



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**MISC. CRIMINAL APPLICATION NO. 43 OF 2004**

**GEORGE MWANGI CHEGE.....APPLICANT**

**Versus**

**REPUBLIC.....**  
**RESPONDENT**

**MISC. CRIMINAL APPLICATION NO. 44 OF 2004**

**JOHN MWANGI NJOROGE.....APPLICANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**MISC. CRIMINAL APPLICATION NO. 48 OF 2004**

**JOSEPH WERU GACHAGUA.....APPLICANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**Issues:**

***I. When Concurrent or Consecutive Sentence may be ordered.***

***II. The Court to make the order and the stage at which the order should be made.***

***III. When the Court becomes functus officio***

**RULING**

These three applications were consolidated for hearing simply because they are similar, came from the same prison, apparently the brain behind all of them being Nyeri

## Main Prison Authorities.

In this ruling therefore, I will be referring to the Applicants as the First Applicant, Second Applicant and Third Applicant in accordance with the order in which the applications are mentioned on the first page of this ruling.

Starting with the First Applicant therefore, his name is George Mwangi Chege. He is serving a total of 19 years imprisonment as a result of his conviction and sentence in Cr. Case No. 963/90, Cr. Case No. 877/93 and Cr. Case No. 1884/93 of the S.R.M.'s Court Nyeri, S.R.M.'s Court Nanyuki and S.R.M.'s Court Nyeri respectively. The offence in each case was robbery contrary to Section 296(1) of the Penal Code.

Those are three separate cases in which the First Applicant was prosecuted, convicted and sentenced separately on different dates each case without regard to any other. The First Applicant was not jointly charged with any of the other Applicants in this ruling in any of the three cases. He has told this court during the hearing of his application which is by an undated Chamber Summons filed on 27th August 2004, that following his conviction in the subordinate court, he appealed to this High Court in Cr. Appeals No. 225/93, No. 184/94 and No. 222/94 respectively.

Each appeal was dismissed and as a result he had now served a total of eleven years and some months. He is still left with a long way to go and that is why he feels that the sentences imposed upon him in the three cases be ordered now to run concurrently so that he is released without having to wait in prison for the remaining seven plus years. He explains that as things stand to-day, he has to serve and complete the sentence in one case before he begins serving the sentence in the next case and that is why he had a total sentence of 19 years imprisonment.

To support his application, the Officer In Charge, Nyeri Main Prison in a letter Ref. No. NMP/PRIS/6/5/Vol.V/342 dated 26th November 2004 told this court that the First Applicant has maintained a clean record and has therefore never been charged of any offence against prison discipline throughout his stay in prison. Following that good conduct, the First Applicant was promoted to special stage. The Officer In Charge recommended that the First Applicant's application be considered favourably.

The Applicant said that in Cr. Case No. 1884/94, he appealed up to the Court of Appeal but later decided to withdraw and did withdraw the appeal.

It is more or less a similar story with respect to the Second Applicant, John Mwangi Njoroge in his undated Chamber Summons filed on 27th August 2004 praying for an order for his sentences to run concurrently. He was convicted and sentenced in Cr. Case No. 874/89, Cr. Case No. 879/89, Cr. Case No. 873/89 and Cr. Case No. 715/89 all of the S.R.M.'s Court Nyeri. Offences ranged from robbery contrary to Section 296(1) to attempted robbery contrary to Section 297(1) of the Penal Code. He got a total of 24 years imprisonment out of which he has already served 15 years.

Four (he talked of five in his submissions) separate cases in which the Second Applicant was prosecuted, convicted and sentenced separately on different dates each case without regard to any other. He was not jointly charged with any of the other Applicants in this ruling in any of the four cases. He has told this court that he appealed against each conviction and sentence mentioning this court's Cr. Appeal No. 16/92, Cr. Appeal No. 120/92, Cr. Appeal No. 23/93 and Cr. Appeal No. 192/94 respectively.

All his appeals were dismissed. He did not appeal to the Court of Appeal. But would like an order to make the sentences run concurrently so that he does not have to wait in prison for the remaining years.

To support his application, the Officer In Charge, Nyeri Main Prison in his letter Ref. NMP/PRIS/6/5/VOL.V/341 dated 26th November 2004 told this court that the Second Applicant has maintained a clean record and has never been charged of any disciplinary offence. That the Applicant is highly respected by fellow inmates and was promoted to special stage following his good conduct. The

Officer In charge recommended the Second Applicant's application be considered favourably.

Joseph Weru Gachagua, the Third Applicant had a total of 16 years imprisonment from three cases Cr. Case No. 880/89, Cr. Case No. 873/89 and Cr. Case No. 715/89 all of S.R.M.'s Court Nyeri the offence being robbery contrary to Section 296(1) of the Penal Code. He has served 13 years and wants an order for the sentences to run concurrently so that he is discharged. His undated Chamber Summons was filed on 2nd November 2004.

Following the convictions and sentences, he appealed to this court in Cr. Appeal No. 14/92, Cr. Appeal No. 32/93 and Cr. Appeal No. 196/94. All appeals were dismissed and he did not appeal to the Court of Appeal.

Three separate cases in which the Third Applicant was prosecuted, convicted and sentenced separately on different dates each case without regard to any other. The Third Applicant was not jointly charged with any of the other applicants in this ruling in any of the three cases.

To support the Third Applicant's Chamber Summons, the Officer In Charge, Nyeri Main Prison in his letter Ref. NMP/PRIS.6/5/VOL.V/340 dated 26th November 2004, told this court that the Third Applicant has maintained a clean record and has never been charged of any disciplinary offence since he was committed into prison. He commands respect from his fellow inmates and that following his good conduct, the Third Applicant was promoted to special stage and is in charge of B-Block where prisoners reside. The Officer In Charge recommends that the Third Applicant's application be considered favourably.

The learned State Counsel, Mr. Orinda, like the Court, could not know provisions of the law under which the three applications were brought as none of the applicants referred to such provisions and the Officer In Charge did not assist in that respect. That left us with provisions of the Criminal Procedure Code (Cap. 75 Laws of Kenya) and although Mr. Orinda thought the applicants were applying for a revision of their convictions and sentences, I could not think that was so. First, because the applicants could have said it specifically; and secondly because the stage at which the law allows revision is long past, the applicants having had their respective appeals heard and decided and therefore having made this court *functus officio* in each criminal case in so far as appeals and revisions are concerned. Thirdly, a revision by the High Court under Sections 362 to 367 of the Criminal Procedure Code is only available against a decision of a subordinate court.

Otherwise under Section 6 of the Criminal Procedure Code, the High Court may pass any sentence authorized by law.

The issue of concurrent sentence is dealt with under *Section 14(1)* which provides, *inter alia*, that when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed, and if those punishments consist of imprisonment, the term of imprisonment shall be served consecutively in the order that the court may direct, unless the court directs that the punishments shall run concurrently. Thus from those provisions, it is evident that passing concurrent sentences is discretionary exercisable at one trial of two or more distinct offences in respect of which terms of imprisonment are imposed. That is the position whether the offence is a felony or a misdemeanor. Perhaps it is better to quote those and other relevant provisions starting with Section 7 of the Criminal Procedure Code as all that is contained in Section 6 is what is stated in the previous paragraph above. Section 7 is therefore as follows:

**“7 (1) A subordinate court of the first class held by:-**

**(a) a chief magistrate, Senior Principal Magistrate, Principal Magistrate or Senior Resident Magistrate may pass any sentence authorised by law for any offence triable by that court.**

**(b) a resident magistrate may pass any sentence authorized by law for an offence under Section 278, 308(1) or 322 of the Penal Code.**

**(2) Subject to subsection (1), a subordinate court of the first class may pass the following sentences in cases where they are authorised by law:**

**(a) imprisonment for a term not exceeding seven years.**

**(b) a fine not exceeding twenty thousand shillings;**

**(3) A subordinate court of the second class may pass the following sentences in cases where they are authorized by law:-**

**(a) imprisonment for a term not exceeding two years;**

**(b) a fine not exceeding ten thousand shillings**

**(5) In determining the extent of a court's jurisdiction under this Section to pass a sentence of imprisonment, the court shall have jurisdiction to pass the full sentence of imprisonment which may be awarded in default of payment of a fine, costs or compensation."**

Section 12 states:

**"Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass." Section 14 states:**

**" (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.**

**(2) In the case of consecutive sentences it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to sent the offender for trial before a higher court.**

**(3) Except in cases to which Section 7(1) applies, nothing in this Section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences:-**

**(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less;**

**or**

**(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose."**

Section 333(2) states:

**"Subject to the provisions of Section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code."**

Section 38 of the Penal Code concerns sentence on escaped convicts. In relation to paragraph (b) which is relevant in this ruling, the section states:

**"When sentence is passed under this Code on an escaped convict, that sentence:-**

***(b) if of imprisonment, shall run consecutively or concurrently, as the court shall order, with the unexpired portion of the sentence which the convict was undergoing when he escaped.”***

It means that, subject to Section 38 of the Penal Code and except where otherwise provided in the Criminal Procedure Code such as in Section 7(1), where more than one sentence of imprisonment are imposed without specifying whether the sentences will run consecutively or concurrently, Section 333(2) of the Criminal Procedure Code will apply so that every one of those sentences is

***“deemed to commence from, and to include the whole of the day of, the date on which it was pronounced”***

with the result that:-

***(a) If the sentences are in one trial and are pronounced on the same date, they definitely run concurrently.***

***(b) If the sentences are in different trials and are pronounced on the same date, they also run concurrently.***

***(c) If the sentences are in one trial but are pronounced on different dates, the sentences will run concurrently only to the extent of the balance of the formerly pronounced sentence is yet to be served so that if at that time the latter pronounced sentence is longer than the remainder of the formerly pronounced sentence, then the latter pronounced sentence, following the end of the formerly pronounced sentence, will be served consecutive to the formerly pronounced sentence.***

***In other words, the prison sentences will run concurrently only***

***to the extent of the duration of service of the two sentences coinciding.***

***(d) If the sentences are in different trials and are pronounced on different dates, the prison sentences will run concurrently only to the extent of the duration of service of the two sentences coinciding. Otherwise the sentences will run consecutively.***

Looking at case authorities, I find **NG'ANG'A v REPUBLIC (1981) KLR 530** where the appellant was convicted of house breaking and theft committed in one criminal transaction. The trial magistrate awarded consecutive sentences, citing the appellant's bad record as a reason for doing so. The appellant appealed against that sentence contending that the sentences should have run concurrently. The appeal against sentences was allowed Travelyan J and Sachdeva Ag. J, as they then were, holding that:

***“Concurrent sentences should be awarded for offences committed in one criminal transaction.***

***The fact that the accused had a bad record is no excuse to alter the rule.”***

The trial magistrate was a second class magistrate who seems to have felt that the sentence he had jurisdiction to impose could only be felt by the bad recorded appellant if the sentences were made to run consecutively. The learned judges advised that if the court has insufficient powers to punish, it ought to have referred the matter to a higher court for sentence as set out in Section 221 of the Criminal Procedure Code.

According to that holding in the case of Ng'ang'a therefore, there is a rule that where offences are committed in one criminal transaction, concurrent sentences should be awarded. The trial magistrate tried to avoid that rule on the ground that the Appellant had a bad record. But on appeal, the High Court rejected that ground. The court did not indicate whether there is any exception.

In the case of **ONDIEK v REPUBLIC (1981) KLR 430**, Simpson J and Kneller J, as they then were, expounded the same rule terming it a “practice” and indicating there could be exception. In that case the appellant was convicted of four counts (the report talks of six counts) and was sentenced to nine months imprisonment. It was not specified to which count the nine months imprisonment related and whether the sentences were concurrent or consecutive. There were four complainants in the case and each complainant was the subject of a separate count alleging wrongful confinement contrary to Section 263 of the Penal Code.

It was held that while the sentence of nine months for each count was enough, if the sentences were made to run consecutively, that would make it three years, which was manifestly excessive. It was further held that

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

Reading that holding together with the holding in the case of Ng’ang’a, it would be justified for one to say the ground that Ng’ang’a had a bad criminal record did not amount to exceptional circumstances under which the “rule” or the “practice” would be “altered”. Nevertheless the “rule” or the “practice” can be “altered” in exceptional circumstances. The court in Ondiek’s case indicated that such exceptional circumstances would not arise where alteration of the “rule” or “practice” would lead to a sentence which is manifestly excessive. In that case the maximum sentence under each count was twelve months and the Appellate Court indicated that although it was tolerating the sentence of nine months imposed by the trial magistrate, the appellate court felt that a lower sentence would have been better. That suggests that had the trial magistrate imposed, on each count, a lower sentence whose consecutive running would not have made the total sentence manifestly excessive, the Appellate Court may not have interfered with such a sentence. Would that have amounted to exceptional circumstances?

In simple terms, the word “exceptional” means “very unusual” or “outstanding”, and judgment to that effect, though judiciously entered, is subjective.

So far, the above discussion has covered concurrent or consecutive sentences:

***(a) Where there are more than one limb in one count in a charge sheet or information or a trial.***

***(b) Where there are more than one count in a charge sheet or information or a trial.***

There is a third category:

***(c) Where there are more than one case or trial. Different trials.***

The case of Ng’ang’a covered category (a) while category (b) is covered by Ondiek’s case. To cover category (c) I looked at the 4th Edition of **Halsbury’s Laws of England, Vol. II page 299 paragraph 495** as well as **T.R. Fittswalter Butler & Marston Garsia; Archbold’s Pleading, Evidence & Practice In Criminal Cases 31st Edition 1943, Sweet And Maxwell Ltd. page 208**. These passages cover all the three categories but for the purpose of this ruling, the passages are particularly useful where they cover category (c).

In paragraph 495 of Halsbury’s Laws of England it is stated:

***“A person sentenced on several charges, whether on separate indictments or on different counts in one indictment, may be sentenced to more terms than one of imprisonment and these terms may be directed either to run concurrently with one another or to be consecutive, so that one commences on the expiration of another. Consecutive sentences of borstal training should never***

*be passed.*

*Where sentence of imprisonment is passed on a person already serving a sentence for another offence, the court may impose a sentence for the subsequent offence to run concurrently with, or to commence at the expiration of, the existing sentence.*

*As a general rule, consecutive sentences should not be such as to result in an aggregate term wholly out of proportion to the gravity of the offences, looked at as a whole.*

*Concurrent sentences are frequently passed so that if an appeal is successful on one or more counts of an indictment, but not all, the appropriate sentence appears on the counts which are upheld. It is also necessary to pass concurrent sentences on counts for offences the maximum sentence for which is less than the sentence deemed appropriate for a more serious offence charged on another count.”*

That is the “rule” or “practice”, and I would like to refer to it as the “rule” because in this country it emanates from Section 14 and Section 333(2) of the Criminal Procedure Code, applies both to felonies and misdemeanors, so that where the prisoner is convicted of several offences on different counts of the same indictment or on different indictment, the court as a general rule has power to direct that the sentences shall run consecutively or concurrently. It is good law for a sentence of imprisonment to be ordered to commence from and after the termination of an imprisonment to which the prisoner had been before sentenced for another offence. It is also good law to order those sentences or their respective parts to run concurrently.

That is where several offences arise out of the same transaction, it is a good working rule that sentences imposed should be concurrent. But the sentence for carrying a firearm with intent to commit an offence or for assaulting a Police officer in attempt to escape, should be consecutive to that for the substantive offence. Perhaps those are two good examples of exceptional circumstances the learned judges in Ondiek’s case talked about. If, however, the assault is part and parcel of the substantive offence, it may be treated as aggravation of, and reflected in the sentence for that offence; any sentence for the assault may then be concurrent.

Another example of exceptional circumstances may be in a case where it was said that an indictment contained two counts for the misdemeanor of passing false coin, and the prisoner was sentenced to two years imprisonment. A sentence of two years imprisonment was found to be unlawful. But it was stated that a sentence of one year’s imprisonment might have been passed for each offence, and that commencement of the second might have been postponed until the termination of the first. That was the case of **R. V. Robinson, I Mood 413**. In another case, **Gregory v R., 15 Q.B.D. 974; 19 L. J. Q.B. 366**, where an indictment for misdemeanor contained four counts, the third of which was held (on error) to be bad in substance, and the prisoner, being convicted on the whole indictment, was sentenced to four successive terms of imprisonment of equal duration, one on each count. It was held that the sentence on the fourth count was not invalidated by the insufficiency of the third count, and that the imprisonment on it was to be computed from the end of the imprisonment on the second count.

Consecutive sentences may be passed which in total substantially exceed the maximum for any one of the offences and Section 14(2) of our Criminal Procedure Code emphasizes that position.

The term “subsequent offence” includes an offence committed prior, but tried subsequently, to the offence for which sentence is being served. In other words, “subsequent offence” in this regard means “subsequent conviction of an offence,” and it is immaterial when the two offences were committed. To avoid the problem here, it is better to talk of “a subsequently pronounced sentence” as it is the date of that pronouncement that is important.

From these authorities therefore, it is clear that a court has power to order a sentence subsequently pronounced or for an offence tried subsequently to run concurrently with an existing sentence which is being served. That power is exercisable, of course, where the existing sentence was imposed in Kenya

and the offender is serving the sentence or is otherwise present in Kenya under a court order or is unlawfully at large under the law of Kenya.

Although it is undesirable, a life sentence can be made to run consecutive to a term of imprisonment but it cannot be followed by a determinate period of imprisonment. Further, it is wrong in principle to make a prison sentence consecutive to detention in a detention camp. The unexpired portion of the detention should merge in the prison sentence.

The upshot of what I have said above is that in deciding whether sentences should run concurrently or consecutively under either category (a) or category (b) or category (c), the court may look for exceptional circumstances or may simply look for a good reason or good reasons while at the same time avoiding to impose a manifestly excessive sentence or avoiding a sentence resulting in an aggregate term wholly out of proportion to the gravity of the offences “either upward or downward”. But the cardinal point, as I said earlier, is that the exercise of that power by the court is discretionary. I may add that the court may exercise that power upon an application by a party in the trial or upon the court’s own motion and the trial court’s decision in that respect may constitute a ground of appeal.

That leads to the issue as to the stage at which concurrent or consecutive sentences should be ordered. From the foregoing, my simple answer is that concurrent or consecutive sentences should be ordered during the trial of the offence or during the trial of the subsequent offence, as the case may be, or during the appeal therefrom. In other words concurrent or consecutive sentences where applicable, should be awarded by the trial court or by the appellate court.

In the cases referred to in the three applications before me, the trial court in each case was a magistrate’s court. It is clearly apparent that no application was made by any of the Applicants now before me, in any of those magistrate’s courts for sentences imposed upon him to be ordered to run concurrently. Similarly it is clear that none of those magistrates ordered, on his own motion, any of the sentences imposed upon any of the Applicants before me now to run concurrently. That is why these three applications have been filed.

In the case of **Patel v Republic** (1968)E.A. 50 where the trial magistrate who had pronounced his judgment before completing writing altered the judgment as he wrote it, it was held that:

***“if the magistrate varied his sentence after having verbally pronounced it but before the conclusion of the trial proceedings he was not functus officio and was in law entitled to vary the sentence.”***

It was the High Court’s view that the magistrate, when passing sentence, had to comply with Section 312 of the Criminal Procedure Code (Tanzania), in order for the magistrate to be *functus officio*. That is the magistrate has to make or pass his finding, order, or sentence and wind it up by informing the Accused of his right to appeal. After that has been done, the magistrate becomes *functus officio*. Kenya does not have specific provisions like Section 312 of Tanzania but the procedure is similar. In the case of Patel therefore, the magistrate had not become *functus officio*.

But in the case of **H. W. Lovesay v R. [(1917-18), 7 E.A.L.R.33]** a sentence ordering a term of imprisonment to run concurrently with the balance of an existing term being served could not be altered by the magistrate who had passed it directing in the alteration that the sentences should now run consecutively, even though the sentence the magistrate had first passed, and which he subsequently altered, was unlawful according to specific provision of the law of that country. We do not have similar provisions in Kenya.

After passing the sentence, the magistrate realised the sentence was contrary to a provision of the law

of his country which specifically provided that a subsequently imposed sentence of imprisonment shall be consecutive to any sentence that the convict may at the time be undergoing. The magistrate had then called for the convict and altered the sentences to run consecutively. On appeal, it was held that the magistrate had no power to make that alteration. He had become *functus officio*.

As explained in the case of Patel and made clearer in the case of Lovesay(Supra), in a similar way each one of the trial magistrates in the criminal cases mentioned in the three applications before me became *functus officio* after finally entering or pronouncing the sentence he entered or pronounced in each trial. There followed appeals, by the Applicants before me now, to the High Court. There was an appeal from each trial and it is clear that a ground to have sentences run concurrently was not among the grounds in any of the appeals. Each appeal was heard and dismissed, the High Court not having been required by any of the appellants to make an order for any of the sentences to run concurrently. The High Court had no way of knowing whether such orders were required by the Appellants and the court did and could not therefore make such orders. There were no appeals to the Court of Appeal. Respective trial magistrates having become *functus officio*, respective appellate judges similarly became *functus officio* after dismissing respective appeals emanating from those trials. I was not one of those judges but as each one of them became *functus officio*, the rest of the judges, me included, became *functus officio*.

That being the position, there is no way this court can now have the power to make the orders each applicant before me is now praying for in his application. Prison Authorities at Nyeri Main Prison ought to be aware of this position, as they are always keen on the correct application of the law. The applications before me are as a result of after thoughts coming too late in the day and executed without the basis of the law to sustain them. Not only do I find each one of the three applications before me irregular, but also unmaintainable in law and brought without jurisdiction on the part of the court to grant the orders prayed for.

Accordingly, each application is hereby dismissed.

Copy of this ruling be sent to the Officer In Charge, Nyeri Main Prison.

Delivered and signed at Nyeri this 30th day of November 2004.

**J. M. KHAMONI**

**JUDGE**