



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

MISC. CRIMINAL APPLICATION NO. 488 OF 2007

STEPHEN WANYEE GICHUHI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The Court was moved by an amended Chamber Summons dated 9th November, 2007 brought under s.60(1) of the Constitution, and ss.12 and 14(1) of the Criminal Procedure Code (Cap.75, Laws of Kenya). The application carried just one prayer: that the Court do order the sentences imposed on the applicant in Criminal Cases 8943 of 2003, 2413 of 2004, and 1348 of 2003 at the Kibera Law Courts, to run concurrently.

The grounds founding the application are thus stated –

- (i) the applicant was arrested and charged with two offences of obtaining contrary to section 313 of the Penal Code;
- (ii) after a first conviction on 29th December, 2005 two other convictions followed;
- (iii) efforts to have three sentences consolidated were futile, as the trial Magistrates did not allow;
- (iv) the High Court’s discretionary powers may be applied to have the sentences consolidated and run concurrently;
- (v) the applicant is ailing; while in prison.

Learned counsel **Mr. Kanyi** submitted that as the several cases in which the applicant had been convicted were not consolidated, the sentences are running *consecutively*. He urged that, by the discretion of the Court, these sentences be made to run concurrently.

In aid of his client’s case, counsel invoked the Court of Appeal decision in **Ngibuini v. Republic** [1987] KLR 517, in which it was held (pp.517 – 518):

“Where the offences charged are founded on the same facts or form or are part of a series of

offences of the same or similar character, they ought to be charged together.

“The court has the discretion to direct that offences in the same charge or information be tried separately where it is of the opinion that the accused may be embarrassed in his defence or that for any other reason it is undesirable.

“Where there is a single complex of offences connected in kind and time it is undesirable though not unlawful for the accused to be arraigned on separate trials.

“It is undesirable to have separate trials as it denies the court the opportunity to look at the accused vis-a-vis the series of offences as a whole when sentencing.”

It was **Mr. Kanyi’s** contention that the situation prevailing in the case of the applicant, is that the several hearings should have been conducted concurrently; that even though the complainants were different, the facts were similar; the offences were similar, even though hearing was in different Courts.

Learned counsel **Ms. Gateru** opposed the plea for consolidation in the application. She urged that the offences had been committed on *different dates*; the *complainants were different*; *each sentence was lawful*, and each had been imposed by a *different Magistrate* possessed of jurisdiction; the *conclusion of the hearings had taken place in different years*; and so there would have been no basis for consolidation in the first place. Counsel urged that the applicant if aggrieved, should proceed against each sentence by way of appeal.

The cases in question are as follows:

- (a) *C.M.C. Criminal Case No. 1348 of 2003 – Nairobi Law Courts;*
- (b) *C.M.C. Criminal Case No. 2413 of 2004 – Nairobi Law Courts;*
- (c) *C.M.C. Criminal Case No. 8943 of 2004 – Kibera Law Courts.*

In the first case in the trilogy, *the applicant* was charged with *stealing* contrary to s.275 of the Penal Code (Cap.63, Laws of Kenya); and the charge was that he, on *19th December, 2001* at the Co-operative Bank, within the Nairobi Area, stole Kshs.544,500/= the property of Co-operative Bank of Kenya Ltd.

In the second case in the trilogy, the charge was brought against *three* accused persons (including the applicant herein). The charge in that case was, *making a document without authority* contrary to s.357(a) of the Penal Code. The particulars were that the accused persons, on *29th July, 2004* at an unknown place in Nairobi, jointly with others not before the Court, without lawful authority or excuse, made a certain document, namely a Banker’s Cheque No. 004465 purporting to be a genuine Banker’s Cheque made and issued by the Kenya Commercial Bank Limited, University Way Branch. There were two other counts brought against *the three*: *uttering a false document* contrary to s.353 of the Penal Code; and *obtaining goods by false pretences* contrary to s.313 of the Penal Code.

In the third case in the trilogy, the accused was only *the applicant* herein; and the charge was, *being in possession of forged bank currency notes* (U.S. dollars) contrary to s.359 of the Penal Code. The particulars were that on *15th November, 2004* at Riruta Report Office within the Nairobi Area, the applicant herein, without lawful authority or excuse, had in his possession twenty-seven 100 U.S. dollar-notes knowing them to be forged.

I have carefully considered the submissions of counsel in this matter, and I have formed the impression that the merits of these submissions are to be determined by reference to the *case law*. The relevant case is the Court of Appeal decision in **Ngibuini v. Republic** [1987] KLR 517. The issue in that case turned around “sentences passed by the Resident Magistrate’s court at Nyeri on the appellant upon his conviction [on] various charges of theft by agent contrary to section 283(b) of the Penal Code in two separate trials namely Criminal Case Nos.212/84 and 213/84.”

The Court of Appeal, after considering the facts of the two cases involving the appellant therein, thus remarked:

“On the facts set out above it is clear that the charges laid against the appellant on July 11, 1984 in the two separate cases could have been charged together. It is the appellant’s case in this appeal that failure to do so has embarrassed him and occasioned to him a miscarriage of justice as it had the effect of depriving him of the possibility of the trial court exercising in his favour the sentencing discretion provided for in section 14 of the Criminal Procedure Code.”

The Court, on the facts of the case, ordered the sentences to run *concurrently*, stating as follows:

“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 them to so run. 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.”

Now in the present instance, Criminal Case No. 1348 of 2003 involved a crime committed on 19th December, 2001 – and the charge was *stealing* contrary to s.275 of the Penal Code.

Criminal Case No. 2413 of 2004 involved *several complainants*, and the main charge was making a document without authority; and the offence was committed on 29th July, 2004.

Criminal Case No. 8943 of 2004 carried the charge of being in possession of forged bank notes – an offence committed on 15th November, 2004.

The trials took place and were concluded at *different times*, in *different Courts*. Is this a situation in which a consolidation of the charges could have been achieved? Obviously, no; there was, lacking, the concomitant transactions of criminal acts which gave them *common origin, purpose* and *timing*, and which would provide the essential similarity that dictates consolidated hearing. Different complainants were involved; the motions of trial were unrelated; and so, these were essentially *quite different* trials.

From the authority of *Ngibuini v. Republic*, it is apparent to me that there would be *no legal basis* for imposing concurrent sentences, where it was entirely inconceivable that the trials could have been consolidated. The basis of the Court’s discretion to make the different sentences concurrent, in my opinion, is that there had been a *real opportunity for the consolidation of the trials*; and that such consolidation would operate in the cause of justice, by according the Court a *fuller view of the magnitude of the offences*, and by giving the accused person a *chance to conduct a co-ordinated defence*.

I am not convinced that such conditions obtained in the trials in question. Consequently, I hold that the applicant must serve the several sentences separately, in the manner in which they were imposed.

The applicant’s application by amended Chamber Summons of 9th November, 2007 is dismissed.

Order accordingly.

DATED and DELIVERED at Nairobi this 6th day of October, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr.--- Kanyi

For the Respondent: Ms. Gateru