLR 530**. In the case, the then Court of Appeal for Eastern Africa stated as follows: -

..... 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.

21. In **BMN v Republic Criminal Appeal No. 97 of 2013 [2014] eKLR** the Court of Appeal dealt with a similar situation and pronounced itself as follows: -

[15] 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.

22. To be able to analyze the issue further, there is need to understand what the phrase ‘same transaction’ means. In **William Kimani Ndichu v. Republic [2015] eKLR** the Court of Appeal referred to **Rex v Saidi Nsabuga s/o Juma and Another (1941) 8 EACA 81** and to **Nathani v R (1965) EA 777**, where the meaning of the phrase “same transaction” was defined 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 the 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.

23. Returning to the matter at hand, I am of the considered position that the considerations under **Sections 12 and 14** of the **Criminal Procedure Code** equally apply to **Section 37** of the **Penal Code**. Therefore, for a convict to benefit under **Section 37** of the **Penal Code** it must be demonstrated that the offences, although tried by different Courts, were committed in the course of the same transaction.

24. There is no doubt that the two offences in which the Petitioner is currently serving sentences were committed in the night of 05/04/2004. Both offences were committed between 10:00pm and 11:00pm.

25. I have already reiterated the manner in which the events unfolded leading to the commission of the offences. I will therefore have to ascertain whether the offences in issue were committed in the same transaction. In doing so, I will be guided by the foregoing decisions of the Court of Appeal.

26. The complainants in the two cases were a father and a son. They were both hijacked from their home together and driven to the bridge on River Kuja. The father was tortured and shot dead. His body was thrown into the river. The son was also shot but the gun did not fire. He was tied and thrown over the bridge.

27. By subjecting the circumstances under which the two offences were committed and the definition of 'same transaction' I am satisfied that a consideration of the proximity of time and the continuity of the action and purpose yield that the two offences were committed in the same transaction.

28. I am further satisfied that the Petitioner herein ought to benefit from the provision of **Section 37** of the **Penal Code** since the two offences were committed in the same transaction.

29. I hereby allow the Petition to the extent that the sentence of 40 years' imprisonment in respect to *Migori High Court Criminal Case No. 105 of 2014* shall run concurrently with the sentence of 20 years' imprisonment imposed in *Kisumu Criminal Appeal No. 616 of 2010*.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 22nd day of May 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Paul Otieno Ndejwe, the Petitioner in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant