



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC. CRIMINAL APPLICATION NO. 17 OF 2013

MATHEW MATHEKA MUSAU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This is ruling on an application filed on 4th February 2013 by way of Chamber Summons seeking an order that “the sentence imposed in respect of Criminal Case No. 462 of 2008 – Makueni to commence as at the date of pronouncement on 13th August 2010”.
2. The application was supported by an affidavit sworn by the applicant explaining briefly that he was convicted in Makueni Principal Magistrate’s Court case No. 462 of 2008 for eight (8) counts of obtaining money under false pretences and one (1) count of being in possession of government stores and on 13th August 2010 sentenced to serve an imprisonment terms for respectively 4 years and 1 year, both sentences running concurrently. Citing section 333(2) of the Criminal Procedure Code, the applicant sought orders “prison authorities for the sentences imposed to be deemed to commence as on 13/8/2010.”
3. It came out at the hearing that at the time of conviction and sentence in Makueni Principal Magistrate’s Court case no. 462 of 2008, the applicant was serving a 10 year default sentence on 10 counts of obtaining money by false pretences in consolidated criminal cases Thika Chief Magistrate’s Court Criminal cases nos. 1942, 1943 and 1945 of 2007, in which he was fined Ksh.20,000/- for each of the 10 counts and in default to serve one (1) year imprisonment. The applicant proposed to pay the fines in the Thika Criminal Cases so that the sentences of imprisonment terms in the Makueni case may commence on the date of pronouncement on the 13th August 2010.
4. Counsel for the Director of Public Prosecution, Mr. Machogu, opposed the application citing section 37 of the Penal Code as requiring a subsequent sentence to be executed after the convicted person has served a sentence imposed in previous proceedings, unless the court direct that the sentences shall run concurrently. Counsel also relied on the decision of the Court of Appeal in *Joseph Kioko Muoki v. Republic* Criminal Appeal No. 133 of 1984, in which the Court observed that section 333 (2) of the Criminal Procedure Code seemed to precluded any court from antedating the beginning of a sentence and submitted that the court was not bound to take into consideration any period that the person convicted was in custody. He submitted that the sentence of 4 years should run from the date of execution of the first sentence. Counsel for the DPP also pointed out that under section 37 (2) of the Penal Code it is not lawful for a sentence of imprisonment in default of a fine should be ordered to run concurrently.

5. As pointed out by the Court to Counsel, section 333 (2) of the Criminal Procedure Code was amended in 2007 by Act No. 7 of 2007 introducing a proviso that the court may consider for purposes of a sentence of an imprisonment term any period that the person convicted had been in custody.

6. Moreover, even before the 2007 amendment to section 333(2) of the Criminal procedure Code, the decision of Court of Appeal in *Joseph Kioko Muoki* case, observed that–

“when considering what term of imprisonment to impose a court is not bound to take into account the period an accused has spent in remand though it usually does and rightly so.”

7. Section 37 of the Penal Code is in the following terms:

“37. Sentences when cumulative

Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him 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 concurrently with a ***former*** sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.”

8. The effect of section 37 of the Criminal Procedure Code on the facts of this case is as follows:

- a. The sentences of 4 years and one year respectively passed on applicant for the counts 1-8 and 9 in Makueni Principal Magistrate’s Court no. 462 of 2008, which the trial court directed to run concurrently are to run consecutively with the sentences imposed in the previous convictions in Thika Chief Magistrate’s Cases nos. 1942, 1943 and 1945 of 2007, as the trial court did not make directions for concurrent execution thereof.
- b. Should the applicant in this case, therefore, pay the fines in the consolidated Thika Chief Magistrate’s Cases nos. 1942, 1943 and 1945 of 2007, the execution of the sentences in the Makueni Principal Magistrate’s Court case no. 462 of 2008 would immediately commence. Otherwise, the subsequent sentences commence after the applicant serves the 10 year sentence in default of payment of the fines in the previous convictions.
- c. Section 37 (2) of the Penal Code is not applicable as the sentences in default of fines are in the *former* and not *subsequent* sentences as contemplated in the subsection.
0. The principle upon which an appellate court would interfere with a sentence by imposed by the trial was adverted to in the *Joseph Kioko Muoki* case as follows:

*“As usual, however, this court will not interfere with the discretion of a trial judge in the matter of sentence unless it appears that in assessing he acted on some wrong principle or did not act on some correct one or has imposed one which is manifestly excessive. **Ogola v. R** (1954) 21 EACA 270 (CAK).”*

9. The Court is not persuaded that there is a ground for adjusting the terms of execution of the sentence by an order that the sentences imposed in the Makueni Principal Magistrate’s Court case No. 462 of 2008 do run concurrently with the sentences in the previous convictions in the Thika Chief Magistrate’s Court cases Nos. 1942, 1943 and 1945 of 2007. The applicant did not demonstrate any exceptional circumstances for which the court should interfere with the trial court’s discretion in sentencing and consider making an order for concurrent execution of the sentences against the general rule of consecutive execution of sentences in section 37 of the Penal Code.

10. Indeed, in the view of this court, each and every count of obtaining money by false pretence is an

independent and distinct offence for which the applicant when convicted should be punished separately; it is not the case of one transaction giving rise to, or manifesting itself in, several offences in which case a concurrent sentences may be justified.

ORDERS

11. Accordingly, for the reasons set out above, the applicant's application herein filed on 4th February 2013 is declined.

DATED AND DELIVERED THIS 26TH DAY OF JANUARY 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Applicant present in person for the Applicant

Ms Saoli for the Respondent

Ms Doreen - Court Assistant.