



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Crim Application 443 of 2004**

**JEREMIAH MUTINDA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicant, JEREMIAH MUTINDA has asked this court to order that the two sentences meted out to him, in two separate cases, should run concurrently.

In his affidavit filed in support of this application, the applicant gives more details about the cases. He says that he was first convicted in Criminal Case No. 4706/97, although he does not disclose the offence for which he was convicted. But suffice it to say that the applicant was sentenced to imprisonment for 2 years. Following his conviction and sentencing, the applicant did not appeal.

In another case, Criminal Case No. 12188/98, the applicant was convicted on four counts, namely; 2 Counts, each for Robbery contrary to section 296(1) of the Penal Code; 1 Count for Possession of a firearm contrary to section 4(2) (b) of the Firearm Act; and 1 Count for Possession of ammunition contrary to Section 4(2) (b) of the Firearm Act. The applicant was jailed for 6 years on the first two counts, and a further 2 years on the other two counts. The said sentences were ordered to run concurrently.

Following the decision by the learned trial magistrate, the applicant lodged an appeal against both conviction and sentence. The said appeal, No. 633 of 1999, was heard by the Hon. W. K. Tuiyot J. Having given due consideration to the applicant's appeal, the appellate court dismissed it, save for ordering that the corporal punishment be reduced from 8 strokes to 2.

It is now the applicant's contention that in his understanding, each sentence which is imposed by a court of law commences on the date when it was handed down. If that be the case, the sentence in Criminal Case No. 4706/97 would have been running simultaneously with the sentence in criminal case No. 12188/98.

However, the applicant was shocked when the prison authorities notified him that the sentence in the Criminal Case No. 12188/98 would only commence after the applicant had finished serving the sentence in Criminal Case No. 4706/97. In other words, that the sentences in the two cases would run consecutively, as opposed to concurrently.

It was for that reason that the applicant has now asked this court to order that the sentences should run concurrently.

In response to the application, learned State Counsel, Mrs. Gakobo said that the application did not have any merits. She placed reliance upon the provisions of Section 37 of the Penal Code, for the contention that unless the trial court expressly ordered otherwise, all sentences in criminal cases would run consecutively.

Section 37 of the Penal Code reads as follows;

“Where a person after conviction for an offence is convicted for 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 a fine shall be executed concurrently with a former sentence under sub paragraph (i) of paragraph ( c ) of subsection (1) of section 28 or of any part thereof.”**

As far as I am concerned, the foregoing statutory provision is very clear indeed. It says that if a person is sentenced to imprisonment at a time when he had been convicted, and whether already sentenced or not, the two sentences are to run consecutively. Therefore, I have no doubt in my mind that the interpretation by the prison authorities, as represented to me by the applicant is correct.

The applicant’s sentences could only run concurrently if it was so ordered by the court. No such orders had been made previously. But being desirous of such orders, the applicant brought this application. When he was canvassing it, the applicant told the court that he was unwell, and was thus in need of medical treatment. He said that medical attention was very wanting at the Kamiti Prison. It was for those reasons that the applicant asked me to order that the sentences should run concurrently.

First, it is significant to note that the applicant did not appeal at all against the judgment in criminal case No. 4706/97. He must therefore be deemed to have accepted, as being reasonable and just, both the conviction and sentence in that case. Next, when he was convicted and sentenced in Criminal Case No. 12188/98, the applicant appealed. His said appeal was dismissed, save for the reduction in corporal punishment. Following the decision by the Hon. Tuiyot J., in the applicant’s appeal, I do not have any locus to question the sentence upheld by him. In any event, the applicant has not purported to question the sentence. That sentence must therefore be deemed as proper, in the mind of both the applicant as well as the court. That being the case, I must ask myself if the applicant has made out a case to warrant an order that the sentences should run concurrently, instead of consecutively.

As I have already said , the applicant’s sole reason for the application is that medical treatment at Kamiti Prison was wanting. By implication, the application is asking that the sentence be reduced, through the order that the subsequent sentence should be deemed to have been concurrent with the first sentence. If that happened, the applicant would be left with a small portion of the sentence, still to be served. Hopefully, he would then finish the sentence sooner (rather than later) and hence be in a position to seek better medical treatment.

I am afraid that although my sympathy goes out to the applicant, in view of his ailment, that alone cannot be reason enough for this court to order consolidation. The applicant’s ill-health, if it cannot be properly managed at the hospital within the

prison walls, can always be attended to at Kenyatta National Hospital, upon a referral by the prison doctor.

In conclusion, I find no merit in this application. It is therefore dismissed.

Dated at Nairobi this 7<sup>th</sup> day of February 2005

FRED A. OCHIENG

JUDGE

Delivered in the presence of ;

Mrs Gakobo for the State

Applicant in person

Mr. Odero Court Clerk