



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION CASE NO. 37 OF 2020

DAVID BENJAMIN ONYANGO.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

The applicant herein **DAVID BENJAMIN ONYANGO**, filed an application by way of motion herein on 27.2.2020. The said application seeks basically 2 prayers:-

i) THAT the sentence herein imposed on the applicant be reviewed so that the sentences on the 4 counts be ordered to run concurrently.

ii) THAT pursuant to section 333(2) of the Criminal Procedure Code, the period of 1 year and 1 week that he spent in custody awaiting conclusion of his case be put into account in the sentence.

The applicant filed this application in person. However, at the hearing of the same, he was represented by his advocate, Mr. Ochieng Ogutu. In his short submissions, counsel relied on the case of Sawebi Mukasa S/O Abdalla Aligwasia (1997)EACA97, that if the offences constitute a series, the sentences ought to be concurrent. That in the present cases, the offences are fraud related and so ought to run concurrently.

And learned counsel Ms. Akunja, for the state was in agreement in as far as giving account for the period spent in remand. On the issue of whether the sentences are to run concurrently or consecutively, the submissions were that if there were options of fines, same ought to run consecutively.

I have considered the submissions of both learned counsel for the parties. On the first issue on the nature of sentence, I find guidance on section 37 of the Penal Code. Same states:

“Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him or under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof;

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrent with a former sentence under sub-paragraph (1) of the paragraph (c) of sub-section (1) of section 28 or of any part thereof”.

The submissions made by counsel for the applicant that the sentences herein ought to run concurrently since the offences emanated from the same transaction seem to be based on the above main section 37 of the Penal Code. These submissions are correct where the court orders prison terms in respect of the separated counts. If the offences relate to the same series of transactions, then the court may order the same to run concurrently (the authority of Sawebi Mukasa (1967)EACA97 was not supplied to court for perusal).

However, this position changes in situations where the court grants options of fines. So that where fines are given, then the proviso to section 37 of the Penal Code dictates that the sentences shall run consecutive to each other. And that it would be unlawful to order that such sentences run concurrently.

The sentencing court herein imposed fines on each of the 4 counts. The imprisonment terms were imposed in default of payment of the fines. If this is so, then the trial court acted within the law in ordering that the sentences do run consecutively.

On the 2nd issue, it is agreed by both the defence and prosecution sides, that the period spent by the applicant in remand custody while

awaiting his trial ought to be accounted for in the sentence. This is the import of section 333(2) of the Criminal Procedure Code. In our instant case, the applicant had been in remand custody for 1 year and 1 week.

I have considered the sentencing proceedings of 30.10.2019. The same do not indicate that the period applicant spent in remand custody awaiting conclusion of his case was given account in the sentence. Applicant is therefore entitled to reduction of his sentence for the period he remained in remand custody. I therefore order that the period of 1 year and 1 week be deducted from the overall imprisonment term of the accused. Orders accordingly.

HON. JUSTICE D. OGEMBO OGOLA

13th November 2020

Court:

Ruling read out in open court (on-line) in the presence of Mr. Ochieng Ogutu for the accused, the accused and Ms. Kibathi for the state.

HON. JUSTICE D. OGEMBO OGOLA

13th November 2020