



REPUBLIC OF KENYA



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**Gathinji v Republic (Criminal Appeal E030 of 2024)
[2025] KEHC 9819 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E030 OF 2024
GL NZIOKA, J
JUNE 20, 2025**

BETWEEN

PETER GITHIGA GATHINJI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the decision in CMCRC E1082 of 2023
by Hon. E Kelly (PM) at Naivasha Chief Magistrate's Court)*

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's court on the 4th October 2023 charged with the offence of Burglary contrary to section 304(1) of the Penal Code (Cap 63) Laws of Kenya, in count (1). The particulars of the charge are as per the charge sheet.
2. He was charged on count two (2) with the offence of attempted arson contrary to section 333(a) of the Penal Code. The particulars are as per the charge sheet.
3. The charges were read to him and as per the record of the trial court and he pleaded guilty on both counts. The prosecution sought for time to avail the facts and the matter stood over to 2nd November 2023. On 2nd November 2023 the facts were not read and the matter was stood over to 9th November 2023. The facts were read out to the accused on that day and the accused pleaded guilty to all facts. He was then convicted on his own plea of guilty.
4. Upon conviction, the accused offered his mitigation to the effect that he has a family and pleaded for a non-custodial sentence. The court then ordered for pre-sentence report and matter stood over to 23rd November 2023 and then 30th November 2023, when the report was filed.
5. On 7th December 2023, the court sentenced the appellant to serve five (5) years imprisonment on each count (1) and (2) and ordered that the sentence run consecutively.



6. However, the appellant is aggrieved by the sentence imposed and appeals against the same on the following grounds:
 - a. That the learned trial magistrate erred in law in ordering the sentences to run consecutively, hence failed to comply with the provisions of section 12 and 14 of the Criminal Procedure Code since all the offences were committed at the same time at the same transaction.
 - b. That the learned trial magistrate failed to comply with section 333(2) of the Criminal Procedure Code hence failed to take into account four (4) months that I had spent in remand.
 - c. That I wish to present during the hearing and determination of this appeal.
7. The appeal was opposed vide grounds of appeal that states:
 - a. That sentences meted out were in accordance to the law/legal.
 - b. That the trial court did not act on a wrong principle when sentencing.
 - c. That the appeal is misconceived and devoid of merit and ought to be dismissed forthwith and sentence upheld.
8. The appeal was disposed of vide filing of submissions. The appellant submitted that he was only challenging the order of the trial court that the sentences run consecutively. That, both offences were committed on the same day, involve the same property, committed with the same criminal intent and were therefore committed in the course of a single transaction.
9. He relied on the case of Republic vs Saidi Nsabuga S/O Juma & Another [1941] EACA and Nathan v Republic, [1965] EA 777 where the Court of Appeal set out what constitutes a same transaction as follows: -

“If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.”
10. The appellant argued that the offences he was charged with having been committed in a single transaction, the trial court ought to have ordered the sentences to run concurrently. He referred the court to the case of; Peter Mbugua Kabui v Republic [2016] eKLR where the Court of Appeal stated that the general principle that where an accused commits a series of offences in a single transaction a concurrent sentence should be given.
11. Furthermore, the appellant cited paragraph 2.3.24 of the New Sentencing Policy Guidelines (2023) which provides that concurrent sentences are appropriate for offences arising from the same incident and/or set of facts.
12. However, the respondent in response submissions dated 4th March 2025 cited section 14 of the Criminal Procedure Code (Cap 75) Laws of Kenya that states a court may sentence an accused to consecutive sentences unless it directs otherwise.
13. Further, that Paragraph 7.14 of the Sentencing Policy Guidelines gives the court discretion to impose concurrent or consecutive sentences
14. The respondent submitted that, while the charges indicated the offences were committed in a single transaction, the appellant is liable to maximum imprisonment for ten (10) years on the first count and



fourteen (14) years on the second count. That the trial court exercised its discretion and sentenced him to ten (10) years imprisonment on both counts thus the sentence was not excessive but was lenient and within the law.

15. Having considered the appeal in the light of the materials before the court, I find that the law on concurrent and consecutive sentences is provided for under section 14 of the [Criminal Procedure Code](#) that 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 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 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.”
16. In *Peter Mbugua Kabui v Republic* [2016] eKLR the Court of Appeal stated as follows:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”
17. In the instant matter, the appellant, broke into the complainant’s house, stole therefrom and attempted to set the house on fire. The offence was committed at the same time and place. The particulars of the charge indicate that, the offences in both counts were committed on 21st day of August 2023 at same place. In my considered opinion, the offences were committed in the same transaction.
18. However, before the court finalises on the appeal, it is important to consider the sentence provided for each offence herein. As for the offence of burglary section 304 (1) (2) of the [Penal Code](#) states:
 - (1) Any person who—
 - (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or



(b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.

And on attempted arson, section 333(a) of the [Penal Code](#) states:

Any person who—

(a) attempts unlawfully to set fire to any such thing as is mentioned in section 332; or is guilty of a felony and is liable to imprisonment for fourteen years.

19. Therefore, if the court were to order that the sentence imposed run concurrently the appellant will serve only five (5) years for a serious offence and that will not serve the interest of justice.

20. The court has power under section 354(3)(b) of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya to make orders and can reconsider the sentence imposed and/or enhance and states: -

(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

21. In that regard I sentence the appellant as follows:

a. 1st count to serve seven (7) years imprisonment

b. 2nd count to serve eight (8) years imprisonment Sentences to run concurrently. Period in custody to be considered.

22. It is so ordered.

DATED, DELIVERED, SIGNED ON THIS 20TH DAY OF JUNE, 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Ms. Chepkonga for the respondent

Ms. Hannah: court assistant

