



**Ngotho v Republic (Criminal Revision E220 of 2024)  
[2024] KEHC 14258 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14258 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL REVISION E220 OF 2024  
DKN MAGARE, J  
NOVEMBER 13, 2024**

**BETWEEN**

**ISAAC NEWTON NJERU NGOTHO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This is a ruling over an undated application filed in court on 25/7/2024 seeking to review the sentence imposed by the subordinate court in Nyeri CMC R E456 of 2024. The Applicant was convicted on his own plea of guilty on all the three counts and sentenced to 1 year in count 1, 2 years for count 2, and 1 month for count 3. The court ordered that the 3 sentences should run consecutively.
2. It is against this order of the sentences to run consecutively that review has been sought. The Applicant sought to have the same run concurrently. His arguments was that the offences were committed on the same day and as such should attract concurrent sentences.
3. The prosecution counsel Mr. Mwakio opposed the said application. He submitted orally before me, that there is no error on the record. According to him, the sentences were so lenient that they do not punish the offences. Further that even if the offences were committed on the same day, they are different in tenor and call for consecutive sentences.
4. The Applicant sought for leniency as he was then drunk on the day of committing the offences. I had to deliver this ruling ex tempore as I was leaving soon thereafter for leave.

**Analysis**

5. The Applicant was charged with the following offences: -



- a. Threatening to kill contrary to Section 223(1) of the *Penal Code*. The particulars were that on the 4<sup>th</sup> day of April, 2024 at around 0800 am at Mukunguru village in Iriaini Location of Mathira East Sub-county of Nyeri County without lawful excuse the Applicant uttered that “I will kill you” to Charles Ngotho Maina while he was armed with a knife.
  - b. Willfully obstructing a police officer contrary to section 103(a) of the *National Police Act* of 2011. The particulars were that on the 4<sup>th</sup> day of April, 2024 at around 2100hrs at Mukunguru village in Iriaini Location in Mathira East Sub-county of Nyeri county the Applicant obstructed No. 100377 PC. Peles Lemintei and No. 107791 PC. Nyamu by ordering his wife to look for a panga and also to lock them in the house and instructed her to scream.
  - c. Creating disturbance in a manner likely to cause a breach of peace contrary to section 95(1) (b) of the *Penal Code*. The particulars were that on the 4<sup>th</sup> day of April 2024 at about 8.00 pm at Mukunguru village in Iriaini Location in Mathira East Sub-county of Nyeri County at the home of Charles Ngotho Maina, the Applicant went and started chasing him and pouring water to him and also beating the cows using a stick.
6. The offence of threatening to kill contrary to Section 223(1) of the *penal code* is set out as doth:
1. Any person who without lawful excuse utters, or directly or indirectly causes any person to receive, a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment for ten years.
7. The offence of resisting arrest contrary to Section 253(b) of the *Penal Code* is set out as doth:
253. Any person who –
- b. assaults, resists or willfully obstructs any police officer in the due execution of his duty, or any person acting in aid of that officer;...  
is guilty of a misdemeanour and is liable to imprisonment for five years.
8. The offence of causing disturbance contrary to section 182(d) of the *Penal Code* is set out as doth:
- Every person who publicly conducts himself in a manner likely to cause a breach of the peace;
- ... shall be deemed idle and disorderly persons, and are guilty of a misdemeanour and are liable for the first offence to imprisonment for one month or to a fine not exceeding one hundred shillings, or to both and for every subsequent offence to imprisonment for one year.
9. A person who commits the three offences is liable to imprisonment to a term not exceeding 14 years. However, in this matter, the Applicant was sentenced to a cumulative sentence of 3 years and 1 month. This is less than one quarter of the maximum sentence. Reading the facts from the lower court file, the sentence is actually a slap on the wrist. In the case of *K v Republic (NBI) Criminal Appeal No.248 of 2014(C.A)(2015) eKLR*, the Court of Appeal had the opportunity to interpret S.20(1) of the *Sexual Offences Act*.. The court stated as follows:-
- ...The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.
- What does “shall be liable” mean in law”. The court of Appeal for *East Africa in the case of Opoya v Uganda*(1967) EA 752 had an opportunity to clarify and explain the words “shall



be liable on conviction to suffer death”. The court held that in construction of penal laws, the words “shall be liable on conviction to suffer death” provide a maximum sentence only; and the courts have discretion to impose sentences of death or imprisonment.

10. Therefore, being given lesser sentences was correct. The sentence was lawful, in spite of being lenient.
11. The next is to address the question of concurrent and consecutive. Before doing so, the court finds that the victims for the 3 counts are different. The first victim was the Applicant’s father, whom he threatened to kill. The transaction ended at that point. The second victim was a police officer carrying out his lawful duties of arresting the applicant. The third victims were members of the public who received threats and were subject of the nuisance and disturbance by the Applicant. The offences are not related.
12. In dealing with the issue as to whether the sentences should run consecutively or concurrently, recourse must be to the law. These kinds of sentences have been 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*. To begin with, it provides that it is lawful for a person who is convicted at one trial for two or more distinct offences, the court may sentence him, for those offences, 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. The said section states 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.
  - (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.
13. On the other hand, Section 37 of the *Penal Code* provides that 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 of that sentence. The said section 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.



14. It must however, be conceded that sentencing 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. Nevertheless, the court sitting on review does not have the same jurisdiction as the court sitting on appeal. Section 37(4) of the *Penal Code* provides for the consideration of the total length of the cumulative sentences.
15. Review on the other hand is limited in scope and tenor. 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.
16. This court is persuaded that the revisionary powers are paternal or supervisory in nature in order to correct or prevent a miscarriage of justice. See the decision of *Public Prosecutor vs. Muhari bin Mohammed Jani and Another* [1996] 4 LRC 728 at 734, 73 by the High Court of Malaysia.
17. The court is simply not interested on the excessiveness of the sentence, per se, as that is in the realm of appeal. It does not however, mean that a court sitting on review cannot deal with the issue of excessiveness of the sentence. It deals with it, in respect of the propriety and correctness of sentence. If for example the court ignores the Sentencing Guidelines or judicial precedent or fails to consider mitigation or the sentence is distorted in its scope and severity, this court will deal with the same. This can be for example pertinent in victimless misdemeanour or political offences, that it may not be in the public interest, the interests of the administration of justice to punish severely or when there is otherwise a need to prevent and avoid abuse of the legal process to punish legitimate causes.
18. It must be remembered that the discretion to impose concurrent or consecutive sentences lies with the court. It carries with it 2 elements, that is, the concept of totality of sentence and double counting. That is to say that 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. The courts should avoid double counting, where the additional offences are ancillary to the main offence and not independent offences. For example, breaking a dwelling house with intention to steal and stealing in the same dwelling house. At the end of the day, the sentence must be proportional to the offending behaviour.
19. The guidelines provide and rightly so that consecutive sentence will normally be appropriate where the offences arise out of unrelated facts or incidents. The 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.
20. In looking at the sentences, the court must address not only the offending behaviour as a whole but also, the personal circumstances of the offender while bearing in mind the purposes of sentencing, that is, retribution, deterrence, rehabilitation, restorative justice, community protection, denunciation, reconciliation and reintegration.
21. The applicant fits in the category where community protection is necessary by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts. Further the Applicant needs punishment for two reasons; he threatened to kill his own father, who is old and vulnerable. Secondly, he attacked the law enforcement officers and members of the public who came to the aid the law enforcement. The Applicant is a gross danger to himself and others. The Applicant placed other people at risk by his conduct. The attack on his aged father is anathema to good order.
22. The same guidelines provide that 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.



23. Further, 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. This case falls in the latter category.
24. Consequently, I find that the court exercised its discretion properly in meting out the sentences to run consecutively. The applicant is not merited for a concurrent sentence.
25. However, it is noted that the applicant was in custody for over three months. The court did not indicate from whence the sentences were to begin. This effectively enhances the sentences without any basis contrary to the tenets set out in Section 333(2) of the *Criminal Procedure Code* that requires that where the convict was held in custody, prior to the sentence, the period spent in custody should be taken into consideration. This is not a fictional consideration but a mathematical question.
26. Consequently, the period the Applicant was in custody ought to be taken into consideration as per law required. In the circumstances, the consecutive sentence meted out shall commence on the date of arrest on 6/4/2024.
27. The upshot of the foregoing is that I make the following orders: -
  - a. The application herein lacks merit and is accordingly dismissed. Nevertheless, the period the Applicant was in custody ought to be taken into consideration. The consecutive sentences given shall begin on the date of arrest.
  - b. The sentences shall run consecutively and shall commence on 6/4/2024, the date of arrest.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 13<sup>TH</sup> 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

