



**Ndiema & another v Republic (Criminal Petition E041 of 2023 & 016 of 2022
(Consolidated)) [2025] KEHC 8747 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8747 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E041 OF 2023 & 016 OF 2022 (CONSOLIDATED)**

JRA WANANDA, J

JUNE 20, 2025

BETWEEN

CHARLES KIPKEMBOI NDIEMA 1ST PETITIONER

DANIEL GUMO 2ND PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The two consolidated Petitions herein arise from the conviction of the Appellants in Eldoret Chief Magistrates' Criminal Case No. 150 of 2020 (consolidated with Eldoret Chief Magistrates' Criminal Case No. 173 of 2020) by way of the Judgment delivered on 8/04/2022 by Hon. Naomi Wairimu-SPM, in which the Petitioners (together with a 3rd accused person) were charged with 3 counts of the offences of stealing contrary to Section 275 of the Penal Code, vandalism of energy installation and infrastructure of electrical apparatus contrary to Section 169(1)(b) of the Energy Act 2019, and sabotage contrary to Section 343 of the Penal Code. There were also the alternative charges of handling stolen goods contrary to Section 322(2) of the Penal Code, and handling energy equipment contrary to Section 169(1)(c) of the Energy Act 2019.
2. The common thread linking the different counts of offences is basically that the accused persons on 5/01/2020 and/or 6/01/2020 vandalized a transformer belonging to the Kenya Power & Lighting Company and stole copper winding and transformer oil which they were then found in possession of, on 13/01/2020 and on 23/01/2020.
3. All the accused persons (including the Petitioners) having been found guilty, were convicted on each of the 3 main counts and were each sentenced to serve 5 years' imprisonment.
4. The Petitioners then each filed the separate Petitions aforesaid. Daniel Gumo filed Eldoret High Court Petition No. E016 of 2022 while Charles Kipkemboi Ndiema filed Petition No. E041 of 2023. The



Petitions seek similar orders, namely, review of sentence and taking into account of time spent in remand during the pendency of the trial in accordance with Section 333(2) of the [Criminal Procedure Code](#). By the orders of this Court made on 24/02/2025, the Petitions were consolidated, with Petition No. E041 of 2023 as the lead file.

5. Charles Kipkemboi Ndiema had also separately filed Eldoret High Court Appeal No. E079 of 2022 which he however withdrew in favour of his Petition herein.
6. I then gave the parties leave to file written Submissions. It however transpired that Charles Kipkemboi Ndiema, the 1st Petitioner, had already filed undated Submissions on 25/07/2023 attached to his Petition but titled “Mitigating Grounds of Petition” while Daniel Kipkemboi Ndiema, the 2nd Petitioner, had also filed undated Submissions on 13/01/2023. Prosecution Counsel Mr. Leonard Okaka, on his part, then filed the Submissions dated 22/01/2025.

1st Petitioners’ Submissions

7. The 1st Petitioner, Charles Kipkemboi Ndiema, basically submitted that he is remorseful and prayed that he be allowed to serve the remainder of the prison term in a non-custodial sentence. He urged the Court to take into account the time spent in remand in accordance with Section 333(2) of the [Criminal Procedure Code](#).

2nd Petitioner’s Submissions

8. The 2nd Petitioner, Daniel Gumo, too, submitted that he is remorseful and repentant, and added that he had undergone rehabilitation during his incarceration, and also that he was a 1st offender. He also submitted that he was arrested on 14/01/2020 and was in remand until 29/06/2022 (2 years and 5 months) when he was sentenced, but that the trial Court did not consider such time spent in custody when sentencing him. He, too, cited the provisions of Section 333(2) of the [Criminal Procedure Code](#) and also cited Petition No. 15 of 2020, Vincent Sila Jona v Republic (2021) KEHC 457 KLR, Abdul Aziz Oduor & Another v Republic, CR Appeal No. 18, and also 102 of 2018. He, too, urged the Court to set aside the prison sentence and substitute it with a non-custodial one.

Respondent’s Submissions

9. Prosecution Counsel Leonard Okaka recounted the background of the case and conceded that the Petitioners were in custody for a remand period of 2 years and 6 months which ought to be credited. He pointed out that no pronouncement was made as to when the sentence would commence and run, and thus further conceded that the sentences should have commenced from the date of arraignment, and to run concurrently.

Determination

10. The issues for determination herein are evidently two, namely, “whether the Court should review the 5 years prison sentences imposed against the Petitioners” and secondly, “whether the sentences should run concurrently”.
11. Regarding the time spent in custody during trial, Section 333(2) of the [Criminal Procedure Code](#) provides as follows:

“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.



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

12. The Judiciary Sentencing Policy Guidelines, Clause 7.10 also contains a similar principle.
13. I have perused the record of the trial Court and it is clear that when sentencing the Petitioners, the trial Magistrate did not state whether she had taken into account the time spent in remand custody by the Petitioners. The trial Court also did not state whether the 5 years prison sentence was for each count separately, or whether it was an all-inclusive sentence. She also did not state the date from which date the sentences were to commence and/or whether the same were to run consecutively or concurrently. The trial Magistrate merely stated that she had sentenced the Petitioners to 5 years in prison with no specificity. From the record, I note that the Petitioners were arraigned on 15/01/2020 and 24/01/2020 respectively. They were then held in remand from the date of arraignment until the date of sentencing, namely, 29/06/2020. As therefore correctly submitted by the Petitioners and conceded by Mr. Okaka, the Petitioners spent 2 years and about 6 months in remand custody before they were sentenced.
14. On the above point, the Court of Appeal, in the case of Bethwel Wilson Kibor vs Republic [2009] eKLR stated as follows:

“By proviso to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

15. The Court of Appeal also advanced the same holding in the case of Ahmad Abolfathi Mohammed & Another vs Republic (2018) eKLR.
16. It follows therefore that it was mandatory for the trial Court to have taken into account the time spent in custody by the Petitioners as aforesaid, but which it failed to do.
17. On the issue of whether the sentences should have run consecutively or concurrently, Sections 12 and 14(1) of the *Criminal Procedure Code* provide as follows:

“12. Any Court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.”

14. Subject to subsection (3), when a person is convicted over 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 punishments shall run concurrently.”



18. The Court of Appeal, in Peter Mbugua Kabui –vs- Republic [2016] eKLR, stated that:

“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.

19. Further, Paragraph 7.13 of the Sentencing Policy Guidelines provides as follows:

“Where the offence emanates from a single transaction the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims the sentences should run consecutively”.

20. The Court of Appeal reiterated the above principle in the case of William Kimani Ndichu v. Republic [2015] eKLR and also in the case of B.M.N. v Republic, Criminal Appeal No. 97 of 2013 [2014] eKLR.

21. In this instant case, as aforesaid, the common thread linking the different counts of offences is that the accused persons vandalized a transformer and stole copper winding and transformer oil therefrom, which they were later found in possession of. Applying the principles set out in Sections 14(1) of the *Criminal Procedure Code* above to the facts of this case, I am satisfied that all the offences were therefore related as they were all committed with the same intent, and in continuation of the same action and purpose. The offences were also basically perpetrated against the same complainant, namely, Kenya Power & Lighting Company, by the same accused persons. The offences were therefore evidently committed under the same transaction and the sentences ought to have attracted a concurrent sentence.

22. There is however a separate issue arising. This is because in a separate case, namely, Eldoret Chief Magistrate’s Court Criminal Case No. 2178 of 2017 (which coincidentally also gave rise to a separate Petition, namely Eldoret High Court Criminal Petition No. E012 of 2023 which incidentally I have also determined today by a separate Judgment), the Petitioner, while out on bond in Eldoret Chief Magistrates’ Criminal Case No. 150 of 2020, committed a similar offence for which he was separately convicted and on 18/01/2023, sentenced to serve a prison term of 7 years. I have the full record before me.

23. In regard thereto, Section 37 of the Penal Code provides as follows:

“ 37. Sentences when cumulative:

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:

.....”

24. Applying the above provision, the sentence of 7 years imposed in the separate case, namely, Eldoret Chief Magistrate’s Court Criminal Case No. 2178 of 2017, having been meted out subsequently on 18/01/2023, and the sentence of 5 years imprisonment meted out in Eldoret Chief Magistrate’s



Court Criminal Case No. 150 of 2020, having been read out earlier on 29/06/2022, it follows that the Petitioner shall start serving the subsequent sentence of 7 years imposed in Eldoret Chief Magistrate's Court Criminal Case No. 2178 of 2017, upon expiry of the sentence of 5 years imprisonment imposed in Eldoret Chief Magistrate's Court Criminal Case No. 150 of 2020.

Final Orders

25. In the circumstances, I order as follows;

- i. The period of 2 years and about 6 months spent in remand custody by the Petitioners during the duration of the trial in Eldoret Chief Magistrates' Criminal Case No. 150 of 2020, shall be included in the computation of the 5 years prison sentence imposed on the Petitioners. In other words, the computation of the 5 years prison sentences shall commence as from the respective dates of arraignment, namely, 15/01/2020 for Charles Kipkemboi Ndiema, 1st Petitioner, and 24/01/2020 for Daniel Gumo, the 2nd Petitioner.
- ii. Since the trial Court did not also specify whether the 5 years imprisonment was for each of the three counts of offences which the Petitioners were convicted for, it is hereby deemed that the sentences ran concurrently.
- iii. However, upon expiry of the sentence of 5 years imprisonment imposed in Eldoret Chief Magistrates' Criminal Case No. 150 of 2020 on 29/06/2022, the 2nd Petitioner, Daniel Gumo, shall start serving the subsequent but separate sentence of 7 years imprisonment imposed upon him in the separate case of Eldoret Chief Magistrate's Court Criminal Case No. 2178 of 2017 on 18/01/2023.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF JUNE 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Both Petitioners

Ms. Muriithi for the State

C/A: Edwin Lotieng

