



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. CRIMINAL APPLICATION NO. 11 OF 2020

(Consolidated With Misc. CR. APP. NO. 12 OF 2020)

CAROLINE MUMBI NGONDI.....1ST APPLICANT

JOHN KARIUKI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

A. Introduction

1. This is a ruling on the amended application filed on 10/06/2020 as consolidated with the one dated 14/05/2020 by the 2nd applicant. The applicants prayed for orders that this court do make a finding that the sentences they were serving ought to have run from the date of their conviction being 1/08/2017 as opposed to the date when the appeal was heard and determined on 7/11/2019.

2. In alternative, the applicants prayed that this court do make a finding that the sentences ought to run from the date of arrest within the meaning of Section 333(2) the Criminal Procedure Code and not from the date the appeal was determined. However, I note that the 1st applicant had another prayer to the effect that this court do declare that her sentence in Criminal Appeal No. 41 and 42 of 2017 which arose from CM's Criminal Case No. 591 of 2014 and Criminal Appeal No. 30 and 31 of 2017 which arose from CM's Criminal No. 593 of 2014 to run concurrently.

3. The two applications were consolidated vide the orders of this court made on 9/07/2020 for the reason that the applicants were charged and convicted together in Criminal Cases Nos. 591 and 593 both of 2014.

4. The background information that the applicants herein were both convicted on 1/08/2017 in Criminal Case 593 of 2014 and sentenced on 1/08/2017 to serve four (4) years in count 1, 3 and 4 and one (1) year in count 2 and the sentences were to run concurrently. That their appeals to the High Court (Embu Criminal Appeal No. 30 and 31 of 2017) in relation to the said sentence were dismissed vide the orders of 7/11/2019. Thus their sentences ought to run from the date of the conviction by the trial court and not the date of the determination of the appeal.

5. The applicants argued their applications by way of written submissions.

B. Submission by the parties

6. The 1st applicant submitted to the effect that she was convicted in Criminal Case 593 of 2014 and sentenced to four (4) years in count 4 and 5 on 1/08/2017 and which sentences were to run concurrently and the appeal from the said conviction and sentence was dismissed on 7/11/2019.

7. That she was further convicted in another criminal case being Criminal Case No. 591 of 2014 on 29/03/2015 and sentenced to 7 years and 3 years in counts one and 2 therein but which sentences were reduced to 4 years and 2 years respectively upon appeal in the High Court Criminal Appeal Nos. 41 and 42 of 2017. The orders by the court of appeal were made on 30/05/2018 and wherein the court ordered that the sentences do run concurrently.

8. It was her submissions that having been sentenced on 29/03/2015 in Criminal Case No. 591 of 2014 to serve 4 years imprisonment after

revision on appeal the said sentence ought to have run from the date of conviction being 29/03/2015 and thus end in March 2019. For the sentences in Criminal Case No. 593 of 2014 she submitted that they were to run from 1/08/2017 and end in August 2021 and both subject to remission. She submitted that the two criminal cases which were before the trial courts arose from one transaction but which were split to avoid duplicity and overloading of the charge sheet as the particulars of the offence and the particulars thereof, the complainant and the parties were also the same. That if the said criminal files were taken before the same trial court, the sentences would have been ordered to run concurrently and if the trial court and the appellate court were made aware of the existence of two different court files, they would have invoked the provisions of section 37 of the Penal Code. She thus prayed that the court do order the two sentences in the two different files to run concurrently.

9. On the part of the 2nd Applicant, he submitted that he was charged in Criminal Case No. 591 of 2014 and 593 of 2014 and sentenced to 4 years in each of the files. He submitted and prayed that the sentences of 4 years in Criminal Case No. 593 of 2014 ought to commence from the date of initial conviction as the presiding judge did not give orders as to when the same ought to have commenced and that when he sought directions from the prison, he was advised to seek clarification from the court. He submitted that the sentences ought to commence from the date of conviction being 1/08/2017 but the Prisons Department interpreting had misunderstood the same to run consecutively. He further argued that the two sentences ought to have run concurrently as the two files emanated from the same transaction. Reliance was made on Ondieki –vs- Republic (1981) eKLR and Ng’ang’a –vs- Republic (1981) eKLR

10. The Respondent through Ms. Mati submitted that they were opposed to the first prayer on the grounds that the two trial magistrates took into account the periods spent in custody. However, the respondent was not opposed to the prayer that the sentences do run concurrently as it was the law and jurisprudence relating to “the lesser severe sentence” as was stated in Ondieki –vs- Republic (1981) eKLR

C. Analysis of the law

11. Section 333(2) of the Criminal Procedure Code provides that: -

“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. However, it is noted that the applicants upon being convicted in the two criminal cases Nos. 593 of 2014 and 591 of 2014 filed appeals to the High Court. Criminal Appeal Nos. 30 and 31 of 2017 against the conviction and sentence in Criminal Case No. 593 of 2014 and Embu High Court’s Criminal Appeal 41 and 42 of 2017 which was against the conviction and sentence in Criminal Case No. 591 of 2014.

13. The record shows that appeals No. 30 and 31 were consolidated and heard by Bwonwonga, J. and were dismissed for lack of merit. Appeals Nos. 41 and 42 were consolidated and heard by this court which found no merit in the consolidated appeal as regards conviction but allowed review of the sentences downwards in all the counts. It is noted that in the appeals heard by the two courts, the issues of sentences running concurrently in the two criminal cases did not feature.

14. As such in my opinion and considering the foregoing, the main issues for determination are: -

a) *Whether this court has jurisdiction to entertain the applications*

b) *If so, whether the applications are merited.*

15. This is in appreciation of the principle that the issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost. It is at once fundamental and over-arching as far as any judicial proceedings is concerned and a threshold question and best taken at inception. (See Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others [2013] eKLR).

16. The jurisdiction of the High court is provided for under article 165(3) of the Constitution and includes *unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; and **any other jurisdiction, original or appellate, conferred on it by legislation.*** The High court further *has supervisory jurisdiction* over subordinate courts donated by Article 165(6) of the Constitution. This jurisdiction is expounded under Sections 362 and 364 of the Criminal Procedure Code.

17. As the Supreme Court held in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, a Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

18. As I have noted above, the applicants had previously approached this court vide the appeals aforementioned and which were heard and determined. What the applicants are clearly requesting this court to review its earlier decisions. At the time the appeals were determined the respective appellate courts were never required by any of the applicants to make an order for the sentences in any of the two cases to run concurrently. The applicants did not lodge appeals in the Court of Appeal against the decision of the High Court.

19. The cardinal rule is that superior courts should not sit in review or on appeal over their own decisions. In my view that the right forum for the instant matters would be in a constitutional or in the Court of Appeal should the applicants want to challenge the appeal judgments. This court is aware of the provisions of Article 50(2)(q) of the Constitution of Kenya 2010 which guarantees as a tenet of fair hearing the right of a person if convicted, to appeal to, or apply for review in *a higher court*.

20. By reviewing the said sentences so as to make orders as to the same running concurrently, this court would abrogate itself the appellate jurisdiction to entertain an appeal from its own decision.

21. In criminal law and procedure, a convict cannot appeal against a decision and after its determination file a revision in the same appellate court to cover issues not addressed by such convict in his/her appeal. It is my considered opinion that if a convict opts to appeal from the judgment of the trial court, he cannot again return to the same court for revision. In my view, the applicants' revision application is misconceived.

22. It is therefore my considered opinion that this court lacks jurisdiction to entertain this application. I have no business therefore looking at the merits of the issues raised in the application.

23. I find the application before me misconceived and incompetent, for want of jurisdiction. It is hereby struck out.

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF JULY 2020.

F. MUCHEMI

JUDGE

In th presence of: -

Ms. Mati for the Respondent

Applicants through Video Link