



**Ngari v Republic (Criminal Revision E002 of 2024)  
[2024] KEHC 12873 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12873 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL REVISION E002 OF 2024  
LM NJUGUNA, J  
OCTOBER 23, 2024**

**BETWEEN**

**GENESIO NJERU NGARI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. For determination is the undated notice of motion through which the applicant seeks the following orders:
  - a. Spent;
  - b. That the honourable court be pleased to call for the records and proceedings in Runyenjes SPM Criminal Case nos. 405 of 2019, 406 of 2019 and Embu CM Criminal Case no. 1050 of 2017; and
  - c. That the honourable court be pleased to revise, review the orders of the trial court issued and substitute them with an order that the applicant's sentences to run concurrently as the applicant stands to suffer double jeopardy.
2. In Runyenjes SPM Criminal Case nos. 405 of 2019, the applicant was charged with 10 counts, the first being the offence of obtaining money by false pretences contrary to section 313 of the *Penal Code* and 9 other counts. He was convicted and sentenced to serve 3 years imprisonment on every count, the sentences running concurrently.
3. In Runyenjes SPM Criminal Case nos. 406 of 2019, the applicant faced 2 counts, the first being the offence of obtaining money by false pretences contrary to section 313 of the *Penal Code*. He was convicted of both counts and was sentenced to 3 years imprisonment in count 1, and 1-year imprisonment in count 2.



4. In Embu CM Criminal Case no. 1050 of 2017, the applicant faced 6 counts, the first being making a document without authority contrary to section 357(a) of the Penal Code. He was convicted on all the 6 counts and sentenced to 3 years imprisonment for counts 1-4, to run concurrently and a fine of Kshs.70,000/= in default 1-year imprisonment on the 5<sup>th</sup> count and a fine of Kshs.100,000/= in default, 1-year imprisonment on the 6<sup>th</sup> count. The sentences for the 5<sup>th</sup> and 6<sup>th</sup> counts were ordered to run consecutively.
5. It is the applicant's argument that he took plea for the offences in Runyenjes SPM Criminal Case nos. 405 and 406 of 2019 at the same time but sentences were pronounced at different times. That this court should order that the offences were committed at the same time to allow the applicant find reprieve under Articles 165(3) and 25(c) of the Constitution. He urged the court to order that all the sentences run concurrently.
6. The application was not opposed and the court directed the parties to file their written submissions.
7. The appellant submitted that the court should consider the time he spent in custody before the trial as part of the sentence as provided under section 333 (1) of the Criminal Procedure Code which was enacted in the year 2007. He relied on the cases of Henry Mugendi Igoki v. Republic [2020] KEHC 7017 (KLR) and Peter Maweu v. Republic [2012] KEHC 5735 (KLR).
8. The respondent submitted that the applicant was tried and convicted of similar offences in the case at the same time thus the element of double jeopardy does not arise and it relied on the case of Nicholas Kipsigei Ngetich & 6 others v Republic [2016] KEHC 1507 (KLR). That double jeopardy occurs when a person is tried for an offence he was already acquitted or convicted of. It relied on section 14 of the Criminal Procedure Code and Paragraphs 7.13 and 7.14 of the Sentencing Policy Guidelines and stated that the trial courts held the discretion to determine whether the sentences ran concurrently or consecutively. Further reliance was placed on the cases of BMN v Republic [2014] KECA 198 (KLR) and Tudo v Republic [2024] KEHC 1783 (KLR) and it argued that the offences committed by the applicant in the 3 cases occurred under different transactions hence the courts cannot be forced to order concurrent sentences for all the offences.
9. It placed further reliance of Paragraph 7.19.2 of the Sentencing policy Guidelines on the court's discretion to order custodial or noncustodial sentences given the circumstances of each case. It argued that the applicant was only entitled to the benefit of section 333 (1) of the Criminal Procedure Code as regards Runyenjes SPM Criminal Case nos. 405 of 2019 and not the other 2 cases since he was not remanded in that case.
10. The issue for determination is whether the application has merit.
11. The revisionary power of the High Court is drawn from Article 167(6)&(7) of the Constitution which provides:
  - “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
  - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”



12. Section 362 of the [Criminal Procedure Code](#) provides as follows on the High Court’s supervisory jurisdiction:

“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.”

13. The applicant seeks review of the orders of the courts that convicted and sentenced him, to the effect that all the sentences imposed should run concurrently so that he does not suffer double jeopardy. As rightly submitted by the respondent, double jeopardy occurs where the accused person was convicted or acquitted of an offence and he is tried a second time for the same offence. Article 50(2)(o) of the [Constitution](#) protects an accused person from double jeopardy by providing that the accused person has a right not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted.

14. In this case, the applicant was arraigned at the same time in the Runyenjes cases and the trials were conducted independently of each other, both resulting in convictions through the different courts at different times. In the Embu trial, the matter is substantially different and he was also convicted and sentenced based on a different set of facts. Therefore, the principle does not apply since the sets of facts in the 3 cases are independent of each other. (see the case of [Nicholas Kipsigei Ngetich & 6 others v Republic](#) [2016] KEHC 1507 (KLR))

15. As stated in my previous paragraphs, the sentences passed in Runyenjes SPM Criminal Case no. 405 of 2019 and Embu CM Criminal Case no. 1050 of 2017 were ordered to run concurrently with the sentences for counts 5 and 6 in the latter were to run consecutively. In Runyenjes SPM Criminal Case no. 406 of 2019, the court was silent on how the sentences imposed were to run for the 2 counts.

16. To begin with, where a court does not state how the sentences are to run, the presumption in law is that the sentences run consecutively. Section 14 of the [Criminal Procedure Code](#) provides thus:

“(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.”

17. To state whether the sentence runs concurrently or consecutively is a preserve of the court and it specifies this through its discretion as provided under the [Judiciary Sentencing Policy Guidelines](#) 2023 as follows:

“2.3.21 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.”

18. Concurrent sentences are imposed where the offences occur out of the same incident, see Paragraph 2.3.24 of the [Judiciary Sentencing Policy Guidelines](#) 2023. In this case, the offences for which the



applicant was convicted through the 3 separate files arose from the same incidents in each file and affected different complainants in each separate file. The applicant was convicted of all the 10 counts in Runyenjes SPM Criminal Case no. 405 of 2019 and he was sentenced to 3-years imprisonment on each count, the trial court specifying that the sentences runs concurrently. In Embu CM Criminal Case no. 1050 of 2017, the 6 offences were committed within the same transaction and the applicant was sentenced to 3 years imprisonment on the 1<sup>st</sup> -4<sup>th</sup> counts. For the 5<sup>th</sup> and 6<sup>th</sup> courts, the applicant was sentenced to fines in default of which he faced 1-year imprisonment, to run consecutively, correctly so. The [Judiciary Sentencing Policy Guidelines](#) 2023 provides:

“2.3.28 In the case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a previous sentence.”

19. Additionally, section 37 of the [Penal Code](#) provides:

“

“37. 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:

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.”

20. On to the issue of section 333 of the [Criminal Procedure Code](#). The applicant seeks that the time spent in custody be included in the sentences imposed by the courts. From perusal of the trial court files, I gather that in Runyenjes SPM Criminal Case nos. 405 and 406 of 2019, the proceedings show that the applicant was released on similar bond terms of Kshs.500,000/= and cash bail of Kshs.200,000/= . In Embu CM Criminal Case no. 1050 of 2017, the accused was released on bond of Kshs.700,000/= without the option of cash bail. This means that the provisions of section 333 of the Criminal Procedure Code do not apply in these cases.

21. In the end, I find that the application lacks merit and it is hereby dismissed.

22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 23<sup>RD</sup> DAY OF OCTOBER, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the Applicant

..... for the Respondent

