



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Criminal Revision 13 of 2008**

*(Arising from Cr. Case no. 903 of 2008 of the Resident Magistrate's Court at Mombasa)*

**REPUBLIC .....APPLICANT**

**VERSUS**

**MWAHENZI SAID NDARU .....RESPONDENT**

**RULING ON REVISION**

Pursuant to the provisions of Section 363(2) of the Criminal Procedure Code, the Deputy Registrar of this court caused the proceedings in Mombasa C.M. Criminal Case No. 903 of 2008 Republic –vs- Mwashenzi Said Ndaru to be placed before this court for perusal in exercise of its supervisory jurisdiction of revision under section 362 of the Criminal Procedure Code.

I have perused the aforementioned proceedings and it is apparent that on 3<sup>rd</sup> April 2008, Mwashenzi Said Ndaru, the applicant herein pleaded guilty to a charge of Eight (8) counts. The first four counts (Counts I – IV) relate to the offence of stealing contrary to Section 275 of the Penal Code. The remaining four counts (Counts V – VIII) relate to the offence of forgery contrary to section 349 of the Penal Code. He was convicted and sentenced to pay a fine of Kshs.20,000/- each on counts I to IV in default to serve 2 years imprisonment. He was also sentenced to serve 3 years each on counts V to VIII. The learned Resident Magistrate did not indicate whether the sentences would be concurrent or consecutive. This prompted the prison authorities to write to the trial court to clarify this aspect because it is said that it became difficult to compute the period the applicant would serve.

The supervisory jurisdiction of this court given under Section 362 of the Criminal Procedure Code enables this court to peruse proceedings of the subordinate court to satisfy itself as to correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court. It is obvious that there is a genuine concern raised by the prison authorities, which this court must step in to correct. The legal position is that where an accused person is sentenced on more than one count it should be expressly stated in his presence and recorded whether the sentences are to be concurrent or consecutive. In the English case of **R =vs= Anthony [1962] Criminal L.R. 259** it was stated inter alia:

**“The sentence imposed in respect of each count, and whether those sentences were to run concurrently or consecutively should be expressed with clarity.”**

It is a general rule of practice that where a person is convicted on several counts of the same offences or on different offences the sentencing court has the power to direct the sentences to run consecutively or concurrently. However it should be noted that consecutive sentences should not be passed for offences arising out of the same transaction. The logic behind this exception is that if consecutive sentences are passed, the total sentence may very often prove to be too great. Where a person is convicted of an offence and the maximum sentence on either count appears to be insufficient for the protection of the public and the treatment of the offender it is proper to pass consecutive sentences.

The difficulties which arise from the proceedings herein are twofold. First, is that the sentencing magistrate did not pronounce whether the sentences would run concurrently or consecutively. Secondly,

the sentences imposed are for payment of fines and for imprisonment. Let me start with the first problem. The question is, what happens when the trial court does not state whether the sentences are concurrent or consecutive? This court in the case of **Ondiek =vs= Republic [1981] K.L.R. 431 held interalia:**

**The practice is that if a person commits more than one offence at the same transaction save in exceptional circumstances the sentences imposed should run concurrently.**

In my appreciation of the general rule of practice, I am convinced that where the court is silent like in these proceedings, it should be presumed that the sentences shall run concurrently. The issue arose and was dealt with by Lord Parker C.J. Ashworth and Atkinson JJ as early as 1962 in **Practice Direction (passing sentence) [1962] 1 W.L.R. 191, 46 Cr. App R. 119** where Lord Parker C.J. stated as follows:

**“While in the absence of any reference to a sentence being consecutive it is no doubt intended to be concurrent...”**

Let me at this juncture deal with the second problem which is unique in these proceedings in that there is a fine and a custodial sentence. I do not see much of a problem here. What will happen is that the custodial sentences shall run concurrently. What will happen to the fines? The practice should be that where fines are imposed, the fines should be paid in each count. In this matter the accused was ordered to pay a fine of Kshs.20,000/- each on counts I - IV. It means that the accused shall in the end pay a total of Kshs.80,000/-. If the accused does not pay the fine and opts to serve the default sentence of two years on each count, it will mean that he shall serve the sentences concurrently together with the substantive sentences in counts V to VIII.

In the end I am convinced that the discretion in imposing the sentences in these proceedings should be altered and corrected on revision to avoid creating a confusion as it has done in these proceedings. I direct that the sentences imposed in counts V to VIII to run concurrently. The accused should pay the fine as ordered in counts I to IV and in default to serve the 2 years imprisonment in each of those counts but the default sentences shall run concurrently with those in counts V to VIII.

I hope this ruling has sorted out the confusion created to the prison authorities.

**Dated and delivered at Mombasa this 23rd day of May 2008.**

**J.K. SERGON**

**J U D G E**