



**Wanja v Republic (Miscellaneous Application E057 of 2024)
[2024] KEHC 11073 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E057 OF 2024
SM MOHOCHI, J
SEPTEMBER 23, 2024**

BETWEEN

KELVIN MWANGI WANJA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant was arrested on 10th February, 2022 and charged on 14th February, 2022 in Nakuru Chief Magistrate’s Court Criminal Case No. E680 of 2022 with the offence of Preparation to commit a felony contrary to Section 308(1) of the *Penal Code*. The trial Court in its judgment of 4th October, 2022 found the Applicant guilty and sentenced him to serve 7 years’ imprisonment. He never appealed.
2. The Applicant was subsequently during pendency of Nakuru CM Cr Case No E680 of 2022 arrested on 5th July, 2022 and charged on 6th July, 2022 in Nakuru Chief Magistrate’s Court Criminal Case No. E2278 of 2022 with the offence of Preparation to commit a felony contrary to Section 308(1) of the *Penal Code*. The trial Court in its judgment of 9th November, 2022 found the Applicant guilty and sentenced him to serve 7 years’ imprisonment. He never appealed.
3. Coincidentally both trials in Nakuru Chief Magistrate’s Court Criminal Case No. E680 of 2022 and Nakuru Chief Magistrate’s Court Criminal Case No. E2278 of 2022 were conducted before Hon Edward Oboge Resident Magistrate.

Notice of Motion

4. The Application before Court for determination was filed on 12th May, 2024 and seeks: -



1. That the honorable Court to order that the sentence imposed upon the applicant in CM'S Court Nakuru Criminal Case Numbers E2278/022 AND E680/022 to run concurrently.
2. That the honorable Court be pleased to invoke the provisions of Section 333 of the criminal procedure code
5. The Application is premised on the following four (4) grounds:
 - a. That, the trial proceedings were conducted by the same magistrate same Court and simultaneously.
 - b. That, the honorable Court though aware did not make any orders as to how the sentences were to run.
 - c. That, section 333 of the criminal procedure code provides that every sentence should be deemed to start from the date it was pronounced.
 - d. That, the Applicant is utterly remorseful of the offences committed.
6. The Application is supported by the undated affidavit filed on even date in which the Applicant contends that, he was charged, convicted and sentenced to serve seven years Imprisonment on 22nd November, 2022 and 18th October, 2022 by Cm's Court Nakuru for two counts of preparation to commit a felony contrary to Section 308 (1) of the *Penal Code* in Nakuru Chief Magistrate Court Criminal Case Numbers E2278/022 and E680/022 and now begs leave of this honorable Court to amend the orders prayed in the application and further seek that this honorable Court to grant orders:
7. That the Honorable Court be pleased to order that the sentences imposed in the two files be ordered to run concurrently.
8. That the Honorable Court be pleased to make any other orders that it may deem fit in the interest of justice.
9. This being a Criminal Revision Application this Court called for the Nakuru Chief Magistrate Court Criminal Case Numbers E2278/022 and E680/022 to consider the correctness, legality and the propriety of the orders imposed by the trial magistrate.
10. The Respondent was afforded an opportunity to respond and conceded to the same so far as it was an application to deploy Section 333 to have the sentence run concurrently. No submissions were filed.

Analysis and determination

11. Article 50(2) of the *Constitution* provides: -

“Every accused person has the right to a fair trial, which includes the right-

 - (q) if convicted, to appeal to, or apply for review by, a higher Court as prescribed by the law.”
12. Article 165(6) of the *constitution* empowers the High Court to exercise supervisory jurisdiction over subordinate Courts.
13. Section 362 of the *Criminal Procedure Code* provides:

“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.”

14. The section gives the Court jurisdiction to review orders issued by the subordinate Court for the purpose of satisfying itself as to the correctness, legality and or propriety of any finding, sentence or order recorded or passed and to the regularity of any proceedings Section 364 of the [Criminal Procedure Code](#) on the other hand provides for the powers of the Court on Revision.

15. It provides: -

“(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.”



16. This Court conforms to the school of thought that, disturbing discretion of a subordinate Court should be done sparingly and only in the most deserving of cases See *Ogolla S/o Owuor v R* {1954} EACA 270 on when the Court will interfere with discretion of trial Court in sentencing, that:
- “The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. This was further echoed in the dictum of the cases in *R v Shershowsky* {1912} CCA TLR 263 as emphasized in *Shadrack Kipkoech Kogo v R* Criminal Appeal No. 253 of 2003 thus “Sentence is essentially an exercise of discretion by the trial Court and for this Court to interfere it must be shown that in passing the sentence, the sentencing Court took into account an irrelevance factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.” (See also *Sayeka v R* {1989} KLR 306)
17. Section 364 of the *Criminal Procedure Code* empowers the High Court to exercise its revisionary powers conferred to it as a Court of Appeal by Sections 354, 357 and 358 and may enhance sentence.
18. In the case of *Prosecutor v Stephen Lesinko* [2018] eKLR Nyakundi J outlined the principles which will guide a Court when examining the issues pertaining to Section 362 of the *Criminal Procedure Code* as follows: -
- a. Where the decision is grossly erroneous;
 - b. Where there is no compliance with the provisions of the law;
 - c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
 - d. Where the material evidence on the parties is not considered; and
 - e. Where the judicial discretion is exercised arbitrarily or perversely if the lower Court ignores facts and tries the accused of lesser offence.
19. It is thus apparent criminal revision jurisdiction is a pointed arrow jurisdiction to a specific criminal matter and cannot be visited upon two separate criminal matters as has been attempted herein.
20. This being a criminal revision, the onus was on the Applicant to demonstrate the sentence(s) as imposed were illegal, that their imposition was grossly irregular and that the trial Court did not exercise its discretion in a judicious manner.
21. The fact that there were two parallel criminal proceedings against the Applicant taking place before Hon Edward Oboge Resident Magistrate does not prejudice the Applicant in any way and any innuendo or insinuation of bias on the Court is regretted.
22. The Applicant has failed to demonstrate the co-relation between Nakuru Chief Magistrate Court Criminal Case Numbers E2278/022 and E680/022 to warrant invocation of the Criminal Revision Jurisdiction.
23. Section 333 (2) of the *Criminal Procedure Code* provides thus: -
- (2) 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.

24. *The Judiciary Sentencing Policy Guidelines* state as follows in respect to Section 333 (2) of the CPC: -
1. The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the Court to consider the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed.
 2. In determining the period of imprisonment that should be served by an offender, the Court must take into account the period in which the offender was held in custody during the trial.
25. In the case of *Bethwel Wilson Kibor v. Republic* [2009] eKLR it was held: -
- “By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take 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 ten 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.”
26. The Sentences imposed in Nakuru Chief Magistrate Court Criminal Case Numbers E2278/022 and E680/022 are separate sentences imposed in different cases and were imposed on two different dates the two cannot in a singularly fashion trigger the provisions of Section 333(2).
27. The Court is persuaded of the correctness, legality or propriety of the Nakuru Chief Magistrate Court Criminal Case Number E680/022 trial Court judgment and sentence of 4th October, 2022 and finds no basis to disturb the same.
28. This Court is persuaded of the correctness, legality or propriety of the Nakuru Chief Magistrate Court Criminal Case Number E2278/022 judgment and sentence of 9th November, 2022 and finds no basis to disturb the same.
29. Consequently, this Court finds the Notice of Motion 12th May, 2024, to be without any merit and the same is accordingly dismissed.

It is So Ordered

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 23RD DAY OF SEPTEMBER 2024.

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MOHOCHI S.M

JUDGE

