



**Lumwachi v Republic (Criminal Appeal E100 of 2022)
[2024] KEHC 3452 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3452 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E100 OF 2022
RN NYAKUNDI, J
APRIL 11, 2024**

BETWEEN

ISAAC ARULA LUMWACHI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. What is before this court is a Petition of Appeal dated 19th September 2022. The Appellant seeks to appeal against his sentence in Eldoret Chief Magistrate’s Court Case No 918 of 2020. The Appellant was charged and convicted with one count of Robbery with violence contrary to section 296(2) of the *Penal Code* and one count of Rape contrary to section 3(1)(c) of the *Sexual Offences Act*. The trial court sentenced him to 14 years imprisonment for the first offence and 7 years imprisonment for the second offence, to run consecutively.
2. Being aggrieved with the sentence, the appellant instituted this appeal premised on the grounds set out on the face thereof. The appellant urged that he is remorseful and repentant. The appellant acknowledged that courts have discretion on sentences running consecutively. He prayed the court to allow the sentences to run concurrently and further, that the court consider the provisions of section 333(2) of the *Criminal Procedure Code*. He relied on the case of *Edwin Otieno Odhiambo v Republic* (2009) eKLR in support of these submissions. He maintained that he is repentant for the offence and begs the court for leniency.
3. Learned counsel for the state opposed the appeal and filed submissions dated 2nd February 2024. She cited section 14 of the *Criminal Procedure Code* and urged that it is not in doubt that the offences the appellant was convicted with were committed in one transaction. Further, that the appellant is right in claiming that the trial magistrate erred in ordering that the sentence runs consecutively. He however urged the court uphold the sentence.



Analysis & Determination

4. The only issue that arises for determination is;
 1. Whether the court should interfere with the sentence of the appellant

Whether the Court should interfere with the sentence of the appellant

- 1 The appellant was sentenced for the offence of robbery with violence contrary to section 296(2) of the *Penal Code* and Rape contrary to section 3(1)(c) of the *Sexual Offences Act*. He was then convicted under section 215 of the Criminal Procedure Code and sentenced to serve 14 years for the first offence and seven years for the second offence, which sentences were to run consecutively.

Section 296(2) of the *Penal Code* states;

- (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

Section 3(1) of the *Sexual Offences Act* states;

- (3)) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

5. It is clear that the sentences were within the law however, the appeal raises two pertinent issues; the fact that they run consecutively and the consideration of time spent in custody.

Section 14 of the *Criminal Procedure* 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.



6. Discussing the severity of consecutive sentences, the Court of Appeal in *Peter Mbugua Kabui v Republic* (2016) eKLR expressed itself 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.

7. The prosecution concedes that the trial court erred in sentencing the appellant to consecutive sentences. However, such a sentence is not considered illegal. Further, the court has discretion in sentencing and it is my considered view that the trial court took into consideration the mitigating factors and the severity of the offence among other relevant factors in meting out the sentence.

8. It's trite law in the sentence policy of Kenya that associated decisions from the various Superior Court that the trial court shall impose a sentence sufficient, but not greater than necessary to comply with the purposes set forth in the *Constitution* and applicable principles. It is now laid down in the sentencing policy of the Judiciary 2023 that the court in determining the particular sentence to be imposed shall consider:-

- a. The nature and circumstances of the offence, the history and characteristics of the convict/offender.
- b. The need for the sentence imposed to reflect the seriousness of the offence, to promote respect for the law, and to provide just punishment for the offence.
- c. To afford adequate deterrence to criminal conduct
- d. To protect the public from further crimes which may be committed by the convict in the event he is released on the non-custodial sentence.

9. In the Appeal before me part of the strong ground argued by the Appellant is on the doctrines of concurrent or consecutive sentences. The law provides that if multiple terms of imprisonment are imposed on a convict at the same time, or if a term of imprisonment is imposed on a convict who is already subject to another term of imprisonment yet to be discharged the terms may run concurrently or consecutively. The letter and the spirit of the law as deducible in the various decisions is that multiple terms of imprisonment imposed at the same time run concurrently unless the court orders all the statute mandates that the terms are to run consecutively. In the trial court judgement, the multiple sentences imposed for the offence of robbery and rape were categorised to run consecutively. The offence of robbery and rape were committed in the same transactional circumstances. The fact of this series of offences committed arising from the same transactional of events could have obligated the learned trial magistrate to aggregate the sentences to run concurrently. Given the strength of the principles in the case of *Nilson v Republic* (1970) KLR 552, similarly the court in the case of *Bernard Gicheru v Republic* (2002) there is an error of the trial magistrate of having acted in excess of jurisdiction in exercising discretion to order for the sentences to run consecutively. As if that is not enough no reasons have been advanced for departing from the approach and application of concurrent sentences where the offences so committed were closely knitted in proximate causation. That order on consecutive is therefore reviewed and to be substituted with concurrent sentences.

10. Similarly, from the reading of the judgement, it is evident that the trial court did not specify that the sentence shall run from the time the appellant was taken into custody. Section 333(2) of the *Criminal Procedure Code* 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.

11. The appellant was arrested on 13th March 2020 and from the record of the court, it is evident that he spent the pendency of the trial in remand until 5th September 2022. In the premises, the appeal succeeds to the extent that the appellants' sentence shall be calculated to run from 13th March 2020 and further the aggregate sentences be served within the frame of concurrently.
12. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF DAY OF APRIL 2024

R. NYAKUNDI

JUDGE

