



**Kingori v Republic (Criminal Revision E241 of 2024)
[2024] KEHC 14036 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14036 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL REVISION E241 OF 2024
DKN MAGARE, J
NOVEMBER 12, 2024**

BETWEEN

ZABLON KAMAU KINGORI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is a ruling over an application dated 27/08/2024 by the Applicant seeking to review the sentence imposed by the court in Nyeri CMCRC E814 of 2024. Hon. M. Gituma convicted the Applicant on his own plea of guilty. The Applicant was then sentenced to 2 years imprisonment for count 1 and 2. The sentences were to run consecutively. The two counts in which the applicant was found guilty were: -

a. House breaking contrary to section 304(a) of the *Penal Code*.

The particulars were that on 29/6/2024 at about 2100 hours at Kangemi area in Nyeri Central Sub-county within Nyeri County, the Applicant broke into a dwelling house of James Muchura Mathenge with intent to steal from therein.

b. Stealing from a dwelling house contrary to section 268(1) as read with section 279(b) of the *Penal Code*.

The particulars were that on 29/6/2024 at about 2100 hours at Kangemi area in Nyeri Central Sub-county within Nyeri County, the Applicant stole from a dwelling house of James Muchura Mathenge, a laptop make HP, a weighing scale and a speaker all valued at Ksh 50,000/= the property of James Muchura Mathenge.

2. The application instituted vide the letter dated 29/8/2024 addressed to this Court sought revision on the basis that trial court did not consider mitigation and the fact that the Applicant pleaded guilty; the applicant was a first offender; was aged 21 years, and as such the sentences should not have run



consecutively. He stated that he is remorseful and continued incarceration will cast negative influence on him, as he has learnt his mistakes.

Analysis

3. The issue is whether the sentence of 2 years imprisonment should be reviewed and in particular to take into consideration the issues raised on mitigating circumstances and to have the sentences to run concurrently.
4. The revisionary powers permit this Court to 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. Section 362 of the [Criminal Procedure Code](#) provides 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.
5. The convict pleaded guilty to the two offences. The prosecutor informed the court that there was no previous record. The applicant pleaded guilty in phases. The first phase was for count 1 and the second phase was for count 2. The court now turned the guilty verdict in count 1 as a record for count 2. As a result, she gave 2 years each to run consecutively.
6. The foregoing then ignored one crucial fact. That the conviction in count 1 is not a previous record for count 2. The offences were committed in the same transaction and convicted in the same charge sheet. This was a misdirection as the convict was actually a first offender.
7. The court equally ignored the fact that the Applicant was barely 21 years and needed more of corrective than punitive punishment. The very fact that the Applicant pleaded guilty should count for something. The sentencing guidelines provide for this.
8. The convict is not a saint. Lying about family background is not a consideration for hefty punishment. It must also be noted that the laptop was recovered and should be a mitigating point. However, the weighing scale was not recovered. This is a ground to have a serious custodial sentence.
9. This court is persuaded that the revisionary powers are paternal or supervisory in nature in order to correct or prevent a miscarriage of justice. In the High Court of Malaysia in *Public Prosecutor vs. Mubari bin Mohammed Jani and Another* [1996] 4 LRC 728 at 734, 735 it was stated as doth:

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”



10. The court should consider whether there is abuse of discretion leading to injustice in the trial magistrate sentencing the Applicant to 2 years imprisonment to run consecutively for an offence carried out in the same transaction. This court recognizes that sentencing is one of the most intricate aspects of trial. It complements the trial. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. The objectives of sentencing as set out in the 2023 *Sentencing Guidelines* are as follows: -

“1.3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.

- 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. Community
- v. 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”

11. The sentence also has to be one that is hinged on retributive justice for the secondary victims. If the court did not take into account the three (3) objectives of deterrence, retribution and denunciation of his offence at the time of sentencing him, chances of the Applicant herein being reintegrated in the society would be next to impossible as there were possibilities of being harmed.

12. The trial court apparently failed to consider that the Applicant herein pleaded guilty to the offence, had no previous criminal record, and was aged 21 years. The property stolen was also recovered. The court proceeded on a wrong assumption that there was a previous record. Lack of a previous record must have a mathematical effect on the offender. Having considered the facts of this case and the mitigation, this court comes to the firm conclusion that a sentence of 2 years was based on the Applicant being a repeat offender. Therefore this court has to consider the misdirection by the court below by christening a first offender as a repeat offender, resulting in excessive sentence.

13. It is not lost that the remorse was not complete as the other items were not returned. A deterrent sentence is necessary. Balancing between the competing principles, a sentence of 18 months for each count suffices.



14. The next question is whether the sentences should run consecutively or concurrently. The issue of consecutive or concurrent sentences is addressed in part under Section 14 of the Criminal Procedure Code and for offences committed during the currency of an existing sentence or before sentencing for a previous conviction, Section 37 of the Penal Code. Section 14 of the *Criminal Procedure Code* 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.

15. Section 37 of the *Penal Code* provides as follows:

37. Sentences when cumulative 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.

16. However, this is a complex arena and the court below must as a corollary seek guidance from the sentencing guidelines paragraphs 2.3.21 to 2.3.30. In this particular matter, paragraphs 2.3.21 to 2.3.26 provide as follows:

2.3.21 Notwithstanding the provisions under the Criminal Procedure Code and the Penal Code summarised 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.



2.3.22 Firstly, all courts when sentencing for more than one offence should pass a total sentence which reflects all the offending behaviour in a way that is just and proportionate. This is whether the sentences are consecutive or concurrent and will usually mean that concurrent sentences will result in a longer sentence overall than a single sentence for one offence. However, the court must avoid ‘double counting’ where the additional offences are ancillary to the main offence e.g., robbery with a weapon – the presence of a weapon – an intrinsic part of the main offence of robbery - will likely aggravate the sentence on robbery and so the weapon offence should run concurrently and will not necessarily exceed the sentence for the robbery itself.

2.3.23 Secondly, it is rarely possible to arrive at a just and proportionate sentence by simply adding together single sentences for each offence. The court must address the offending behaviour as a whole together with the personal circumstances of the offender. Accordingly, the court must bear in mind the purposes of sentencing set out in paragraph 1.3.

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 of one offence of dangerous driving e.g., driving into a bus stop.

2.3.25 A consecutive sentence will normally be appropriate where the offences arise out of unrelated facts or incidents e.g., attempting to obstruct the course of justice in relation to an unrelated offence; where the defendant is convicted of dealing in drugs and also possession of a firearm upon arrest – the firearm offence is not an intrinsic part of the drugs matter and requires separate recognition, or where the accused commits a theft on one occasion and an assault on a different victim on another occasion.

2.3.26 A consecutive sentence may also be appropriate where the offences are of the same or similar kind but where the court is of the view that a concurrent sentence will not sufficiently reflect the overall criminality e.g., assault of a police officer whilst trying to evade arrest for the original offence; assault of the same victim committed in the context of domestic violence or where there are sexual offences against the same victim.

17. In this case, the applicant broke into a dwelling house with intent to steal and stole from the said dwelling house of James Muchura Mathenge, a laptop make HP, a weighing scale and a speaker all valued at Kshs. 50,000/= the property of James Muchura Mathenge. The laptop was recovered. As hitherto stated, A consecutive sentence will normally be appropriate where the offences arise out of unrelated facts or incidents. On the other hand, a concurrent sentence will normally be appropriate where the offences arise out of the same incident or facts.
18. There were no aggravating circumstances to require consecutive sentence. Consequently, I shall set aside the order that sentences run consecutively. The case for review has been shown for a concurrent sentence.
19. The other error that is glaring from the record is that the court did not indicate from whence the sentences were to begin. This effectively enhances the sentences without any basis. Section 333(2) 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.

Order

20. Based on the above findings, I make the following orders: -

- a. I set aside the sentence of 2 years imposed for each count and substitute with a sentence of 18 months imprisonment for each count having regard to the fact that the convict was a first offender.
- b. The sentences shall run concurrently and shall commence on 3/7/2024, the date of arrest.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF NOVEMBER, 2024.

Ruling delivered physically in open court.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mwakio for the State

Pro se Applicant – present

Court Assistant – Jedidah

