



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mogaka v Republic (Revision Case E004 of 2023)
[2023] KEHC 19985 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19985 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
REVISION CASE E004 OF 2023
WA OKWANY, J
JULY 13, 2023**

BETWEEN

DENNIS ABUGA MOGAKA APPLICANT

AND

REPUBLIC RESPONDENT

(Being a Revision of the Sentence in Criminal Case No. 901 of 2021 at the Principal Magistrate Court in Keroka by Hon. B.M. Kimtai, Principal Magistrate dated 13th September 2021)

RULING

1. The Applicant filed the Application dated 27th January 2023 seeking the revision of sentence in Criminal Case No. 901 of 2021. The Applicant was charged and convicted of the offence of manslaughter contrary to section 202 of the Penal Code. The applicant also faced the second count of assault causing actual bodily harm contrary to section 251 of the Penal Code was also brought against him. He was convicted on his own plea of guilty on the two charges and sentenced to serve 5 years imprisonment for each charge.
2. It was the Applicant's case that the two sentences should run concurrently. He listed 3 grounds in his Application as follows: -
 1. That he pleaded guilty to the charges and saved the court time.
 2. That he is a young man of 20 years old and a first offender.
 3. That he was extremely remorseful for the offences he committed and was engaged in vocational training at prisons so that he could be a resourceful person when released.
3. The Constitution of Kenya vests revisionary powers in the High Court under articles 50 (2) and 165 which provide thus: -



- (2) 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 law.

165

- (1) 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.

4. Similarly, section 362 of the *Criminal Procedure Code* donates revisionary jurisdiction to this court as follows: -

362. Power of High Court to call for records

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.

5. Section 364 provides for the manner in which such jurisdiction shall be exercised as follows: -

364. Powers of the High Court on Revision

- (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 order, or which otherwise comes to its knowledge, the High Court may –

- (b) In the case of any other order other than an order of acquittal, alter or reverse the order.

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

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.

6. In the present case, the Applicant was sentenced to serve 5 years imprisonment for each count but that it was not indicated whether the sentences were to run consecutively or concurrently.

7. It is trite that sentencing is at the discretion of the trial court upon adequate consideration of the circumstances of a case, legal principles and mitigating circumstances. In *Shadrack Kipkoech Kogo v R.*, Eldoret Criminal Appeal No.253 of 2003, the Court of Appeal stated 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 irrelevant 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)”

8. Guided by the above principles, I find that this Court will not easily interfere with a sentence unless it is established that the trial court acted on some wrong principles in passing the sentence. It is the duty



of this Court on review to consider the trial court's sentence on the parameters of legality, propriety and correctness.

9. Sections 205 and 251 of the [Penal Code](#) provides that:

205. Punishment of manslaughter

Any person who commits the felony of manslaughter is liable to imprisonment for life.

251. Assault causing actual bodily harm

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

10. It is my finding that the sentences meted by the trial court were legal as it is clear that the trial magistrate considered the Probation Officer's report on record and mitigating circumstances in passing the said sentence. The prayer in this Application is for the said sentences to run concurrently.

11. Section 12 of the [Criminal Procedure Code](#) provides that a lawful sentence can be combined. Section 14 of the same [Act](#) also provides:

14. Sentences in cases of conviction of several offences at one trial

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.

12. The Judiciary Sentencing Policy Guidelines further provide for concurrency of sentences for closely related offence or those that arise from the same transaction. Paragraph 7 of the Sentencing Policy Guidelines provides as follows: -

7.13 Where the offences emanate 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 sentence should run consecutively.



- 7.14 The discretion to impose concurrent or consecutive sentences lies in the court.
13. I find that it is therefore a general principle that offences that arise from one transaction should have concurrent sentences. The Court of Appeal clearly explained this principle in *Peter Mbugua Kabui v Republic* (2016) eKLR, 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.
14. Similarly, the Court of Appeal in Nyeri held in *John Waweru Njoka v Republic* [2001] eKLR thus: -
- “In law it lies in the discretion of the Court to order whether sentences should run concurrently or consecutively. Nevertheless, it is an established principle of law that where offences are committed in one transaction, the sentences ought to run concurrently even when laid in separate counts. In the present case, the magistrate entered conviction on both limbs of the charge for breaking as well as for stealing. From the evidence on record, these two offences were committed in one transaction. That being so, we are satisfied that the magistrate ought not to have ordered the sentences on the two limbs of the charge to run consecutively.....We are satisfied that there was a point of law involved on sentence in this appeal when the magistrate ordered the sentences on the two limbs of the charge to run consecutively because they were committed in one transaction and should, therefore, have run concurrently. For this reason, we are satisfied, that an appeal would lie before us on sentence on second appeal.”
15. I have considered the nature of the offences that the Applicant was charged with and the punishment provided for the same under the law. It is my finding that even though the trial magistrate properly exercised his discretion and meted out a lawful sentence for each count, he ought to have directed that the two sentences should run concurrently because they were committed in the same transaction.
16. I am further guided by article 50 (2) (p) which states as follows: -
- (2) Every accused person has the right to a fair trial, which includes the right—
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;
17. In this case, the least severe form of punishment would be for the offences to run concurrently and not consecutively. In this regard, I find merit in this Application and hereby direct that the sentence of 5 years for the charge of manslaughter and 5 years for the charge of assault causing actual bodily harm shall run concurrently taking into account the period, if any, that the Applicant spent in custody while awaiting his trial.
18. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS
13TH DAY OF JULY 2023.**

W. A. OKWANY



JUDGE

