



**Mwangi v Republic (Criminal Revision E061 of 2025)  
[2025] KEHC 6161 (KLR) (14 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6161 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL REVISION E061 OF 2025  
DKN MAGARE, J  
MAY 14, 2025**

**BETWEEN**

**GEORGE KAMAU MWANGI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This is a ruling over an application dated 20.02.2025 by the Applicant seeking to review the sentence imposed by the court in Nyeri CMCR No. E065 of 2021 by Hon. E.N. Angima. The Applicant was then sentenced to 7 years imprisonment for burglary and stealing contrary to section 304(1)(b) and 306(a) of the [Penal Code](#), among others.
2. The applicant was charged jointly with one Mercy Gathigia Mwangi. They were convicted for the exact count. Mercy Gathigia Mwangi was sentenced to one year's probation. She was said to have a previous record. I have perused the sentence and I cannot understand why persons arrested in the same circumstances can have different and so diverse sentences.
3. What is clear is that an injustice occurred in that a person with a previous record was given a slap on the wrist while the person with no record was given 7 years of imprisonment. He has so far served 4 years since 2021. There appears to be a mention of a previous record in the presentence report. However, the prosecution was categorical that the Applicant had no previous record. The court did not give the *raison d'être* for giving the applicant 7 years imprisonment. The female accomplice was treated with extreme lenience while the applicant was treated as a child of a lesser god. If the magistrate was to consider the previous record, which was not there, there are very strict procedures to follow. In the case of [Stephen Magera Marwa v Republic](#) [2014] eKLR, D.S. Majanja posited as follows:

The learned magistrate fell into error by accepting the prosecutor's submissions which were not supported by any record of previous convictions. The statements of the prosecutor were prejudicial to the appellant. Previous convictions must be proved by production of a court record and in that respect



I adopt the sentiments of Lesiit J., in [\*Abdi Ahmed v Republic Meru HCCA No. 87 of 2010 \(Unreported\)\*](#) where she stated;

With due respect to the learned magistrate the way to receive a previous record of an accused person was not followed. In such a case the prosecution is required to adduce proof of previous conviction by producing a certificate from the Central Bureau of Criminal Records as proof of the conviction. In the bare minimum the prosecution could provide the case number and the court in which the accused person was convicted and if possible cause it to be availed to the court. In either case the court is expected to put the record to the accused person and require him to admit or deny the same. In the instant case neither a certificate of previous records nor a conviction nor the court and criminal case number in which the Appellant was convicted were given. The prosecution did not therefore establish that the Appellant was ever convicted of any offence prior to the one on record.”

4. Further the discriminatory sentence, where a first offender is given a humongous sentence and a repeat offender is left on CSO was erroneous and an abuse of discretion. It is anathema to Article 27 of [\*the Constitution\*](#), which provides as follows:

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
- (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender.

5. Discrimination is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based on such considerations as race, colour, sex, religious beliefs, political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups. This was succinctly stated in the case of [\*Jacqueline Okeyo Manani & 5 others v Attorney General & another\*](#) [2018] eKLR, where E.C. Mwita posited as follows regarding discrimination and differentiation:

28. From the above definition, discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes



that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups. Article 27 of *the Constitution* prohibits any form of discrimination stating that. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law, and that (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

29. *The Constitution* advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.
30. In this regard, the Court stated in the case of *Nyarangi & 3 Others V Attorney General* [2008] KLR 688 referring to the repealed constitution; “discrimination that is forbidden by *the constitution* involves an element of un favourable bias. Thus, firstly, an unfavourable bias must be shown by the complainant; and secondly, the bias must be based on the grounds set in the constitutional definition of the word “discriminatory” in section 82 of *the Constitution*.”
6. The sentences meted out to the applicant were manifestly unjust and discriminatory. It shall never be the case that a party shall be discriminated on any unconstitutional grounds.
7. This therefore brings the second question into mind, on the revisionary powers permitted to this Court. The power to call for and examine the record of any criminal proceedings before any subordinate court is vested in the High Court. The purpose of the powers are to satisfying the High Court as to the 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. Section 362 of the *Criminal Procedure Code* provides as follows:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the 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.
8. This court is persuaded that the revisionary powers are paternal or supervisory in nature in order to correct or prevent a miscarriage of justice. In the High Court of Malaysia in *Public Prosecutor vs. Mubari bin Mohammed Jani and Another* [1996] 4 LRC 728 at 734, 735 it was stated as doth:

“The powers of the High Court in revision are amply provided under section 325 of the *Criminal Procedure Code* subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”
9. The sentencing should be one that meets the ends of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. Discriminatory sentencing is improper



and cannot be countenanced. The objectives of sentencing, as set out in the 2023 Sentencing guidelines, are as follows:

- “ 1. 3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
- i. Retribution: To punish the offender for their criminal conduct in a just manner.
  - ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
  - iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
  - iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender’s contribution towards meeting those needs. Community
  - v. Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender’s criminal acts.
  - vi. Denunciation: To clearly communicate the community’s condemnation of the criminal conduct.
  - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
  - viii. Reintegration: To facilitate the re-entry of the offender into the society”

10. The sentence also has to be hinged on retributive justice for the secondary victims. If second offenders are whisked away to comfort while the first offenders are firmly locked up, then there is a failure of justice. The trial court apparently failed to consider that the Applicant had no previous record. She proceeded to give the person with a record an extremely lenient sentence. The subject matter was minuscule, had no previous criminal record, and was aged 41 years. The property stolen was also recovered. The court did not consider any mitigation given. Having considered the facts of this case and the mitigation, this court comes to the firm conclusion that a sentence of 7 years was based on the arbitrariness of the court and was untenable. Therefore this court has to consider the misdirection by the court below by treating a first offender in a more serious manner than the repeat offender, resulting in excessive sentence.

11. The next error is that there were two counts, but the court gave one sentence covering neither of the offences. The court must, as a corollary, not only convict but also sentence for each of the counts and state whether the sentences should run consecutively or concurrently. The issue of consecutive or concurrent sentences is addressed in part under Section 14 of the *Criminal Procedure Code* and for offences committed during the currency of an existing sentence or before sentencing for a previous



conviction, Section 37 of the [Penal Code](#). Section 14 of the [Criminal Procedure Code](#) provides as follows: -

- (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 therefor 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 send 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.
- (4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

12. Section 37 of the [Penal Code](#) provides as follows:

37. 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 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 payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.

13. However, this is a complex arena and the court below must, as a corollary, seek guidance from the sentencing guidelines paragraphs 2.3.21 to 2.3.30. In this particular matter, paragraphs 2.3.21 to 2.3.26 provide as follows:

2.3.21 Notwithstanding the provisions under the [Criminal Procedure Code](#) and the [Penal Code](#) summarised in paragraph 2.3.4 above, the discretion to impose concurrent or consecutive sentences lies with the court. There are two elements to the concept of totality, and these apply as much to terms of imprisonment as they do to community service and fines.

2.3.22 Firstly, all courts when sentencing for more than one offence should pass a total sentence which reflects all the offending behaviour in a way that is just and proportionate. This is whether the sentences are consecutive or concurrent and will usually mean that concurrent sentences will result in a longer sentence overall than a single sentence for one offence. However, the court must avoid 'double counting' where the additional offences are ancillary to the main offence e.g., robbery with a weapon – the presence of a weapon – an intrinsic part of the main offence of robbery - will likely aggravate



the sentence on robbery and so the weapon offence should run concurrently and will not necessarily exceed the sentence for the robbery itself.

2.3.23 Secondly, it is rarely possible to arrive at a just and proportionate sentence by simply adding together single sentences for each offence. The court must address the offending behaviour as a whole together with the personal circumstances of the offender. Accordingly, the court must bear in mind the purposes of sentencing set out in paragraph 1.3.

2.3.24 A concurrent sentence will normally be appropriate where the offences arise out of the same incident or facts. E.g., poaching of several animals that vary in the degree of protection they are afforded under the law; a burglary ‘spree’ of several properties committed in one night; fraud and associated forgeries, or a dangerous driving incident where multiple victims are injured as a result of one offence of dangerous driving e.g., driving into a bus stop.

2.3.25 A consecutive sentence will normally be appropriate where the offences arise out of unrelated facts or incidents e.g., attempting to obstruct the course of justice in relation to an unrelated offence; where the defendant is convicted of dealing in drugs and also possession of a firearm upon arrest – the firearm offence is not an intrinsic part of the drugs matter and requires separate recognition, or where the accused commits a theft on one occasion and an assault on a different victim on another occasion.

2.3.26 A consecutive sentence may also be appropriate where the offences are of the same or similar kind but where the court is of the view that a concurrent sentence will not sufficiently reflect the overall criminality e.g., assault of a police officer whilst trying to evade arrest for the original offence; assault of the same victim committed in the context of domestic violence or where there are sexual offences against the same victim.

14. There were no aggravating circumstances to require a consecutive sentence. There is no attribution of the sentence to each count. Consequently, I shall set aside the seven-year sentence. In lieu thereof, I direct that the period served is sufficient for the two counts.

15. The other glaring error from the record is that the court did not indicate when the sentence was to begin. This effectively enhances the sentences without any basis. Section 333(2) provides as follows:

(2) Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) 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.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

16. The effect of the foregoing is that the sentences should have started on 22.02.2021.

## Order

17. Based on the above findings, I make the following orders: -

- a. I set aside the sentence of 7 years imposed on the applicant and substitute it with a sentence of the period served.
- b. The applicant shall therefore be released forthwith unless otherwise lawfully held.
- c. File is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 14<sup>TH</sup> DAY OF MAY, 2025.**

Ruling delivered physically in open court.



**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Pro se Applicant – present

Mr. Kimani for the Respondent

Court Assistant – Michael

**M. D. KIZITO, J.**

