



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEALS NO. 320 OF 2007, 188 OF 2011 and 223 OF 2011

DANIEL NDUNGU KIBE.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(arising from the judgment of Hon. W.W Mutuku Resident Magistrate,

Othaya Criminal Case No. 586 of 2006), Criminal Case No. 570 of 2005) and

judgment of Hon. F.M. Kombo SRM Mukurweini Criminal Case No. 73 of 2009)

RULING

1. By a Notice of Motion filed on 20th January 2014 the applicant moved the court that his rights to liberty be granted and enforced as after completion of his imposed sentence.
2. The application was supported by the affidavit of the appellant DANIEL NDUNGU KIBE sworn on 9th January 2014 in which he deponed that he had three convictions and sentences wherein he had duly served all the sentences but is still being held in custody by the prison authority thereby violating his right to liberty.
3. He therefore sought the order that every sentence begins and expires by the date of sentence on its own.
4. For the purposes of this ruling a background of the appellants cases will be necessary. The applicant was charged with the offence of stock theft contrary to section 275 of the Penal Code in Criminal cases No. 586 of 2005 at Mukurweini and was tried and convicted and sentenced to pay a fine of Ksh. 30,000/- in default 1 years imprisonment. Against the said conviction and sentence the appelalnt filed criminal appeal No. 3020 of 2007 Nyeri.
5. The appellant was further charged with the offence of stealing contrary to section 275 of the Penal Code in Othaya criminal case No. 570 of 2005 and was tried convicted and sentenced on count 1 fine of Ksh. 10,000/- in default one year imprisonment, count II fine of Ksh. 50,000/- in default 3 years imprisonment, Count III fine of Ksh. 10,000/- in default 1 year imprisonment, Count IV fine of Ksh. 50,000/- in default 3 years imprisonment, Count V fine of Ksh. 10,000/- in default one year imprisonment, count VI fine of Ksh. 50,000/- in default 3 years imprisonment, Count VIII fined of Ksh. 50,000/- in default 3 years imprisonment and Count X fine of Ksh. 10,000/- in default one (1) year imprisonment. All the sentences were to run concurrently from 6th September 2011.

6. From the above conviction and sentence the applicant filed High Court Criminal appeal No. 188 of 2011.

7. The applicant was also charged with the offence of making a document without authority contrary to section 357 of Penal Code in Mukurweini criminal case No. 973 where he was convicted and sentenced on count 1 to three years imprisonment. Count II two (2) years imprisonment, count III two (2) years imprisonment and Count IV to three years imprisonment and counts V, VI AND VII to three years imprisonment with all the sentence running concurrently.

8. From the above conviction and sentence the applicant filed criminal appeal No. 273 of 2011.

9. When the appeals came up for hearing the applicant submitted that he wanted each sentence to run independently of each other and that since he had been in prison for the last seven (7) years he was entitled to be released. He submitted that section 12 of CPC and section 14 of CPC allowed consolidation of the sentences given. He further submitted that he was now a reformed man and therefore the court ought to interfere with the lower courts sentence and order that the sentence each run independently.

10. Mr. Nyamache for the state submitted that section 37 and 354(2) (b) of CPC stipulates how sentences should run. He further submitted that the same position is provided for under section 28 of Penal Code.

11. Section 37 of the CPC provides thus:

***“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 dealt which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless he court directs that it shall be executed concurrently with the former sentence or any part thereof.*”**

12. Section 14(1) CPC provides that when a person is convicted at one trial of two or more distinct offence the court may sentence him to those offences for the several punishments prescribed therefore which court is competent to impose, and those punishment when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court admits that the imprisonment shall run concurrently.

13. The above position of law is supported by the following authorities TOM MWANGI KAMAU v R NAKURU HIGH COURT CR APPEAL NO. 334 OF 2004, NAIROBI HIGH COURT CR APPEAL NO 267 OF 2007 JOHN CHEGE MWANGI V R MACHAKOS HIGH COURT CR NO. 141 OF 2009 FRANCISKA KAVUU MUTUA V R and MOMBASA HIGH COURT CRI APPEAL NO. 184 OF 2011 JOSEPH ABTALLA V R.

14. It is to be noted that the applicant was sentenced to in respect of independent criminal transactions and therefore the sentence can not be ordered to run concurrently. In this I find support in the court of appeal decision in GEORGIA OTIENO AKULA & 3 OTHERS V R COURT OF APPEAL AT KISUMU CR APPEAL NO. 406 OF 2009 reported in [2013]e KLR when the court observed that sentence can be ordered to run concurrently if the offences charged of occurred within the transaction even though he charged in different charge sheets.

15. It is therefore clear that the applicants sentence as imposed are lawful and therefore find no merit on the application herein which I hereby dismiss.

16. I must however state that the applicant is entitled to revision of the sentence of three years imposed upon him through the normal review exercise if the appeals were withdrawn. I therefore direct that the appeal be fixed for hearing on 16th July 2014.

Dated, signed and delivered at Nyeri this 23rd day of May 2014.

J. WAKIAGA

JUDGE

Mr. Nyamache for the State

Appellants in person

Court: Ruling read in open court in the presence of the above named. The three appeals to be fixed for hearing on 16th July 2014.

J. WAKIAGA

JUDGE