



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.11 OF 2014

DANCUN ANAYA ALI.....1ST APPELLANT

JOSEPH GITUNGO MWANGI.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the judgment of the Hon. Onyina Ag. Principal Magistrate) in

Kibera Chief Magistrate's Criminal Case No.4453 of 2013

delivered on 27/11/ 2013)

JUDGMENT

Both appellants were 1st and 2nd accused persons respectively before the Chief Magistrate's court in Kibera Criminal Case No 4453 of 2013. They were jointly charged with seven counts of burglary contrary to Section 304(1)(a) as read with Section 304(2) of the penal code. In the alternative to counts IV, VI and VII, the 1st appellant was charged with handling stolen goods contrary to section 322(1) as read with Section 322(2) of the Penal Code. The 2nd appellant was also charged with alternative charges to counts III, V, VI and VII of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code. In count VIII the 1st appellant was singly charged with having suspected stolen property contrary to Section 323 of the Penal code.

Both appellants were convicted on their own plea of guilty in the main counts. In counts I to VII they were each sentenced to three years imprisonment respectively. In count VIII the 1st appellant was sentenced to two years imprisonment.

They appealed only against the sentence. The 1st appellant submitted that in respect to counts I to VII, the sentences ought to have run concurrently. He stated that for the period he has served the partial sentence, he has reformed and urged the court to find in his favour. The 2nd appellant also urged the court to order that the sentences run concurrently.

Learned state counsel Ms. Aluda submitted the charge sheet did not state the time the offences were committed but urged the court to look into the issue of sentence.

Under Section 354(3) (b) of the Criminal Procedure Code this court in an appeal against sentence, may increase or reduce the sentence or alter the nature of the sentence.

In the instant case, the legality of the sentence has not been challenged. All the appellants are urging the court to do is to have the sentences run concurrently. The learned trial magistrate passed a multiple of sentences. It was important that he further ordered that the sentences run either concurrently or consecutively. Under Section 12 of the Criminal Procedure Code, **“Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass”**.

The principles under which sentences shall run concurrently were, in addition, laid down in the case of **Ng’anga –vs- Republic (1981) KRL, 530** in that in normal circumstances, concurrent sentences are awarded for offences committed in one criminal transaction. My understanding of this holding is that there may be exceptional circumstances which may warrant the court to give concurrent sentences notwithstanding that the offences were not committed in one criminal transaction.

A good exception to the rule in the Ng’anga case was reiterated by the Court of Appeal sitting in Kisumu in **George Otieno Akula & 3 Others –Vs- Republic, Criminal appeal No.406 of 2009** while relying on the case of **Ngibuini –vs- Republic (1987) KLR, 517**. In the case, the court observed that sentences can run concurrently if the offences formed a series of offences of the same or similar character even though they did not arise from the same transaction. The court stated as follows:-

“Based on what we have slated above, in our view this was a case where concurrent sentences would have served the purpose. In doing so, we find consolation in the decision of this court in the case of Ngibuini –Vs Republic (1987) KLR 517 in which the appellant was tried in separate cases where the complainants were neither the same nor did the offences arise out of the same transaction, the court was of the opinion that because the offences formed a series of offences of the same or similar character, they should have been charged in one charge and thus stated:

“We are in the circumstances in agreement with learned counsel for the appellant that the sentences in the two separate trials ought to have been made to run concurrently and the High Court erred in failing to direct they do so. The High court order that the sentences in the separate trials do run consecutively is therefore set aside and we substitute an order that the sentences in Criminal Case 213/84 and 212/84 shall run concurrently.”

As observed in the **George Otieno Akula** case, the instant offenses in counts I to VII were of similar character, and although they were committed on diverse dates and the complainants were different, the learned trial magistrate ought to have ordered that the sentences run concurrently. He erred in remaining silent on how the sentences should have run in which case the appellants would serve cumulative sentences.

With respect to count VIII there was no evidence that it arose out of the transactions in counts I to VII. It is neither of a similar character nor linked to the other counts. In that case the sentence under its head must run consecutive to the other sentences.

In the end, I allow the appeals. I order that each of the appellants shall serve three years imprisonment in counts I to VII respectively and that the sentences shall run concurrently. However, in respect to count VIII (for the 1st Appellant), the sentence shall run consecutive to the other sentences.

It is so ordered.

DATED and DELIVERED in NAIROBI this 16th day of April, 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1. 1st Appellant in person.

2. 2nd Appellant in person.
3. Mr. Mureithi for the Respondent.