



**Njeri & another v Republic (Criminal Revision E020 of 2023)
[2025] KEHC 13163 (KLR) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL REVISION E020 OF 2023
DKN MAGARE, J
SEPTEMBER 18, 2025**

BETWEEN

MERCY WAITHERA NJERI 1ST APPLICANT

RITA ACHIENG OKUTO 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants were charged with the offence of stupefying contrary to Section 230 and Section 268 as read with Section 275 of the Penal Code. Section 268 provides as follows:
 - (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
 - (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say;
 - a. an intent permanently to deprive the general or special owner of the thing of it;
 - b. an intent to use the thing as a pledge or security; an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
 - c. an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - d. in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and



- e. “Special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.
 - (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.
 - (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.
 - (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.
2. Section 275 of the Penal Code provides as follows:

General punishment for theft - Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.
 3. Section 230 of the Penal Code provides as follows:

Stupefying in order to commit felony or misdemeanour – Any person who, with intent to commit or to facilitate the commission of a felony or misdemeanour, or to facilitate the flight of an offender after the commission or attempted commission of a felony or misdemeanour, administers or attempts to administer any stupefying or overpowering drug or thing to any person, is guilty of a felony and is liable to imprisonment for life.
 4. After full hearing and determination, they were convicted and sentenced to serve 7 years for stupefying and 2 years for the offence of stealing. The sentences were to run consecutively. Mercy Waithera is aged 35 years whereas Rita Achieng is aged 38 years. There was no appeal to the High Court and Court of Appeal. The application before the court is for re-sentencing. The judgment was on 30.05.2022.
 5. Following a full hearing and determination, the Applicants, Mercy Waithera (aged 35) and Rita Achieng (aged 38), were convicted and sentenced as follows:
 - a. Five (5) years imprisonment for the offence of stupefying, and
 - b. Two (2) years imprisonment for the offence of stealing
 6. The trial court ordered that the sentences run consecutively, amounting to a total of seven (7) years imprisonment. The judgment was delivered on 30.5.2022. No appeal was filed in the High Court or the Court of Appeal. The matter now before the court is an application for re-sentencing. The Applicants seek the following:
 - a. That the two sentences run concurrently, rather than consecutively.
 - b. That the court takes into account the period they have already spent in custody.
 7. The Respondent did not oppose the same. The applicants prayed that the court take into account time spent in remand and also prayed that their sentence runs concurrently.
 8. Section 362 of the Criminal Procedure Code, which enables this court to resentence, reads 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.

9. The orders which this court can give under Section 362 of the Criminal Procedure Code are spelt out under Section 364 of the Criminal Procedure Code in the following manner;

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-

- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
- (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
- (c) in proceedings under Section 203 or 296 (2) of the Penal Code, the *Prevention of Terrorism Act*, the *Narcotic Drugs and Psychotropic Substances (Control) Act*, the Prevention of Organized Crimes Act, the *Proceeds of Crime and Anti-Money Laundering Act*, the *Sexual Offences Act* and the *Counter-Trafficking in Persons Act*, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”



10. It thus behoves this court to examine the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the subordinate court in line with Section 362 of the Criminal Procedure Code and if necessary, issue orders under Section 364.
11. Under Section 230 of the Penal Code, an offender for the offence of stupefying is liable to life-imprisonment. The trial court issued a 5-year sentence under this offence.
12. Under Section 268 as read with Section 275 of the Penal Code, an offender for the offence of stealing is liable to imprisonment for three years. The trial court sentenced the applicants to 2 years.
13. As to the court's consideration of the time in custody under Section 333 (2) of the Criminal Procedure Code, the court is mandated to consider the period the accused spent in remand custody to constitute part of the sentence. In the persuasive authority of *Fatuma Hassan Salo vs Republic* (2006), Makhandia J asserted that:

“Sentencing is a matter for the discretion of the trial court. The discretion must however, be exercised judicially. The trial court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous or irrelevant factors.”
14. There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed. In line with this, there must exist a reasonable proportionality between the sentence passed and the circumstances of the crime committed. This principle was emphasized in the case of *R v. Scott* [2005] NSWCCA 152, where Justices Howie, Grove and Barr underscored that sentencing must balance the gravity of the offence with the culpability of the offender. The court noted that disproportionate sentencing undermines public confidence in the criminal justice system and may result in an injustice to the offender. It stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”
15. Correspondingly, in the New Zealand decision of *R v. AEM* [2000] NZCA, the court emphasized that sentencing must not only reflect the seriousness of the offence, but also ensure fairness to the offender in light of all relevant circumstances. The Court of Appeal observed that a mechanistic or overly punitive approach to sentencing risks undermining the rehabilitative and restorative aims of criminal justice, especially where the offender has demonstrated remorse or has already spent a substantial period in pre-trial custody. The decision reaffirmed that proportionality, individualization, and the principle of totality are essential in crafting just and effective sentences. The court stated as follows:

“... One of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”
16. Under Section 230 of the Penal Code, an offender for the offence of stupefying is liable to life imprisonment. The use of the word ‘is liable’ offers the court discretion and shall be liable prescribes a minimum mandatory sentence. The term liable has been interpreted to mean that it's at the courts discretion to determine the number of years an offender shall serve taking into account:
 - a. Benefit of the least severe of the prescribed punishments



- b. Age of the accused person
- c. Disability
- d. Proportionality
- e. Accountability, parity, consistency, legality and transparency
- f. Mitigating and Aggravating circumstances
- g. Being a first-time offender.
- h. Cause of crime
- i. Time served in custody
- j. Magnitude of the offence

17. In the present case, the amount stolen was a modest sum of Kshs. 600/= . While the offence of stealing is not to be treated lightly, the value of the subject matter is a relevant factor in determining the proportionality of the sentence imposed. The Sentencing Policy Guidelines, 2016, provide useful direction on this matter as follows:

Notwithstanding the provisions under the Criminal Procedure Code and the Penal Code summarized 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.

and

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.

18. The offence of stupefying the victims was committed in the same transaction as the offence of stealing, with the intent to facilitate the theft by overcoming resistance. The offences were therefore closely linked in time, purpose, and execution, and ought to have been treated as part of a single criminal enterprise. In this regard, the decision by the trial court to impose consecutive sentences was harsh and excessive, and fails to adhere to the principle of totality. Accordingly, the sentences should have been ordered to run concurrently, yielding a total custodial term of five years. In *Mokela vs. The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”



19. The predecessor of the Court of Appeal in the case of *Ogolla s/o Owuor vs. Republic*, [1954] EACA 270, pronounced itself on this issue as follows:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

20. Under Paragraph 1.3 of the Sentencing Policy Guidelines, the objectives of sentencing are:

- (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.
- (v) Community 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.

21. The court has also noted the various trainings the applicants have undertaken while in prison. Lest no one get tempted to say that crime pays, the incarceration appears excruciating. Mercy Waithera Njeri had undergone training and was of good behaviour. On the other hand, Rita Achieng Okuto joined school in 2023. She took time to adjust to prison life. She underwent rehabilitation. It is noted that also their biological clock was ticking and needed to get out at least to conceive before menopause. One indicated that thanks to the government she had had hysterectomy due to cervical cancer. She wanted to go out and fend for her remaining and only kid.

22. The applicants have been in custody since they were arrested. In the circumstances, I set aside the order of sentences running consecutively. I replace the same with an order that the sentences shall run concurrently.

23. The five and two years shall run concurrently from the date of arrest as per the provisions under Section 333(2) of the Criminal Procedure Code.

Determination

24. In the circumstances, I make the following orders:

- a. The application for review is allowed. The sentences meted out to the applicants for 5 years and two years respectively shall run concurrently. The sentences shall commence from the date of arrest, that is, 6/5/2021.
- b. The file is closed.



**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kimani for the State

Applicants present

Court Assistant – Michael

M. D. KIZITO, J.

